Circuit Court for Charles County
Case No. 8-K-16-000497

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1355

September Term, 2019

DEANGELO HEMSLEY

v.

STATE OF MARYLAND

Kehoe,
Nazarian,
Leahy,

JJ.

Opinion by Leahy, J.

Filed: July 22, 2021

On the evening of April 23, 2016, Deangelo Hemsley ("Appellant") "busted in" to the home of Jaqueline and John Yates,[1] where his estranged wife and his daughter were temporarily living, and stabbed John Yates to death.

In May 2016, a grand jury indicted Appellant of eight offenses, including the first-degree murder of John Yates. Appellant, a diagnosed schizophrenic, entered a plea of not competent to stand trial and was committed to the Department of Health and Mental Hygiene ("DHMH")[2] for evaluation. He later entered a plea of Not Criminally Responsible by Reason of Insanity ("NCR").

After Appellant was found competent to stand trial in January 2017, he was tried before a jury trial over five days in the Circuit Court for Charles County. The trial was bifurcated on the separate issues of guilt and criminal responsibility. The jury found Appellant guilty of first degree murder of John Yates (count 1); home invasion (count 3); kidnapping of A.H. (count 4); second-degree assault of A.H. (count 6); and false imprisonment of A.H. (count 7). The same jury also found him criminally responsible.

Appellant presents the following five questions for our review, which we have reworded slightly for clarity:

> I. Did the circuit court err when, during the guilt/innocence phase of the bifurcated trial, it precluded two lay witnesses from testifying to their first-hand observations of Appellant's abnormal behavior to refute evidence of specific intent?

[1] Jaqueline and John Yates are the parents of Mr. Hemsley's wife, Dameka Hemsley, and grandparents to Appellant's daughter, A.H.

[2] Effective July 1, 2017, the "Department of Health and Mental Hygiene" was renamed and is now the "Maryland Department of Health." 2017 Md. Laws ch. 214 (S.B. 82).

II. Did the circuit court err when, during the criminal responsibility portion of the bifurcated trial, it permitted a clinical social worker to testify regarding her documentation of Appellant's mental health symptoms?

III. Did the trial court violate Appellant's Fifth Amendment privilege against compelled self-incrimination when it granted the State's request for a second psychiatric examination of Appellant and allowed admission of the results of that examination during the criminal responsibility phase of the bifurcated trial?

IV. Did the circuit court err when it failed to merge Appellant's conviction for second-degree assault of A.H. into his conviction for kidnapping A.H.?

V. Was the evidence sufficient to support the charge for home invasion in violation of Md. Code Ann. §6-202(b) of the Criminal Law Article?[3]

First, we hold that the circuit court did not err in precluding the testimony of two lay witness about Appellant's alleged abnormal behavior on the day of the murder after determining that there was no rational nexus between the proffered testimony and Appellant's *mens rea* to commit first-degree murder. Second, we conclude that

[3] Appellant originally presented his questions as follows:

1. "Did the circuit court err when, during the guilt/innocence phase of the trial, it precluded two lay witnesses from testifying regarding their first hand observations of appellant's behavior to refute evidence of specific intent?"
2. "Did the circuit court err when it permitted a lay witness to give expert opinions regarding whether the lay witness documented signs or symptoms of specific mental health disorders?"
3. "Where DHMH examined appellant and concluded that appellant was not criminally responsible, did the circuit court violate appellant's rights under the Fifth Amendment when it ordered appellant to submit to a second psychiatric examination with the prosecution's privately retained forensic psychiatrist?"
4. "Did the circuit court err when it failed to merge and imposed separate sentences on appellant's conviction for kidnapping A.H. and second-degree assault of A.H.?"
5. "Was the evidence insufficient to support the charge for home invasion in violation of Md. Code §6-202(b) of the Criminal Law Article?"

Appellant's challenge to the admission of the clinical social worker's testimony was not preserved. Third, we hold that, under the circumstances, the trial court did not violate Appellant's Fifth Amendment privilege against compelled self-incrimination, or exceed its authority under Maryland Code (2001, 2018 Repl. Vol.), Criminal Procedure Article ("CP"), § 3-111, by granting the State's request for a second psychiatric examination of Appellant and admitting the results of that examination only during the criminal responsibility phase of the bifurcated trial. Fourth, we agree with Appellant—and the State—that Appellant's sentence for second-degree assault merges into his sentence for kidnapping; therefore, we vacate the sentence for second-degree assault. Finally, we hold that there was sufficient evidence to support Appellant's conviction for home invasion in violation of Maryland Code (2002, 2012 Repl. Vol., 2014 Supp.), Criminal Law Article ("CR"), §6-202(b).

BACKGROUND

A. Procedural Background

On June 1, 2016, Appellant entered a plea of incompetent to stand trial in the Circuit Court for Charles County and requested that his competence be evaluated. On June 8, 2016, the court entered an order requiring that Appellant be committed to DHMH for examination as to competency to stand trial. After receipt of DHMH's evaluation indicating that Appellant was not competent to stand trial, on July 28, 2016, the court committed Appellant to DHMH based on a finding that, because of a mental disorder, he was a danger to himself and others. On August 3, 2016, Appellant entered an NCR plea.

On January 26, 2017, based on a DHMH report, the circuit court found Appellant competent to stand trial. The court also ordered that Appellant be evaluated to determine whether he could be held criminally responsible. Dr. Vanessa Green and Dr. Annette Hanson of Clifton T. Perkins Hospital Center ("Perkins"), evaluated Appellant and in a report dated March 2, 2017, opined that Appellant was both "Competent to Stand Trial" and "Not Criminally Responsible."

On May 1, 2018, the State filed a "Request to have Defendant Evaluated by State's Retained Expert to Determine Criminal Responsibility." The State sought permission to have Appellant evaluated by a forensic psychologist, Dr. Michael Spodak, due to the unavailability of Dr. Green at trial and the incomplete records held by Perkins in relation to the March 2nd report.[4] Appellant filed an opposition to the request, arguing that his Fifth Amendment privilege against compelled self-incrimination would be violated by an order to submit to "interrogation by a State agent while in custody."

On May 10, 2018, at a motions hearing, the court heard argument from the State on its request for a second evaluation. In deciding whether to grant the State's request, the court considered other options, such as allowing Dr. Hanson to conduct a "full, complete, documented evaluation[,]" rather than allowing Dr. Spodak to perform his exam. The State objected, arguing that under the circumstances, it was entitled to an evaluation performed

[4] Dr. Green no longer works at Perkins. At the time of Appellant's commitment, she was a fellow with the Perkins fellowship program, but was also an "active duty military psychiatrist." After finishing her rotation at Perkins, Dr. Green returned to active duty with the military. Perkins was unable to locate the interview notes compiled by Dr. Green while she evaluated Appellant, and they therefore could not be produced in the underlying action.

by Dr. Spodak. Eventually, the circuit court granted the State's request over Appellant's objection.

The following facts were adduced at trial, beginning on June 10, 2019.

B. Guilt/Innocence

During the guilt/innocence portion of the trial, testimony established that, on the evening of April 23, 2016, Appellant "busted in" to the Yates home, where A.H. and her cousin, Jamari Hagens, were sitting in the kitchen. Dameka Hemsley, the Yates's daughter and mother of A.H., was elsewhere in the home. Jaqueline Yates was on her way into the kitchen and John Yates was in the basement.

Mr. Hagens, A.H. and Jaqueline Yates testified that Appellant was yelling, wielding a box cutter and a crowbar and "saying, '[w]here's my daughter at?'" A.H. replied, saying "I'm right here." Appellant then approached Jaqueline Yates, demanding "[w]here is Mr. Yates?" She informed him that Mr. Yates was "downstairs." Appellant then began walking downstairs, and Jaqueline Yates immediately "went into [her] bedroom and [] called 911" because she was "frightened" about what Appellant might do in the basement. She said that he seemed unusually angry and unfocused and was speaking to her in a way he normally would not.

Moments later, Mr. Hagens and A.H. heard Mr. Yates "choking on his blood" and "took off running downstairs to see what was going on." They saw Appellant "on top of" Mr. Yates. Hagens related that he saw blood "squirting out of [Mr. Yates's] neck, everywhere." A.H. tried to pull Appellant off Mr. Yates, while Hagens ran "to the next door neighbor ['s] house and called the police."

A.H. recounted that, Appellant, who was covered in blood, grabbed A.H. by the arm and pulled her upstairs to his truck, saying "[c]ome on, let's go." She testified that she did not go with Appellant willingly. Appellant put A.H. in the passenger seat and as he walked around the back of the truck to reach the driver's seat, A.H. "climbed over the driver's seat because the window was down, . . . jumped out of the window" and ran "[b]ack in the house."

Police responded to the scene and witnessed Appellant's truck coming down the Yates's driveway towards them. Appellant failed to follow the police commands to stop but was eventually blocked by a police cruiser. Sargent Daniel Bacon testified that he "approached the vehicle, gave orders for the driver to put his hands up and exit the vehicle." Appellant did not respond to any of these commands. Instead, Appellant appeared to be gripping the steering wheel, quietly staring straight ahead, and revving his engine. Appellant was then apprehended and arrested.

Mr. Yates was pronounced dead at the scene. Dr. Jack Titus, assistant medical examiner for the Office of the Chief Medical Examiner for the State of Maryland, testified that Mr. Yates's death was caused by "six sharp force injuries to his body" and was determined to be a homicide. He noted that "[t]here was a stab wound to the left side of [Mr. Yates's] face that went in through the skin and soft tissue, and actually hit the upper part of the spinal column and fractured it."

At the close of the State's case, Appellant moved for a judgment of acquittal on all counts. The court denied the motion, although the State entered *nolle prosequi* on count five (child abuse).

Appellant elected not to testify. Instead, he called his cousin, Mr. David Thomas, as a witness. As discussed in more detail *infra*, the State objected to Mr. Thomas's anticipated testimony regarding the "history of behavior . . . specifically [Appellant's] mental health, to negate the specific intent to first-degree murder down to second-degree murder." The State contended that such testimony was inadmissible in the guilt/innocence portion of the trial. Over defense counsel's objection, the court agreed with the State, and restricted Mr. Thomas's testimony to evidence relevant to the timeline of April 23, 2016.

Before the jury returned its verdict, Appellant renewed his motion for acquittal. The court denied the motion as to all charges, except count eight (wear and carry of a deadly weapon with intent to injure), on which Appellant was acquitted.

The jury returned a guilty verdict on five counts: (count 1) first degree murder of John Yates; (count 3) home invasion; (count 4) kidnapping of A.H.; (count 6) second-degree assault of A.H.; and (count 7) false imprisonment of A.H.

C. Criminal Responsibility

The criminal responsibility portion of the trial began before the same jury on June 12, 2019. During this portion of the trial, testimony was elicited regarding Appellant's bizarre behavior, declining mental health, and diagnosis as a schizophrenic.

1. Expert Testimony

Both Appellant and the State presented expert testimony. Appellant called Dr. Annette Hanson, Director of Forensic Psychiatry at Perkins. She described Perkins as a "public mental health hospital . . . run by the health department" and staffed by "independent health department employees" employed by neither the State nor the defense.

Dr. Hanson testified that, as Director, she "supervise[s] and perform[s] court ordered evaluations." Dr. Hanson recalled that, after being judged incompetent to stand trial in July 2016, Appellant was seen by her forensic fellow, Dr. Green. She noted that Dr. Green followed Appellant's progress in treatment and collected his history through interviews. Dr. Hanson joined Dr. Green in reviewing Appellant's medical records and conducting some interviews.

Based on the evaluations that she and Dr. Green conducted, Dr. Hanson concluded that Appellant had "schizophrenia at the time of the offense." She elaborated that, "[to] a reasonable degree of medical certainty, Appellant lacked substantial capacity to appreciate the criminality of his conduct and to conform his conduct . . . to the requirements of the law." Her conclusions were supported by a variety of factors identified during interviews with Appellant and from his medical records. She explained that Appellant's medical condition appeared to have deteriorated between approximately 2014 and 2016 when he began receiving treatment from an internist rather than a psychiatrist and was switched off of his antipsychotic medication. After the switch, Appellant began "having trouble." He started acting erratically, hearing voices, experiencing paranoia, and "sensory hallucinations," and held beliefs about being the "chosen of God." Based on these findings, then, she and Dr. Green determined that Appellant was "legally insane, or not criminally responsible" at the time of the offense.

The State called Dr. Michael Spodak, a physician and psychiatrist with expertise in forensic psychiatry, who had been hired to review the Perkins evaluation. Dr. Spodak was given permission by the court to conduct an independent "not criminally responsible

evaluation" of Appellant. Dr. Spodak testified that he disagreed with the Perkins assessment and was of the opinion that Appellant "did not meet the legal test for being not criminally responsible." Dr. Spodak determined that, at the time of the offense, Appellant did not "have a mental condition which caused him to lack substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law."

Dr. Spodak expressed disappointment at the Perkins evaluation, saying that it was overly broad, contained generalizations, and did not restrict its focus to Appellant's condition on the evening of the offense. While Dr. Spodak agreed that Appellant met "the diagnosis for being schizophrenic" and "probably had some symptoms of his illness" on the day of the offense, he disagreed that, at the time of the offense, Appellant lacked "substantial capacity either to appreciate the criminality of the conduct or to conform the conduct to the requirements of the law."

2. Other Testimony

In addition to expert testimony, both Appellant and the State sought testimony from police officers and medical and mental health professionals who came into contact with Appellant after he was arrested and while he was in custody. The State called Trisha Baggott, whose testimony will be discussed in more detail below. Ms. Baggott is a licensed clinical social worker who was employed at the Charles County Detention Center as a mental health coordinator in 2016.

3. Verdict and Sentencing

On June 14, 2019, the jury returned a verdict finding Appellant criminally responsible. On September 5, 2019, the court sentenced Appellant as follows:

- life in prison on count 1 for first degree murder of John Yates;
- 25 years on count 3 for home invasion, concurrent with count 1;
- 25 years on count 4 for the kidnapping of A.H., which the court merged with count 7 for the false imprisonment of A.H., to run concurrently with counts 1 and 3; and
- 10 years on count 6 for the second-degree assault of A.H, to run concurrently with counts 1, 3 and 4.

DISCUSSION

I.

Exclusion of Witnesses During First Phase of Trial

Appellant claims the circuit court erred when, during the guilt/innocence phase of the trial, it precluded David Thomas and Dameka Hemsley from testifying regarding their first-hand observations of Appellant's behavior.

A. Background

Appellant intended to call David Thomas, Appellant's cousin. Mr. Thomas shared a meal with Appellant a few hours prior to Mr. Yates's murder. Before Mr. Thomas took the stand, the State objected to his anticipated testimony regarding the "history of behavior . . . specifically [Appellant's] mental health, to negate the specific intent to first-degree murder down to second-degree murder." Such evidence, the State argued, could be

introduced in the "not criminally responsible" portion of the trial, but was inappropriate in the guilt/innocence portion of the trial. In the guilt/innocence portion, the State argued, such evidence was tantamount to an attempt to offer the partial defense of diminished capacity, which is not recognized in Maryland.

More specifically, the State contended that lay witness testimony about a defendant's demeanor cannot be offered to negate specific intent. The State insisted that, even though Mr. Thomas was with Appellant earlier in the day, Mr. Thomas was not entitled to offer evidence of any "bizarre behavior" or "peculiar look[s]" that he observed in Appellant, because this would be an attempt to "paint[] a picture that there is a mental health problem going on." The State argued that only an expert would be allowed to testify that a defendant's mental health rendered him incapable of forming a particular *mens rea*. Therefore, the State reasoned, any evidence about Appellant's behavior was both inadmissible and irrelevant.

The court agreed, over defense counsel's objection, and restricted Mr. Thomas's testimony to matters concerning the timeline on April 23, 2016. On the heels of this ruling, defense counsel decided not to call Dameka Hemsley as a witness. Defense counsel explained that he did not call her as a witness because he assumed that the court would not allow her to testify, even though "the biggest issue right now is, there is no secret that Dameka Hemsley moved out of that house because of her fear of [Appellant's] bizarre behavior."

B. The Parties' Contentions on Appeal

Appellant, relying on *Simmons v. State*, 313 Md. 33, 41 (1988) and *Hoey v. State*, 311 Md. 473, 495 (1988), contends that a criminal defendant is permitted to introduce relevant evidence of a mental impairment in order to show that the defendant did not have the *mens rea*—the mental element of a crime—during the commission of the crime. He argues that Mr. Thomas and Ms. Hensley, both lay witnesses, could have offered evidence that Appellant was less capable than a "normal" person of forming the requisite mental state for murder. According to Appellant, Maryland law recognizes that lay witnesses with the proper foundation, namely, he purports, a close relationship and personal observations, may testify as to whether a person is mentally abnormal. Such evidence, he avers, would not have constituted evidence to support a diminished capacity defense. Appellant acknowledges that evidence demonstrating that the defendant did not as a fact possess the requisite mental state is admissible, whereas evidence establishing that the defendant was generally less capable than a normal person of forming a requisite *mens rea* is inadmissible. The testimony of Mr. Thomas and Ms. Hemsley, he insists, was relevant to the former circumstance and would have rebutted the State's argument that the killing was premeditated and deliberate.

At the outset, the State claims that the issue is not properly before this Court because Appellant did not make a formal proffer specifying what either Mr. Thomas or Ms. Hemsley would have said if called to the stand and how that testimony would be relevant to the proceeding. The State acknowledges that defense counsel did proffer that Mr. Thomas would have said that Appellant was acting oddly that night —that Appellant

stopped by his house on the way to the Yates's home in a vehicle that didn't have tags, ate crabs, and abruptly got up and left. The State urges, however, that the proffered testimony may have been relevant to "rebut the State's timeline," but it was not relevant to "whether Hemsley, *at the time of the* [murder], was suffering from a mental disorder that prevented him from having the *mens rea* necessary to commit intentional, premeditated murder." For this reason, the State maintains, even if the issue is preserved, the trial court acted within the bounds of its discretion by disallowing testimony from Mr. Thomas or Ms. Hemsley.

The State contends there can be no "rational nexus" between the testimony offered by Mr. Thomas or Ms. Hemsley and Appellant's claimed inability to form the specific intent to commit murder. A rational nexus, the State argues, "exists only when the inference the proponent wishes the jury to draw follows logically from the evidence presented." Here, the State claims, no rational nexus can be shown because neither of the proposed witnesses was present on the scene of the offense and each could only testify to having interacted with Appellant hours or days before the incident.

Further, the State avers that Appellant did not present an evidentiary foundation to establish that he suffered from a mental disorder or that the mental disorder prevented him from committing premeditated murder. Without evidence that Appellant suffered from the effects of a particular mental health condition that could have prevented him from forming the specific intent to kill, contends the State, the fact-finder could not find that Appellant was too mentally ill to form the *mens rea* required for first-degree murder. Accordingly, the State concludes that the trial court did not abuse its discretion in excluding the testimony.

Finally, the State asserts that, even if the trial court erred in excluding the testimony, the error was harmless. The evidence, the State argues, is overwhelming that Appellant committed first-degree murder, and the exclusion of "vague" testimony about his abnormal behavior did not contribute to the jury's guilty verdict.

C. Preservation

Maryland Rule 8-131(a) states that, in general, "the appellate court will not decide any [] issue unless it plainly appears by the record to have been raised in or decided by the trial court." The purpose of this rule is "to make sure that all parties in a case are accorded fair treatment, and also to encourage the orderly administration of the law." *Conyers v. State*, 354 Md. 132, 148-49 (1999) (citation omitted).

Additionally, Maryland Rule 5-103(a)(2) provides that "[e]rror may not be predicated upon a ruling that admits or excludes evidence unless the party is prejudiced by the ruling," and "[i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer on the record or was apparent from the context within which the evidence was offered." This Court has explained that a "claim that the exclusion of evidence constitutes reversible error is generally not preserved for appellate review absent a formal proffer of the contents and materiality of the excluded testimony." *Muhammad v. State*, 177 Md. App. 188, 281 (2007). A proffer "does not need to be extremely specific," because "the defendant cannot know exactly how the witness will respond." *Grandison v. State*, 341 Md. 175, 208 (1995). Nonetheless, the interests of fairness are furthered by "requir[ing] counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly

correct any errors in the proceedings." *State v. Bell*, 334 Md. 178, 189 (1994) (quoting *Clayman v. Prince George's Cnty.*, 266 Md. 409, 426 (1972)).

As discussed, prior to Mr. Thomas's testimony in the guilt/innocence portion of the trial, the State lodged an objection to certain statements that he was expected to make concerning Appellant's mental health, arguing that such testimony was irrelevant and an attempt to present an unavailable diminished capacity defense. In response to this objection, Appellant's counsel responded:

> [Defense Counsel]: I want to put on the record, I guess anyhow, the restriction that I am hearing on what I can ask.
>
> The issue, it confounds me as a defense attorney in these cases how when we present the NCR defense, that we are then precluded from bringing to the jury's attention in the guilt/innocence stage, how his behavior was in a means of determining what level of homicide he may have been involved at . . . I think it is unfair to a defendant and it deprives them, unconstitutionally, of a fair trial…
>
> . . . . I am going to make that objection right now, that I should have been able to go into all the acts that led up to this, including all of his bizarre behavior. And I am well aware of what the case law says, that no lay witness can express an opinion as to whether they think he is insane or comprehended anything. But they are allowed to say what they see . . . [and whether] what they interpret as a normal . . . if I could establish through, let's say, Mr. Thomas, that he has known Mr. Hemsley for years and would know what he looked like in a normal state, and that it wasn't a normal state that night, he could speak to the factors that he sees that make that different, and even indicate to a jury that in fact, "I think he was acting odd that night. I don't think he was acting himself that night."

Defense counsel further stated that he was not going to call Ms. Hemsley as a witness because he "wasn't going to waste the court's time by calling Dameka Hemsley to the stand, only to have [the court] say that I can't . . . I can't get [her testimony] in," even though, "the biggest issue right now is, there is no secret that Dameka Hemsley moved out of that house because of her fear of his bizarre behavior. She told the police that and told

the doctors that. It is everywhere." Appellant later renewed his objection to the exclusion of Mr. Thomas's and Ms. Hemsley's testimony, stating ". . . Judge, I also ask that you adopt the argument that I made about not being able to go into . . . the evidence of his bizarre behavior, as far as going to the attack." The judge responded that Appellant had "preserved . . . I believe you have preserved that argument."

In *Conyers v. State*, the defendant complained on appeal that he was not allowed to question two witnesses about (1) a fellow inmate's plans regarding the defendant's indictment papers, and (2) a warning that one of the witnesses had given the defendant about this inmate and the inmate's motives. 354 Md. at 162. At trial, the State had objected to questions attempting to elicit this testimony. *Id*. at 162-64. The Court of Appeals held that, because the defendant "never established what was excluded" and "never proffered what the answers would be to the questions" that the State objected to, these issues were not preserved for appeal. *Id*. at 164.

In *Grandison v. State*, the defendant wished to cross-examine a victim impact witness to discredit her testimony and show her bias and financial motive by offering proof of a civil suit she brought, the success of which "depended upon her establishing that [the defendant] was responsible for [the offenses at issue]." 341 Md. at 205-06. The sentencing court refused to allow this questioning, thereby excluding this evidence. *Id*. at 207. When attempting to explain why he wanted to introduce the evidence, defendant explained that it was relevant to show that the "victim impact statement was exaggerated" and to show bias, but did not give details about "how or why [the witness] was biased." *Id*. at 209. On appeal, the Court held that the proffer "may have been sufficient to preserve the issue for

appeal," even though it was insufficient "to show even nominal relevance to the [sentencing proceedings]." *Id*. at 208.

In the instant case, the issue of Ms. Hemsley's excluded testimony was not preserved. As defense counsel explained, he never even attempted to call Dameka Hemsley to the stand. Instead, he simply offered that it was "no secret" that Ms. Hemsley moved out of their shared home because she was afraid of Appellant's bizarre behavior. This cannot be fairly characterized as a proffer, but more significantly, Ms. Hemsley's testimony was neither offered nor excluded. Therefore, Appellant's challenge to the court's ruling regarding Dameka Hemsley's testimony is precluded from our review under Maryland Rule 8-131(a).

Mr. Thomas's testimony, however, was clearly proffered. Defense counsel stated that, while he understood and accepted that Mr. Thomas could not testify as to the ultimate issue of Appellant's insanity, Mr. Thomas should be allowed to offer testimony on what he had observed in Appellant only hours before Mr. Yates's murder. Counsel then gave a brief overview (recited above) of what he expected Mr. Thomas to say. As in *Grandison*, counsel offered some details about what Mr. Thomas would say and why he felt he should be allowed to introduce this testimony. Although he may not have offered Mr. Thomas's anticipated testimony in minute detail, there was no requirement that he do so. Instead, he offered enough specific information about what Mr. Thomas would say, and why he thought it was relevant to the proceeding, to preserve this issue for appeal. Accordingly, we hold that Appellant's challenge to the court's ruling restricting Mr. Thomas's testimony has been preserved for appeal.

D. The Merits

In *State v. Simms*, the Court of Appeals explained the standards by which appellate courts review the admission of evidence:

> It is frequently stated that the issue of whether a particular item of evidence should be admitted or excluded "is committed to the considerable and sound discretion of the trial court," and that the "abuse of discretion" standard of review is applicable to "the trial court's determination of relevancy." *See e.g. Merzbacher v. State*, 346 Md. 391, 404-05, 697 A.2d 432, 439 (1997). Maryland Rule 5-402, however, makes it clear that the trial court does not have discretion to admit irrelevant evidence . . . [T]he " de novo" standard of review is applicable to the trial judge's conclusion of law that the evidence at issue is or is not "of consequence to the determination of the action." *Parker v. State*, 408 Md. 428, 437, 970 A.2d 320, 325 (2009), (citations omitted) (quoting *J.L. Matthews, Inc. v. Md.-Nat'l Capital Park & Planning Comm'n*, 368 Md. 71, 92, 792 A.2d 288, 300 (2002)).

420 Md. 705, 724-25 (2011) (quoting *Ruffin Hotel Corp. of Md. v. Gasper*, 418 Md. 594, 619 (2011)). In other words, a "ruling that evidence is legally relevant is a conclusion of law, which we review de novo." *Williams v. State*, 232 Md. App. 342, 351-52 (2017), *aff'd*, 457 Md. 551 (2018). A ruling that "evidence is inadmissible because its probative value is outweighed by the danger of unfair prejudice, or other countervailing concerns," on the other hand, "requires review of the trial judge's discretionary weighing and is thus tested for abuse of that discretion." *Simms*, 420 Md. at 725.

In this case, the trial judge determined that Mr. Thomas's testimony concerning his impression that Appellant was acting abnormally on April 23, 2016 was not, as a matter of law, relevant to the guilt/innocence phase of the bifurcated trial. Defense counsel argued that the cases that would restrict such testimony "[unc]onstitutionally restrict[] a defense attorney from properly presenting a defense on the guilt/innocence stage with respect to

the intent, by limiting us not to bring in recently observed acts of a bizarre nature by an individual." The trial court responded that "that is the condition of the law. I am not going to make new law." Thus, we review the court's determination that the testimony was not relevant without deference.

If a defendant enters "pleas of both not guilty and not criminally responsible by reason of insanity and has elected a jury trial, the defendant or the State may move for a bifurcated trial in which the issue of criminal responsibility will be heard and determined separately from the issue of guilt." Md. Rule 4-314(a)(1). Maryland law is clear that " . . . a finding of insanity is not tantamount to an absence of *mens rea*, or inconsistent with a general intent to commit a crime." *Pouncey v. State*, 297 Md. 264, 269 (1983). Therefore, a defendant can be both guilty and insane, and evidence must be adduced to prove both the requisite *mens rea* of a crime and the presence or absence of criminal responsibility. *Id.* at 268.

In Maryland, the issue of guilt is tried first, while the issue of criminal responsibility is "tried as soon as practicable after the jury returns a verdict of guilty on any charge." Md. Rule 4-314(b)(2). Maryland Rule 4-314(b)(6)(A) further states that:

> Evidence of mental disorder or mental retardation as defined in Code, Criminal Procedure Article, § 3-109 shall not be admissible in the guilt stage of the trial for the purpose of establishing the defense of lack of criminal responsibility. This evidence shall be admissible for that purpose only in the second stage following a verdict of guilty.

The question of whether and under what circumstances a defendant may introduce psychiatric or mental state evidence during the guilt/innocence portion of a bifurcated trial is controversial. Kathryn S. Berthot, *Bifurcation in Insanity Trials: A Change in*

Maryland's Criminal Procedure, 48 Md. L. Rev. 1045, 1057-58 (1989). Maryland Rule 4-314(b)(6) indicates only that evidence of a mental disorder is inadmissible during the guilt stage of the trial "for the purpose of establishing the defense of lack of criminal responsibility." It does not indicate that mental health evidence is inadmissible for other purposes, such as disproving the *mens rea* of a crime.

In fact, the Court of Appeals has held that "where a particular mental element of a crime must be proved to establish the commission of a crime, evidence that it did not exist, whether due to mental impairment or some other reason relevant to that issue, is admissible." *Hoey v. State*, 311 Md. 473, 495 (1988).[5] The Court explained that "evidence demonstrating a lack of *mens rea* serves a different purpose from evidence demonstrating that the defendant was insane at the time of the crime and hence not criminally responsible." *Id.* at 494. When evidence is offered to negate *mens rea*, it is offered to "negate an indispensable element of the crime and bears on culpability." *Id.*

Although the State is correct in its contention that Maryland does not recognize a diminished capacity defense, we must distinguish "between the diminished capacity defense that a defendant is mentally incapable or less capable of forming a specific intent and the defense that one simply did not possess a specific intent." *State v. Greco*, 199 Md. App. 646, 663 (2011), *aff'd* 427 Md. 477 (2012). A diminished capacity defense attempts

[5] Prior to 1988, Maryland did not allow bifurcated proceedings when a defendant raised the issue of criminal responsibility. *See Langworthy v. State*, 284 Md. 588 (1979); *Tull v. State*, 230 Md. 596 (1963); *Bremer v. State*, 18 Md. App. 291 (1973). The Court of Appeals established in *Treece v. State* that, due to substantial amendments to former Title 12 of Maryland Code, Health-General Article ("HG") in 1984, bifurcation was no longer precluded when defendants entered NCR pleas. 313 Md. 665, 87-688 (1988).

to prove that, due to a mental impairment, a defendant is "*generally less capable* than a normal person of forming a requisite *mens rea*." *Greco v. State*, 427 Md. 477, 496 (2012) (emphasis in original). On the other hand, a defense that the defendant "did not *as a fact* possess the requisite mental state" simply attempts to disprove elements of a crime with which a defendant has been charged. *Id.* In *Greco*, the Court of Appeals instructed that

> exclusion of evidence going to whether a defendant in fact possessed the requisite mental state would run afoul of "the basic proposition that the state must prove every element of a crime beyond a reasonable doubt, including specific intent, if necessary, and that an accused is entitled to rebut the state's case."

Id. (quoting *Johnson v. State*, 292 Md. 405, 477 n. 10 (1982), *overruled on other grounds by Hoey v. State*, 311 Md. 473, 494-95 (1988)). Thus, as a matter of law, evidence of a defendant's impaired mental condition is generally admissible during the guilt portion of a trial for the "limited purpose of showing the absence of *mens rea*." *Hoey*, 311 Md. at 495 n. 5; *see also* Berthot, *supra*, at 1061-62. Still, it is axiomatic that any mental health evidence offered in the guilt portion of a bifurcated proceeding must also be relevant.

Testimony is relevant when it tends "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. Relevant evidence has two components: materiality and probative value. *Smith v. State*, 423 Md. 573, 590 (2011). "'Materiality looks to the relation between the proposition for which the evidence is offered and the issues in the case.' Probative value is 'the tendency of evidence to establish the proposition that it is offered to prove.'" *Id*. (quoting 1 *McCormick on Evidence* § 185 at 773-774 (4th

Strong ed. 1992)) (internal citations omitted). The trial court cannot admit irrelevant evidence. Md. Rule 5-402.

Here, the proposition that Appellant wished to prove was that he did not possess the *mens rea* for murder, or that he did not commit a "deliberate, premeditated, and willful killing." CR § 2-201. Deliberation means that there must have been "a full and conscious knowledge of the purpose to kill"; premeditated means "the design to kill must have preceded the killing by an appreciable length of time, that is, time enough to be deliberate"; and willful means that there must have been "a specific purpose and intent to kill." *Willey v. State*, 328 Md. 126, 133 (1992) (quoting *Tichnell v. State*, 287 Md. 695, 717 (1980)).

To be relevant, then, Mr. Thomas's excluded testimony would need to have a tendency to make Appellant's lack of *mens rea* more probable. For this purpose, mental health evidence must be supported by a sufficient factual basis and bear a rational nexus to a defendant's inability to form a particular *mens rea*. *Shiflett v. State*, 229 Md. App. 645, 679-80 (2016).

Although the case in *Shiflett v. State*, 229 Md. App. 645 (2016), involved a mid-trial competency hearing rather than a bifurcated proceeding, our opinion in *Shiflett* is instructive here. Mr. Shiflett, a heroin addict suffering from co-occurring mental illnesses, blamed his childhood friend, Ms. Hadel, for his imprisonment after the two were caught committing a robbery. *Id.* at 652. He wrote her numerous threatening letters from prison and, once released, camped out in the woods behind her apartment, waiting for her husband to leave. *Id.* at 653. Mr. Shiflett broke into the apartment one night, encountered Ms. Hadel's little girl, whom he dragged down the hall to her mother's bedroom. *Id.* He

released her once he spotted Ms. Haden, pulled out a knife, and then stabbed Ms. Hadel to death. *Id.*

Mr. Shiflett wanted to introduce expert testimony describing his "psychological profile" in order rebut evidence of premeditation introduced by the State and to prove that he was unable to form the *mens rea* for first-degree murder under CR § 2-201. *Id*. at 676. The psychiatrist would have testified, among other things, that Mr. Shiflett had specified bipolar disorder, obsessive compulsive disorder, and borderline personality disorder and that "'the combination of illnesses is particularly malignant . . . and ha[s] significant impact on his thinking and behavior.'" *Id*. at 677. The psychiatrist would have explained Mr. Shiflett's thought process about the victim, his increasing paranoia and frustrations, and that he "*has that inability to stop himself and not act over and over again.*" *Id*. at 678. The trial court excluded the expert's testimony after determining that the proffered testimony lacked an adequate factual basis and lacked relevance because there was no nexus between Mr. Shiflett's psychological profile and the specific intent required to prove first-degree murder. *Id*.

We affirmed the trial court's decision, explaining that such testimony will only be admissible if it is relevant, and relevance depends on whether there is a direct connection between a mental illness and the specific mental state or behavoir at issue. *Id*. at 679. More specifically, "for expert testimony about Mr. Shiflett's psychological profile to be helpful to the jury in determining whether he formed the *mens rea* for first-degree murder, the testimony must bear a 'rational nexus to the issues of premeditation and intent.'" *Id.* (quoting *Hartless v. State*, 327 Md. 558, 577 (1992)). We determined, in *Shiflett*, that no

rational nexus could be established between the expert's testimony and Mr. Shiflett's *mens rea* at the time of the crime, because the expert was not present during the crime, and her testimony would not help the jury to infer that Mr. Shiflett was suffering from the symptoms of a mental illness on the date of the murder. *Id*. at 679-81. "Without some direct connection between Mr. Shiflett's disorders and his ability to plan and carry out his murder, [the psychiatrist's] testimony would have invited the jury to speculate about what was or wasn't in his mind at the time, and was therefore properly excluded." *Id*. at 681.

Returning to the case before us, we first note that "'[n]ormal conduct and abnormal conduct are matters of common knowledge, and so lay persons may conclude from observation that certain observed conduct is abnormal.'" *State v. Conn*, 286 Md. 406, 407 (1979) (quoting *Carter v. United States*, 252 F.2d 608, 618 (D.C. Cir. 1957)). As a lay person, then, Mr. Thomas would generally be entitled to testify regarding any unusual or abnormal behavior he witnessed in Appellant, so long as the testimony is relevant. And, unlike the psychiatrist in *Shiflett*, Mr. Thomas encountered Appellant only a few hours before the murder took place, meaning that he could testify to Appellant's symptoms and behavior around the time of the murder.

Nonetheless, the record discloses that Appellant failed to establish a sufficient nexus between Mr. Thomas's proffered testimony and Appellant's lack of *mens rea* for murder. First, Appellant did not present a sufficient factual basis to establish that he suffered from a mental illness or impairment, such as by offering psychological profile testimony by an expert that "allows the jury to infer that the defendant was suffering from the symptoms of that psychiatric disorder on the date in question." *Shiflett*, 229 Md. App. at 679. Mr.

Thomas, as proffered, would have described behavior that was not sufficient to show that, at the time of the murder, Appellant was suffering from a mental disorder that prevented him from having the *mens rea* necessary to commit "willful, deliberate, and premeditated" murder. Second, and importantly, Appellant failed to show how the proffered testimony—that Appellant was distracted, acting oddly, driving in a car without a license plate—had any nexus to a determination that Appellant was incapable of forming the specific intent required for first-degree murder. To the contrary, one could argue that Appellant was distracted because he was preoccupied with planning to kill John Yates and driving a vehicle without a license was part of that plan. Appellant failed to demonstrate that Mr. Thomas's testimony concerning Appellant's "history of behavior . . . specifically [Appellant's] mental health" was relevant to show that he was suffering the effects of a mental disorder, at the time of the murder, and that the effects of that disorder could have prevented him from forming the *mens rea* required for first-degree murder. The trial court was correct in refusing to admit such testimony and in limiting Mr. Thomas's testimony to matters relevant to the proceeding. Without some direct connection between Appellant's "odd" behavior and his inability to plan and carry out his murder, Mr. Thomas's testimony "would have invited the jury to speculate about what was or wasn't in his mind at the time, and was therefore properly excluded." *Id.* at 681.

II.

Testimony of Trisha Baggott

As noted, during the criminal responsibility portion of the trial, the State called Trisha Baggott, a licensed clinical social worker who in 2016 was employed at the Charles

County Detention Center as a mental health coordinator. Ms. Baggott was tasked with assessing inmates for suicidality, coordinating any medication, and implementing any necessary crisis intervention.

Ms. Baggott testified that Appellant refused to speak to her at first, was unwilling to disclose his mental health history and seemed confused about why he was unable to leave the detention center. She stated, however, that she could not see in his record where anyone had recorded evidence of Appellant displaying symptoms of schizophrenia while he was in the Detention Center. Over defense counsel's objection, Ms. Baggott testified that she knew the difference between paranoia and psychosis, but that, in the mental health status section of the weekly assessments she performed on him, she never made any documentation indicating that she noticed Appellant exhibiting signs of either.

A. The Parties' Contentions

Appellant contends that the circuit court erred when it permitted Ms. Baggott to testify as a lay witness about the absence of signs or symptoms of specific mental health disorders following Appellant's arrest. He argues that Maryland Rules 5-701 and 5-702 prohibit the admission as "lay opinion" of testimony based upon specialized knowledge, skill, experience, training or education. Appellant insists that when the State called Ms. Baggott to testify as a lay witness rather than an expert, it fell afoul of this prohibition. Specifically, Appellant claims that the State elicited expert opinions from Ms. Baggott "in the form of testimony regarding the absence of [paranoia and psychosis] to claim that [A]ppellant was not suffering from or manifesting symptoms of a mental health disorder after his arrest." Therefore, Appellant concludes, the circuit court erred in letting Ms.

Baggott testify about whether she personally observed symptoms of psychosis and paranoia, because her responses are "predicated on specialized knowledge of diagnostic criteria for these mental health disorders."

The State counters that Appellant waived this claim by failing to make a timely objection to the admission of Ms. Baggott's testimony. The State avers that any objections to a line of questioning must be reasserted each time a question concerning the matter is asked, or else a continuing objection must be requested. In this case, the State contends, Appellant's objections to Ms. Baggott's testimony were sporadic, and he failed to object to all the questions asked of and answered by Ms. Baggott regarding her reports. For this reason, and because the trial judge was never asked to "exclude or strike the specific testimony at issue," the State contends that the issue of Ms. Baggott's testimony is not properly preserved for review.

Even if the issue is preserved, the State continues, the trial court properly exercised its discretion in admitting the testimony. The State argues that Ms. Baggott's testimony was properly admitted to impeach the testimony of Dr. Hanson. Dr. Hanson testified that Appellant's jail records showed evidence of schizophrenia and paranoid delusions, and Ms. Baggott's testimony was offered to refute this testimony. The State insists that Ms. Baggott's testimony was not opinion testimony; rather, her testimony was merely given to "demonstrate the absence of documentation of symptoms while Appellant was awaiting trial," again, as a way to rebut Dr. Hanson's testimony.

Finally, the State argues that any error in admitting Ms. Baggott's testimony is harmless and did not contribute to the jury's verdict in the criminal responsibility phase of

trial. The State avers that a licensed clinical social worker's testimony "regarding symptoms observed at a jail weeks after the incident was not central to the jury's determination of criminal responsibility." Therefore, the State concludes, even if Appellant's argument has merit, it does not provide a basis for reversal.

B. Preservation

Maryland Rule 4-323 details the proper method for making objections to evidence in a criminal proceeding. The rule states that "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." Md. Rule 4-323(a). The rule goes on to explain that any "grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative, so directs." *Id.*

In general, "the admissibility of evidence admitted without objection cannot be reviewed on appeal. An objection is required so that the proponent of the evidence may rephrase the question or proffer so as to remove any objectionable defects, if possible." *Hall v. State*, 119 Md. App. 377, 389 (1998). Even when objections are made, to be preserved, they must be "'reasserted unless an objection is made to a continuing line of questions.'" *Wimbish v. State*, 201 Md. App. 239, 261 (2011) (quoting *Ware v. State*, 170 Md. App. 1, 19-20 (2006)), *abrogated on other grounds by State v. Davis*, 249 Md. App. 217 (2021). "That is, to preserve an objection, a party must either 'object each time a question concerning the [matter is] posed or . . . request a continuing objection to the entire line of questioning.'" *Id.* (quoting *Brown v. State*, 90 Md. App. 220, 225 (1992)).

"Objections are waived if, at another point during the trial, evidence on the same point is admitted without objection." *DeLeon v. State*, 407 Md. 16, 31 (2008).

Further, although grounds for an objection to evidence are not required to be stated unless requested by the court, "[i]t is well-settled that when specific grounds are given at trial for an objection, the party objecting will be held to those grounds and ordinarily waives any grounds not specified that are later raised on appeal." *Klauenberg v. State*, 355 Md. 528, 541 (1999).

Here, the State contends that the issue of Ms. Baggott's testimony was not preserved for our review because Appellant's counsel objected sporadically and in a way that did not allow the trial judge to address an issue that, they claim, Appellant has now raised for the first time on appeal. The relevant portions of Ms. Baggott's testimony contain two separate objections made by defense counsel. In the first instance, counsel objected to a question on the ground that Ms. Baggott was not qualified as an expert. The relevant testimony reads:

> [STATE]: Do you know the difference between paranoia and psychosis?
>
> [DEFENSE COUNSEL]: Objection. She's not qualified.
>
> [STATE]: That's not an opinion. Expert's needed for an opinion. It's not, asking if she knows the difference.
>
> [THE COURT]: Well, that question doesn't ask for an opinion, so overruled.
>
> [STATE]: Do you know the difference between paranoia and psychosis?
>
> [MS. BAGGOTT]: Mmm hmm.
>
> [STATE]: Is that a yes? Sorry.

[MS. BAGGOTT]: Yes. I'm sorry.

[STATE]: Okay. And in these assessments that you did – now, we went through an example. There's actually a mental health status part of it, right?

[MS. BAGGOTT]: Mmm hmm.

The State continued asking questions about what areas Ms. Baggott assessed and included in her weekly reports. Ms. Baggott reported that her assessments included checking whether Appellant was appropriately oriented to time, place and person, as well as how his eye contact, interview behavior, recall, speech, mood, flow and content of thought and insight appeared to her. She also testified that her reports included information on whether she had noticed any signs of delusions or hallucinations in Appellant. The line of questioning continued with the State returning to the matters of paranoia and psychosis:

[STATE]: Okay. Now, did you note, did you notate in your assessments, in even reviewing the records, any signs of paranoia?

[DEFENSE COUNSEL]: Objection, Your Honor.

[THE COURT]: Lay a foundation on that.

[STATE]: Okay . . . So, in this assessment that you have to, pretty much you notate through a checkbox, correct?

[MS. BAGGOTT]: Yes.

[STATE]: So, when you saw him on May 2nd, did you make any documentation that Mr. Hemsley was showing signs of paranoia?

[MS. BAGGOTT]: No.

[STATE]: Did you make any documentation that he was showing signs of psychosis?

[MS. BAGGOTT]: No.

[STATE]: Now, again, on May 9th. Did you make any documentation, after going through the assessment that we just spoke of, any signs of paranoia?

[MS. BAGGOTT]: May 9th?

[STATE]: May 9th.

[MS. BAGGOTT]: No.

[STATE]: Any signs of psychosis?

[MS. BAGGOTT]: No.

From these excerpts, it is clear that defense counsel objected twice to Ms. Baggot's testimony about whether she witnessed any signs of paranoia or psychosis in Appellant; once on the basis that Ms. Baggot was not qualified as an expert, and once generally. It is also clear, however, that, once the court required the State to lay a foundation for their second question about paranoia or psychosis, counsel failed to make any further objections.

This Court's opinion in *Fone v. State*, 233 Md. App. 88 (2017) is instructive here. In that case, the defendant contended on appeal that the trial court erred when it failed to exclude expert testimony after the State violated mandatory discovery rules by not disclosing information about laptop user access to certain email and Flickr accounts. *Id.* at 109. At trial, the prosecutor stated that he planned to introduce an exhibit and expert testimony regarding laptop user access to the email and Flickr accounts shortly before and after a Yahoo! Messenger session in which child pornography was sent. *Id*. at 110. Defense counsel responded that the State never disclosed that it intended to present this evidence and made a motion *in limine* to exclude the evidence. *Id*. at 111. The court denied

the motion, over defense counsel's objection, and allowed the expert to testify about the exhibit. *Id*. Defense counsel "did not seek a continuing objection." *Id*. at 111.

When the State later called the expert to testify, defense counsel did not object to any expert testimony about the laptop hard drive, the Yahoo! Messenger program, the images sent via Yahoo! Messenger, the prosecutor's use of the exhibit to refresh the expert's recollection of the timeline, or questions about how to determine who was using the laptop. *Id*. at 111-12. Defense counsel objected only when the expert was asked about user access to an external hard drive around the time of the Yahoo! Messenger session and argued that the State had not disclosed that their expert would testify about this topic. *Id*. at 112. The court overruled the objection. *Id*. The prosecutor resumed his questions, and defense counsel did not "lodge any further objections." *Id*.

On appeal, this Court determined that the defendant failed to preserve his objection to the trial court's ruling. *Id*. We noted that, "'to preserve an objection, a party must either 'object each time a question concerning the [matter is] posed or . . . request a continuing objection to the entire line of questioning.'" *Id*. at 113 (quoting *Wimbish*, 201 Md. App. at 260-61). We explained that the defendant did not object to "any of the long line of questions that elicited the evidence [the defendant] complains about on appeal[,]" and that his only objection, to the admission of the expert's testimony about the external hard drive, was not raised on appeal. *Id*. We explained that, even though the defendant objected at the beginning of the trial, there was not "sufficient temporal proximity between the trial court's denial of the motion *in limine* and the direct examination of [the expert] that the failure to make a contemporaneous objection should be excused." *Id*. We also pointed out

that the defendant "could have requested a continuing objection but did not." *Id.* Accordingly, we held, defendant's objections were insufficient to preserve the matter for appellate review. *Id.* at 112. *See also Fowlkes v. State*, 117 Md. App. 573, 587-88 (1997) (holding that defense counsel's sporadic objections to victim's testimony about her physical injuries were not sufficient to preserve the objection for the court's review because defense counsel should have objected each time a question concerning victim's injuries was posed or requested a continuing objection).

Returning to the case at bar, we conclude that defense counsel waived his objection to Ms. Baggott's qualifications to testify about the absence of signs or symptoms of specific mental health disorders in Appellant after he was arrested. After defense counsel noted the first objection, he allowed Ms. Baggot to testify about her ability to distinguish the difference between paranoia and psychosis without objecting again or asking for a continuing objection. Later, following the second objection, defense counsel failed to object to the State's five questions about notations of paranoia or psychosis in Ms. Baggott's assessments, and defense counsel never asked the court to exclude or strike any of the testimony offered.

Appellant cites to the holding in *State v. Robertson*, 463 Md. 342, 366-67 (2019), that "defense counsel's initial objection to the State's continuing line of questioning was sufficient" to preserve the issue for appellate review because "[c]ontinuing objections would have been futile and would likely 'spotlight for the jury the remarks of the [State].'" *Id.* (citation omitted). In *Robertson*, when the State began questioning the defendant about prior bad conduct, defense counsel objected and requested a bench conference. *Id.* at 366.

During the bench conference, defense counsel "asserted that there had been an agreement with the State" that evidence regarding the bad conduct would be excluded from the trial. *Id*. Although the trial court "acknowledged that defense counsel and the State had previously agreed that [the defendant's] involvement in the previous incident would not be mentioned at trial[,]" it overruled the objection because defense counsel had opened the door to questions about the prior bad conduct. *Id*. at 350 n. 2, 367. The State then pursued a continuing line of questioning about the prior bad conduct. *Id*. at 367. Although defense counsel did not object again, the Court of Appeals determined that, under the circumstances, "defense counsel adequately objected to the State's use of the previous incident during cross-examination" because further objections would have been futile and would likely have drawn the jury's attention to the State's remarks. *Id*. at 365-67.

Appellant does not explain why further objections would have been futile in his case. By contrast to the circumstances in *Robertson*, here, there was no determinative bench conference, and the court did not provide an explanation for its ruling on the objection. Defense counsel needed to "either object each time a question concerning the matter was posed or request a continuing objection to the entire line of questioning." *Fone*, 233 Md. App. at 113 (cleaned up). On this record, we cannot glean why additional objections or a request for a continuing objection would have been futile or would have highlighted any testimony to Appellant's detriment. Accordingly, we hold that Appellant's objection was waived, and the issue is not preserved for our review. *Fowlkes*, 117 Md. at 588.

III.

Psychiatric Examination

A. The Parties' Contentions

Appellant's next challenge is more novel. He argues that the court erred when it ordered him to submit to a second psychiatric examination with Dr. Spodak after he previously submitted to a forensic psychiatric examination with the doctors at Perkins. He contends that this was a violation of his Fifth Amendment rights because the Fifth Amendment protects against compelled court-ordered psychiatric examinations.

Appellant admits that he put his psychiatric condition at issue when he entered his NCR plea but insists that the applicable Fifth Amendment waiver is limited and applies only to the "contemplated psychiatric exam by staff at [Perkins]." Appellant construes the Supreme Court's opinion in *Buchanan v. Kentucky*, 483 U.S. 402, 422-24 (1987) to limit the State to evaluations that are either jointly requested or requested by Appellant. Practically speaking, argues Appellant, this means the State could have reviewed materials from his Perkins exam and other medical records obtained by subpoena but should not have been allowed by the court to conduct a further exam three years after the murder.[6] In other words, Appellant clarifies in his reply, the "crux of the problem" is "whether a criminal defendant who places his psychiatric condition at issue results in a limited waiver of his protections under the Fifth Amendment[.]" Appellant urges that "by placing his psychiatric

[6] We note that Appellant's briefing does not include any argument or suggestion that the three-year time period contributed to either the alleged unconstitutionality or illegality of the second examination.

condition at issue, [his] waiver was limited to the single psychiatric examination contemplated by Perkins."

Appellant allows that the court may order DHMH to examine a defendant who has entered an NCR plea pursuant to CP § 3-111, in order to determine whether the defendant is criminally responsible and is competent to stand trial. Appellant submits, however, that CP § 3-111 does not grant the circuit court the ability to order an examination of a defendant by a private psychiatrist.

The State refutes Appellant's claim that Dr. Spodak's exam violated his Fifth Amendment privilege against self-incrimination, highlighting that the Supreme Court has established, in both *Buchanan v. Kentucky*, 483 U.S. 402, 422 (1987) and *Estelle v. Smith*, 451 U.S. 454, 465 (1981), that a defendant who puts his mental status at issue by pleading not guilty by reason of insanity is susceptible to examination by the State. Such an exam, the State argues, does not violate a defendant's Fifth Amendment rights if he has chosen to assert the defense and introduce supporting psychiatric testimony. The State repudiates Appellant's reading of *Buchanan* to constrain the State's ability to request a subsequent or second examination, emphasizing that the Supreme Court did not reach that issue in *Buchanan.*

Further, the State avers, the trial court correctly granted its request under CP § 3-111(a) for a psychiatric examination of Appellant and properly allowed the State to admit the results during the criminal responsibility phase of the bifurcated trial. The State purports that the trial court had the authority to order Dr. Spodak's examination because CP § 3-111(c) does not restrict examinations to assessment by DHMH; in fact the statute

expressly provides that, "for good cause shown, the court may extend the time for examination or order an additional examination." CP § 3-111. The State also cites Maryland cases in which courts have allowed the State to obtain independent psychological evaluations of defendants when those defendants have intended to rely NCR defenses. Appellant points out in his reply, however, that the cases on which the State relies did not involve the State "seeking a second examination by a privately retained psychiatrist because it did not like the outcome of the initial examination."

B. Appellant's Fifth Amendment Challenge

The self-incrimination clause of the Fifth Amendment states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. "The essence of this basic constitutional principle is 'the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.'" *Estelle v. Smith*, 451 U.S. 454, 462 (1981) (*quoting Culombe v. Connecticut*, 367 U.S. 568, 581-82 (1961)).

Under the protections afforded by the Fifth Amendment, when a defendant "neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence," that defendant may not be compelled to submit to a court-ordered evaluation if the defendant's statements can be used against the defendant in criminal proceedings. *Id.* at 468-69 (holding that, because the defendant did not offer psychiatric evidence at trial or invoke the NCR defense, the State was not entitled to introduce evidence from an expert psychiatric examination that the defendant did not consent to at trial). The Fifth Amendment does not,

however, offer the same protection to a defendant who, by asserting an NCR defense, places the defendant's psychiatric condition at issue. *See id.* at 465-66, 469; *see also Buchanan v. Kentucky*, 483 U.S. 402, 422-23 (1987).

When a defendant asserts an NCR defense and introduces supporting psychiatric testimony, the defendant's "silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case." *Estelle*, 451 U.S. at 465. In *Buchanan,* the petitioner had attempted to establish the defense of "extreme emotional disturbance" during his trial for the murder of a young woman. *Buchanan*, 483 U.S. at 408. The Supreme Court considered "whether the admission of findings from a psychiatric examination of petitioner proffered solely to rebut other psychological evidence presented by petitioner violated his Fifth [] Amendment rights where his counsel had requested the examination and where petitioner attempted to establish at trial a mental-status defense." *Id.* at 404. Buchanan's sole witness at trial was a social worker "who was asked by defense counsel to do little more than read to the jury the psychological reports . . . in the custody of Kentucky's Department of Human Services. In such circumstances, with petitioner not taking the stand, the Commonwealth could not respond to this defense unless it presented other psychological evidence." *Id.* at 423. The trial court allowed the Commonwealth to ask social worker to read excerpts from other psychological reports, in which the psychiatrist "set set forth his general observations about the mental state of petitioner but had not described *any* statements by petitioner dealing with the crimes for which he was charged." *Id.* (emphasis in original). The Supreme Court affirmed the trial

court's ruling, determining that "the introduction of such a report for this limited rebuttal purpose does not constitute a Fifth Amendment violation." *Id.*

The Supreme Court has since clarified and broadened this ruling in the context of a case in which the petitioner, Cheever, presented expert testimony during his trial in support of his defense of voluntary intoxication by methamphetamine which, he claimed, negated his ability to form the specific intent to commit the murder for which he was charged. *Kansas v. Cheever*, 571 U.S. 87, 89-91 (2013). The State presented the rebuttal testimony of another expert who had examined Cheever in a separate proceeding by order of the federal court. *Id*. at 91. At trial, defense counsel objected on the ground that the State's expert's opinions were based, in part, on an examination to which Cheever had not voluntarily agreed and thus the expert's testimony would "violate the Fifth Amendment proscription against compelling an accused to testify against himself." *Id*. at 91-92.

The Supreme Court did not agree that Cheever's Fifth Amendment privilege against compelled self-incrimination was violated. Writing for a unanimous Court, Justice Sotomayor, held that "[t]he rule of *Buchanan*, which we reaffirm today, is that where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit an offense, the prosecution may present psychiatric evidence in rebuttal." *Id.* at 94. Justice Sotomayor pointed out that, although, "as Cheever notes, the mental evaluation in *Buchanan* was requested jointly by the defense and the government, our holding was not limited to that circumstance." *Id.* at 93. The admission of this evidence, Justice Sotomayor explained,

> harmonizes with the principle that when a defendant chooses to testify in a criminal case, the Fifth Amendment does not allow him to refuse to answer related questions on cross-examination. A defendant "has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts." *Fitzpatrick v. United States*, 178 U.S. 304, 315, 20 S. Ct. 944, 44 L.Ed. 1078 [(1900)]. . . . When a defendant presents evidence through a psychological expert who has examined him, the government likewise is permitted to use the only effective means of challenging that evidence: testimony from an expert who has also examined him.

Id. at 94.

"It is accepted" in Maryland that a defendant's constitutional rights are "not violated by allowing the State a mental examination of a defendant who has entered a not criminally responsible plea [.]" *Hartless v. State*, 327 Md. 558, 564 (1992) (holding that, under Maryland Rule 4-263, when a defendant presents a mental status defense other than insanity, the State may still secure a mental examination of a defendant in order to present rebuttal expert testimony). If the "defendant introduces psychiatric testimony at trial" the State may also "present testimony by its psychiatrist on the issue of criminal responsibility." *Id; see also Bremer v. State*, 18 Md. App. 291, 316 (1973), *superseded by statute*, Md. Rule 4-314(a), *as recognized in Treece v. State*, 313 Md. 665 (1988) (explaining that where a defendant has "pleaded insanity as a defense and presented evidence to meet the threshold question, the maintenance of a 'fair state-individual balance' requires that the State be permitted to have him examined"). The Court of Appeals has explained that the "the underlying concern is that in order for the State to be able to bear effectively its burden of proving guilt, or of meeting an affirmative defense, it must have

the means to adequately assess and, if necessary, rebut a defendant's expert psychiatric testimony." *Hartless*, 327 Md. at 565.

In this case, it is undisputed that Appellant entered an NCR plea and requested that the court order a competency evaluation.[7] He designated the doctor who conducted that examination, Dr. Hanson, as his expert witness and offered her testimony at trial. Although Perkins is a State hospital, a Perkins doctor is perfectly capable of offering impartial and competent testimony, and is, therefore, available to be called as an expert in a case for the defense. *See Johnson v. State*, 292 Md. 405, 410-16 (1982), *overruled on other grounds by Hoey v. State*, 311 Md. 473, 494-95 (1988); *Djadi v. State*, 72 Md. App. 223, 229 (1987).

Dr. Hanson examined Appellant and testified that she did not believe him to be criminally responsible at the time of the offense. Appellant's presentation of her testimony, then, triggered the State's right to present its own psychiatric evidence to rebut Appellant's evidence. *See Cheever*, 571 U.S. at 94. Appellant can cite to no authority that holds, as Appellant contends, that by placing his psychiatric condition at issue, Appellant's waiver was limited to the single psychiatric examination that was ordered by the court at Appellant's request. To the contrary, the State contends that under the circumstances presented in this case, the State would have been able, upon court order, to obtain an

[7] When a defendant pleads not criminally responsible as a defense, wishes to assert the defense at trial, and is indigent, due process requires that the defendant have the right to be examined by an "impartial, competent psychiatrist at State expense." *Swanson v. State*, 9 Md. App. 594, 596 (1970). This requirement is fulfilled by "by making available to [a] defendant the impartial and competent psychiatric staff of the Clifton T. Perkins State Hospital." *Skinner v. State*, 16 Md. App. 116, 123 (1972); *see also Bremer*, 18 Md. App. at 316. It is undisputed that Appellant is indigent.

evaluation of Appellant's mental status by a psychiatrist of its choosing pursuant to Maryland Rule 4-263(f)(2).[8] In support, the State cites *Johnson v. State*, 348 Md. 337 (1998), a case that involved an appeal from the trial court's ruling denying a belated NCR plea. Although the procedural posture in *Johnson*, and a subsequent rule change,[9] somewhat limit *Johnson*'s persuasive authority here, we observe that the Court of Appeals instructed, in relevant part:

> Johnson's failure to file a NCR plea did not preclude the State from obtaining an evaluation of Johnson's mental status by a psychiatrist of its choice since Johnson intended to rely at any sentencing hearing on 'a substantially impaired' mental status as a mitigating circumstance against the imposition of the death penalty.

Id. at 346-47 (internal quotations omitted).

Although Appellant's Fifth Amendment waiver was not limitless, we can find no authority to support Appellant's assertion that by placing his psychiatric condition at issue,

[8] Maryland Rule 4-263 governs discovery in the circuit court in criminal causes. The version of Maryland Rule 4-263(f)(2) in effect in 2019 at the time of the trial in this case provided:

> On motion filed by the State's Attorney, with reasonable notice to the defense, the court, for good cause shown, shall order the defendant to appear and (A) permit the taking of buccal samples, samples of other materials of the body, or specimens of blood, urine, saliva, breath, hair, nails, or material under the nails or (B) *submit to a reasonable physical or mental examination*.

(Emphasis added).

[9] In *Johnson v. State*, the Court of Appeals referenced Maryland Rule Rule 4-263(d)(1) which, at that time, addressed discovery by the State "as to the person of the defendant." 348 Md. at 346-47. In the version of the rule in effect when *Johnson* was decided in 1998, the defendant was required to "submit to a reasonable physical or mental examination" upon the request of the State. In 2009, however, the Court of Appeals adopted a new version of the rule, adding, among other requirements, a court order upon motion by the State's Attorney before a defendant must appear to provide any samples or examinations. The new version was then recodified as section 4-263(f).

his waiver was limited to the single psychiatric examination that was ordered by the court at Appellant's request. Under the circumstances presented in this case, where the State sought permission to have Appellant evaluated by a forensic psychologist due to the unavailability of the lead doctor from Perkins who evaluated Appellant, and the incomplete records held by Perkins in relation to the March 2nd report on which the Appellant relied, the State "could not respond to [Appellant's] defense unless it presented other psychological evidence." *Buchanan*, 483 U.S. at 422-23. Accordingly, we hold that the court did not err when it ordered Appellant to submit to a psychiatric examination with Dr. Spodak.

C. The Maryland Statute[10]

Section 3-111(a) of the Criminal Procedure Article provides that "[i]f a defendant has entered a plea of not criminally responsible, the court may order the Health Department to examine the defendant to determine whether the defendant was not criminally responsible under § 3-109 of this title and whether the defendant is competent to stand trial." Further, "if a court orders an examination under this section . . . (3) for good cause shown, the court may extend the time for examination *or order an additional examination*." CP § 3-111(c) (emphasis added).[11]

[10] We note that Appellant does not directly challenge the constitutionality of CP § 3-111, arguing instead, that the language of the statute does not permit the State to obtain an independent exam by a privately retained psychiatrist.

[11] This provision was originally located in Maryland Code (1984), Health-General Article ("HG"), §12-110. *See* 2001 Md. Laws ch. 10 (S.B. 1). When the provision was first enacted, the Task Force commented only that 12-110(c)(3) was a "new provision . . .
(Continued)

When we interpret a statute, we look at its plain meaning and construe it "without forced or subtle interpretations designed to limit its scope." *Balt. Sun Co. v. Univ. of Md. Med. Sys. Corp*., 321 Md. 659, 669 (1991). We discern the plain language of § 3-111(a) and (c)(3) as explicitly conferring on the court the discretion to order additional examinations where good cause is shown. We can find no legislative history or other authority interpreting the statute as Appellant proposes; namely, that CP § 3-111 authorizes the trial court to allow only the Health Department to examine a defendant in order to determine whether he is criminally responsible.

Although we have found no case interpreting the meaning of "good cause" under CP § 3-111(c)(3), the Court of Appeals has determined, for example, what constitutes "good cause" to accept a belated NCR plea under the former Maryland Rule 731. *See Grandison v. State*, 305 Md. 685, 711 (1986) (considering whether there was "good cause" under a previous version of the Maryland Code and Rules for the court to accept the defendant's NCR plea after the statutory deadline).[12] The Court in *Grandison* explained that, in the context of a late plea, "'good cause' vests the trial court with wide discretion." *Id.* at 711. The Court went on to explain that when a court makes a determination about good cause, "the trial judge's determination is entitled to the utmost respect and should not

added to permit the Court to order an additional examination of the defendant in its discretion." 1984 Md. Laws ch. 501.

[12] *Grandison v. State* was decided under a previous version of the Maryland Code and Rules. Specifically, the case refers to HG §12-108 and Maryland Rule 731, which are now codified at CP § 3-110 and Maryland Rule 4-242(b). *See* 2001 Md. Laws ch. 10 (S.B. 1); Maryland Register, Vol. 11, Issue 9, Part II, S-95 (April 27, 1984).

be overturned unless there was a clear abuse of that discretion." *Id.* In *Grandison*, the Court held that the circuit court did not abuse its discretion in finding no good cause to allow a late NCR plea, because the defendant offered very little evidence to support his request and refused to submit to a psychiatric examination. *Id*. at 711-13.

We adopt the meaning of "good cause" espoused in *Grandison* and hold that "good cause" under CP § 3-111(c)(3) also "endow[s] the trial court with broad discretion." *Id*. at 711. *See also Johnson v. State*, 348 Md. 337, 345 (1998) (quoting the meaning of good cause in *Grandison*, 305 Md. at 711). In this case, the State requested that Dr. Spodak be allowed to directly evaluate Appellant because Dr. Hanson was not primarily responsible for assessing Appellant. The record establishes that Dr. Green, who was primarily responsible for Appellant's assessments, was unable to be located and her notes were missing, *and* that Dr. Spodak was unable to get enough information from the Perkins file to assess whether Appellant was criminally responsible at the time of the offense. It is clear from the transcripts that the court carefully considered whether to allow the State's expert to perform a further evaluation. The court considered alternatives such as allowing the examination but offering a curative jury instruction; and ordering Perkins to do a new, full examination rather than allowing Dr. Spodak to perform his exam. Accordingly, we hold that the circuit court did not err or abuse its discretion when it exercised its authority under CP § 3-111(c)(3) to grant the State's request for an additional psychiatric examination of Appellant and then allowed the admission of the results of that examination only during the criminal responsibility phase of the trial.

IV.

Merger

A. Parties' Contentions

Appellant claims the circuit court should have merged his convictions for kidnapping and second-degree assault of A.H. because both charges were based on Appellant's act of moving her from the basement of her grandparents' house to his vehicle. It is not clear, Appellant avers, whether the jury convicted him of second-degree assault based on the force he used to kidnap A.H., or the separate intent-to-frighten offense of threatening A.H. with a knife. Appellant notes that the court instructed the jury that it could convict Appellant of second-degree assault under one of two theories: battery or intent to frighten. The court also, Appellant explains, instructed the jury that to convict him of kidnapping, the State was required to prove that Hemsley used force or threat of force to both confine and move A.H. Thus, argues Appellant, the circuit court erred when it failed to merge these convictions, because assault is a lesser-included offense of kidnapping and the convictions are based on the same act or acts.

The State concedes that Appellant is entitled to relief on this claim. We agree with Appellant, and the State, that it is not clear which theory of second-degree assault was used to convict Appellant and that a reasonable jury could have concluded either that the factual basis underlying his assault conviction was separate and distinct from the facts surrounding his kidnapping conviction, or that the assault was an integral part of the kidnapping. Thus, because any ambiguity in the factual bases used by the jury to find a defendant guilty must

be resolved in the defendant's favor, Appellant's sentence for second-degree assault shall be merged into his sentence for kidnapping.

B. Analysis

We agree that the circuit court should have merged Appellant's convictions for kidnapping and second-degree assault of A.H. The Court of Appeals has explained that "[s]entences for two convictions must be merged when: (1) the convictions are based on the same act or acts, and (2) under the required evidence test, the two offenses are deemed to be the same, or one offense is deemed to be the lesser included offense of the other." *Brooks v. State*, 439 Md. 698, 737 (2014). The required evidence test "focuses upon the elements of each offense; if all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements, the former merges into the latter." *Nicolas v. State*, 426 Md. 385, 401 (2012) (citation omitted). Recently, the Court of Appeals clarified that, "where merger is required, sentences should be imposed according to the offense encompassing the additional element[,]" and that this remains true even when a greater-included offence carries a lesser penalty. *State v. Frazier*, 469 Md. 627, 651-52 (2020).

The court's second-degree assault instruction in this case offered two avenues for the State to prove second-degree assault. First, the court explained that second-degree assault can be "intentionally frightening another person with the threat of immediate offensive physical contact." The court stated that, for this option, the "State must prove that the defendant committed an act with the intent to place [A.H.] in fear of immediate offensive physical contact, that the defendant had the apparent ability at that time to bring

about offensive physical contact, and that [A.H.] reasonably feared immediate offensive physical contact." Or, explained the court, "assault is causing offensive physical contact to another person." For this option, the court expounded that the State "must prove that the defendant caused physical harm to [A.H.], that the contact was the result of an intentional or reckless act of the defendant and was not accidental, and that the contact was not consented to by [A.H.]."

The court's kidnapping instruction stated that "[k]idnapping is the confinement or detention of a person against that person's will, accomplished by force or threat of force, coupled with the movement of that person from one place to another with the intent to carry or conceal that person."

In some cases, "a particular assault might be nothing more than a lesser included offense with the greater inclusive offense of kidnapping." *Pair v. State*, 202 Md. App. 617, 627 (2011). In other cases, however, an assault can have an "autonomous and non-merging status of its own[.]" *Id.*; *see also Hunt v. State*, 12 Md. App. 286, 310 (1971) (explaining that there was evidence from which the jury could have found that defendant assaulted the victim independent of any assault incident to the kidnapping itself, and that, therefore, the convictions of assault and kidnapping did not merge). In this case, Appellant committed second-degree assault both when he threatened A.H. with a knife upon kidnapping her, and when he grabbed her by the arm and forced her into his truck incidental to kidnapping her. In other words, the facts indicate that the assaults could possibly be viewed as independent acts but might also be considered as incidental to the kidnapping of A.H.

Under these circumstances, based on the court's instructions to the jury and the State's closing arguments,[13] we agree with Appellant that "a reasonable jury could have concluded either that the factual bases underlying [Appellant's] convictions for second degree assault were separate and distinct from the facts surrounding his conviction [for kidnapping] or that the assaults were an integral part of the [kidnapping]." *Nicolas*, 426 Md. at 400. Where there is any "factual ambiguity in the record, in the context of merger, that ambiguity is resolved in favor of the defendant." *Id*. We therefore agree with the State's concession to Appellant's argument that the circuit court should have merged his convictions for kidnapping and second-degree assault of A.H. Accordingly, we vacate Appellant's sentence for second-degree assault.

[13] During the State's closing arguments, the State explained that second-degree assault can be proven "in two ways." The State continued:

> One, the intent to frighten, or, if you believe there was an actual battery. In other words, if I hit you . . . or I had that offensive contact, if I actually make contact with you, that is an actual battery.
>
> So, you all have to agree that that an assault took place, but you can say, "Well, I think it was a battery." And you can say, "I think it was an intent to frighten." ***But as long as you both agree, and all twelve of you all agree that in some way an assault was accomplished, then that is all this statute, that is all this requires.***
>
> ***
>
> Some of you can agree on intent to frighten, and some can agree on just the battery.

(Emphasis added).

V.

Sufficiency of Evidence

A. Parties' Contentions

Finally, Appellant argues that the State failed to present sufficient evidence to support a conviction for home invasion in violation of CR § 6-202(b). Appellant avers that when he entered the Yates home, he entered the home of his mother- and father-in-law, where he had visited many times and with whom he had "no bad blood." This situation, argues Appellant, does not amount to "breaking," because someone who is inadvertently trespassing, or someone who believes he has express or implied permission to enter cannot be considered to be "breaking." Because Appellant had visited the home on other occasions and because of his relationship with the Yates family, then, "there was no evidence introduced at trial that [A]ppellant was aware he was making an unwarranted intrusion."

The State disagrees and maintains that the evidence was sufficient to support Appellant's conviction for home invasion. The State highlights that Appellant challenges only the "breaking and entering" element of the crime, and that breaking can be actual breaking, but that there is no need for an entry to be violent, dramatic, or forceful. Instead, the State argues, the record establishes that Appellant did not have a right to enter the home; that he "busted" in; that he'd knocked in the past before entering; and that there is evidence that he broke a sliding glass door upon entering the Yates home. Therefore, the State concludes, a rational trier of fact could have found beyond a reasonable doubt that Appellant's entry into the Yates home was breaking.

B. Analysis

When reviewing a criminal conviction for sufficiency of evidence, this Court

> ask[s] whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." "In examining the record, we view the State's evidence, including all reasonable inferences to be drawn therefrom, in the light most favorable to the State." It is not our role to retry the case. "Because the fact-finder possesses the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence." "[T]he finder of fact has the 'ability to choose among differing inferences that might possibly be made from a factual situation[.]'"

Hayes v. State, 247 Md. App. 252, 306 (2020) (citations omitted).

Here, Appellant objects only to the characterization of his entrance into the Yates home as "breaking." Section 6-202(b) of the Criminal Law Article states that "[a] person may not break and enter the dwelling of another with the intent to commit a crime of violence." A person who violates this section will be guilty of felony home invasion. "The breaking element of burglary 'may be satisfied where it is shown that there has been an 'actual' breaking, or the breaking occurred 'constructively,' through an entry gained by artifice, by fraud, conspiracy, or by threats.'" *Winder v. State*, 362 Md. 275, 326 (2001) (citations omitted). Actual breaking can "involve simply lifting a latch or opening a door closed by its own weight;" in fact, "[t]urning a doorknob and opening a closed door or merely further opening a door left ajar involves sufficient force to constitute an actual breaking, provided it is a trespassory act." *Finke v. State*, 56 Md. App. 450, 467 (1983).

Our cases also instruct that there is no breaking when a person has the right to enter a dwelling or if the person enters with the consent of the owner. *Id*. It is a complete defense

to burglary if "there remains a genuine possibility, not disproved beyond a reasonable doubt, of **BOTH** 1) a subjective belief by the defendant that the intrusion was warranted **AND ALSO** 2) the objective reasonableness of such a belief." *Herd v. State*, 125 Md. App. 77, 108 (1999) (emphasis in original); *see also Walls v. State*, 228 Md. App. 646, 681 (2016). "There is a rebuttable presumption that a defendant's entry into premises owned or leased by another is not authorized, licensed, or privileged." *Id.*

In *Holland v. State*, this Court found that there was insufficient evidence to support a conviction of burglary when the defendant knocked on the door and was invited into the home. 154 Md. App. 351, 366, 369-71 (2003). There, we determined, there could be no finding of breaking or trespassory entry, because the homeowner expressly consented to defendant's entry when he invited him to come in. *Id*. at 369-71. Similarly, in *Warfield v. State*, the Court held that the defendant was not guilty of breaking when he opened his employer's garage door and entered the garage in order to remove the snow piled against the door. 315 Md. 474, 500-01 (1989). The Court reasoned that the defendant had implied permission to take this action; he was not a trespasser in his employer's yard because he had been hired to shovel her sidewalk and walkways, was "lawfully on the property by invitation," and reasonably believed that it was "necessary in the performance of his duties that he open the garage door and enter the garage to get at the snow piled against the door." *Id*.

Contrary to these examples, in Appellant's case, a rational trier of fact could have found beyond a reasonable doubt that his entry into the Yates home was an actual breaking and that he had neither express nor implied permission to enter the home. Jaqueline Yates,

A.H., and Hagens testified that Appellant did not have express permission to enter the home. Appellant is described as having "busted in" unannounced, yelling and brandishing a box cutter. Unlike in *Holland*, Appellant did not request and was not granted express permission to enter the home, whether by knocking or some other method.

Further, a rational trier of fact could have found beyond a reasonable doubt that Appellant did not have implied permission to enter the Yates home. Although Appellant had been invited into the Yates home in the past and had a good relationship with the Yates family, there is no indication that Appellant had permission to enter the home on April 23, 2016. For example, although Appellant may have been welcomed into the Yates home previously, evidence indicates that he always knocked before entering. This suggests that Appellant did not believe himself to be entitled to enter the Yates home without first seeking permission. Moreover, at the time of the murder, Ms. Hemsley and A.H. were living in the Yates home after Ms. Hemsley separated from Appellant. A rational trier of fact could reasonably have concluded, then, that the strained relationship might have made Appellant less welcome in the Yates home.

Finally, there is evidence that, upon entering the Yates home, Appellant broke one of the two entry doors to the home. Although there is no direct evidence that Appellant was responsible for breaking this glass door, Jaqueline Yates testified that she knew it "wasn't broken before [Appellant] came."

The evidence adduced by the State was sufficient to support a rational trier of fact determining, beyond a reasonable doubt, that Appellant's entry into the Yates home

constituted a "breaking" under CR §6-202(b). Therefore, we affirm the judgment of the circuit court.

In sum, we vacate Appellant's sentence for second-degree assault and hold that the trial court should have merged Appellant's conviction for second-degree assault of A.H into his conviction for kidnapping A.H. We affirm the judgments of the circuit court on all other issues.

JUDGMENTS OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED; SENTENCE FOR SECOND-DEGREE ASSAULT VACATED; APPELLANT TO PAY TWO-THIRDS COSTS; CHARLES COUNTY TO PAY ONE-THIRD COSTS.