Circuit Court for Montgomery County
Case No. 137864C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1955

September Term, 2021

CHARLES BOTTENFIELD

v.

STATE OF MARYLAND

Wells, C.J.,
Ripken,
Battaglia,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Wells, C.J.

Filed: October 28, 2022

Charles Bottenfield, appellant, was charged with first-degree and second-degree assault arising from an altercation with his partner Michelle Wayerski. As part of its case, the State introduced phone calls made between Bottenfield and Wayerski while Bottenfield was detained awaiting trial. In the calls, Bottenfield twice refers to "the guys here." After the close of the State's case, Bottenfield moved for a judgment of acquittal on the first-degree assault charge, arguing that the evidence was insufficient. The trial court denied Bottenfield's motion. Bottenfield was subsequently found guilty of first-degree assault. On appeal, Bottenfield presents two questions for our review:

1. Is the evidence sufficient to support Mr. Bottenfield's conviction for first degree assault?

2. Did the trial court abuse its discretion in admitting evidence of Mr. Bottenfield's pretrial incarceration?

For the foregoing reasons, we affirm on both issues.

FACTUAL AND PROCEDURAL BACKGROUND

The State charged Bottenfield with first-degree and second-degree assault arising from an altercation between Bottenfield and his partner Wayerski. On June 12, 2020, a neighbor called an ambulance after seeing Wayerski sitting in front of her house looking "really distraught." Wayerski testified that she did not remember the events of June 12, 2020, but police body-camera footage, which was played at trial, revealed that she had told police that Bottenfield got mad and started beating her. When asked what exactly Bottenfield did, Wayerski said that he "punched me, he head-butted me . . . [h]e head-butted me so many times." Another section of the body-camera footage revealed the following interaction between the officer and Wayerski:

[WAYERSKI]: Oh, and he did actually choke me.

[OFFICER]: He choked you to, you, to the point where you couldn't breathe?

[WAYERSKI]: Well, I couldn't breathe, but then he let go of me.

[OFFICER]: So like this –

[WAYERSKI]: That's why I have little marks on my neck.

[OFFICER]: While he's choking you, do you – did you feel like you were going to pass out?

[WAYERSKI]: No. I thought I was going to die. I thought he was going to kill me.

[OFFICER]: Uh-huh. So you're saying that you, you could not breathe when he was choking you?

[WAYERSKI]: It was hard for me to breathe, yeah.

[OFFICER]: It was hard for you to breathe when he –

[WAYERSKI]: Yeah, because he had his, his whole hand on my throat, squeezing it.

Wayerski also told the officer that Bottenfield took her phone and "threw it somewhere in the street out here so I couldn't call anybody." At the hospital, Wayerski was diagnosed with a broken nose, although Wayerski testified that it "didn't feel broken." The State introduced into evidence the body-camera footage, as well as pictures of Wayerski's injuries and her medical records.

Also, as part of its case, the State played portions of two jail-house calls between Bottenfield and Wayerski made while Bottenfield was incarcerated pre-trial. The relevant portion of the first call is as follows:

[BOTTENFIELD]: Like you [sic] guys said, as long as my girlfriend.

> [WAYERSKI]: As long as your girlfriend what?
>
> [BOTTENFIELD]: Gets smart.
>
> [WAYERSKI]: So you're thinking your girlfriend's dumb?
>
> [BOTTENFIELD]: No. No. I'm just saying the guys here said I would have, really have nothing to worry about if my girlfriend just pled the Fifth on everything and didn't speak to nobody and didn't (unintelligible) wouldn't answer.

And the second call:

> [BOTTENFIELD]: That's all. The guys here are making fun of me (unintelligible).
>
> [WAYERSKI]: Making fun of you why?
>
> [BOTTENFIELD]: Probably because I'm fucking worried about this shit and they're telling me not to.
>
> [WAYERSKI]: Worried about what shit?
>
> [BOTTENFIELD]: This whole bullshit that I'm going through. (Unintelligible) the case and by the County (unintelligible). They said don't worry. They said as long as your girl doesn't show up to any court proceedings and your girlfriend knows to plead the Fifth if anybody asks her about anything, then you should be okay. I'm like, I already know that, she's a smart girl, I hope.

At trial, Bottenfield objected to the introduction of the calls under Rule 5-403.[1] Following Bottenfield's objection, the court ruled on the admissibility of the calls:

[1] To be further discussed below, Maryland Rule 5-403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

> I'll make a determination that the probative value of the statement is significant -- the probative value is -- maybe it's not substantial, but (unintelligible) requires, so I'll allow it. If you want a curative instruction suggesting, I can give it, but I probably would suggest that would just make it worse, but that's up to you.

Soon thereafter, the State played the calls, after which the court excused the jury for a recess. The State then moved the calls into evidence. The court asked defense counsel whether it had any objection to moving the calls into evidence, to which defense counsel replied, "No, Your Honor."

At the close of the State's case, Bottenfield moved for a judgment of acquittal as to the first-degree assault charge, arguing that the State failed to make a prima facie showing that Bottenfield intended to cause serious physical injury. The trial court denied Bottenfield's motion and this timely appeal followed. Other facts will be discussed as they relate to the issues.

STANDARD OF REVIEW.

We review a challenge to the sufficiency of evidence to support a criminal conviction by asking "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Smith v. State*, 415 Md. 174, 184 (2010) (quoting *Jackson v. Virginia*, 443 U.S. 307 (1979)) (emphasis in *Jackson*). "[W]e do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence. We defer to the jury's inferences and determine whether they are supported by the evidence." *Id.* at 185 (internal citations omitted).

Bottenfield's challenge to the admission of the jail-house calls is based on Maryland Rule 5-403 which considers whether relevant evidence should nevertheless be excluded because its probative value is substantially outweighed by the risk of unfair prejudice. When reviewing whether the relevancy of evidence is substantially outweighed by any unfair prejudice, we are guided by a two-pronged analysis:

> First, we consider whether the evidence is legally relevant, a conclusion of law which we review *de novo*. [*State v.*] *Simms*, 420 Md. [705, 725 (2010)]. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. If we conclude that the challenged evidence meets this definition, we then determine whether the court nonetheless abused its discretion by admitting relevant evidence which should have been excluded because its "probative value is outweighed by the danger of unfair prejudice, or other countervailing concerns as outlined in Maryland Rule 5-403." *Simms*, 420 Md. at 725[].

Washington Metro. Area Transit Auth. v. Washington, 210 Md. App. 439, 451 (2013). "During the first consideration, we test for legal error, while the second consideration requires review of the trial judge's discretionary weighing and is thus tested for abuse of that discretion." *Simms*, 420 Md. at 725.

DISCUSSION

I. The Evidence was Sufficient to Sustain the Conviction for First-Degree Assault

A. Parties' Contentions

Bottenfield contends that the contact described by Wayerski in the body-camera footage does not amount to a first-degree assault because, where no evidence of serious physical injury exists, no intent to cause such injury can be inferred. In support of his argument, Bottenfield asserts that in determining that sufficient evidence did exist, the trial

court relied solely on Wayerski's statement to the officer that she was choked to the point of fearing for her life. However, according to Bottenfield, the physical evidence does not corroborate that account because: Wayerski admitted to being on blood thinners which causes bruising "very easily"; she only described "little marks" on her neck; and, while she told the officer it was "hard for me to breathe[,]" she did not feel as though she was going to pass out. Bottenfield further relies on the fact that Wayerski testified that her nose did not feel broken, and that "nothing happened to stop the assault or prevent Mr. Bottenfield from causing serious physical injury, if that was his intention[,]" as further indicating his lack of intent to cause serious physical injury.

The State counters by arguing that when considering the evidence in the light most favorable to the State, it was sufficient to sustain a conviction of first-degree assault. The State argues that the jury may infer intent by the defendant's conduct and the "surrounding circumstances," whether or not the victim actually suffered such an injury. Based on the evidence, including the body-camera footage, the jury could have reasonably found that beating her repeatedly on the head, choking her to the extent that she could not breathe, and leaving her without her phone, shows that he intended to cause Wayerski injury that created the substantial risk of death or permanent or protracted injury. The State also notes that the drawing of a particular inference upon competing inferences is "the exclusive prerogative of the jury, as the fact-finder."

B. Analysis

Bottenfield argues that the evidence presented at trial was insufficient to sustain a conviction of first-degree assault. Section 3-202 of the Criminal Law Article ("CR")

prohibits a person from causing or attempting to cause "serious physical injury to another." "Serious physical injury" is defined as physical injury that:

> (1) creates a substantial risk of death; or
>
> (2) causes permanent or protracted serious:
>
> i. disfigurement;
>
> ii. loss of the function of any bodily member or organ; or
>
> iii. impairment of the function of any bodily member or organ.

CR § 3-201(d). In *Cathcart v. State*, we held that the evidence was sufficient to sustain a conviction of first-degree assault where the defendant held the victim on the floor and "punched her repeatedly in her face with his right hand while he choked her with his left." 169 Md. App. 379, 393–94 (2006), *vacated on other grounds*, 397 Md. 320 (2007). The victim in *Cathcart* lost consciousness during the attack and, among other injuries, suffered a broken nose. *Id.* The evidence presented to the jury in *Cathcart* included testimony from witnesses describing her appearance following the beating, as well as photographs of her injuries and her medical records. *Id.* at 394.

Similarly, in this case, the body-camera footage was shown to the jury, in which Wayerski described the attack and being "punched" and "head-butted" "so many times." Wayerski also described to the officer how Bottenfield had choked her to the point that she could no longer breathe, and that during the choking, she felt as though she was "going to die" and that Bottenfield "was going to kill" her. In addition to the body-camera footage, photographs of Wayerski's injuries were admitted, as well as medical records diagnosing her broken nose. We conclude that this case is analogous to *Cathcart*.

Bottenfield suggests that this evidence is insufficient because the State failed to prove that Wayerski actually suffered any serious physical injury. We disagree. First, we note that the statute not only prohibits causing substantial physical injury but *attempting* to cause serious physical injury. CR § 3-202(b)(1) (emphasis added). "Although the State must prove that an individual had a specific intent to cause a serious physical injury, a jury may infer the necessary intent from an individual's conduct and the surrounding circumstances, *whether or not the victim suffers such an injury*. *Cathcart*, 169 Md. App. at 393 (quoting *Chilcoat v. State*, 155 Md. App. 394, 403 (2004)) (emphasis added). The statute therefore does not require the victim to sustain a serious physical injury in order for a jury to convict a defendant of first-degree assault. *See also Brown v. State*, 182 Md. App. 138, 179 (2006) ("[C.R.] § 3-202(a) permits conviction for first-degree assault based on an attempt to cause 'serious physical injury,' not merely a completed injury.")

Further, we conclude that when viewing the evidence in the light most favorable to the State, the jury could have reasonably found that Wayerski did in fact sustain serious physical injury. A jury could have reasonably found that being head-butted multiple times and being punched, causing a broken nose, qualifies as a protracted and serious disfigurement. And further, the jury could have reasonably found that being choked to the point of not being able to breathe, and thinking one was going to die, easily meets the threshold of creating a substantial risk of death. Just as in *Cathcart*, where choking and a broken nose were found to have been sufficient, it is similarly sufficient here.

Bottenfield also argues that because nothing happened to stop the assault or to prevent Bottenfield from inflicting serious physical injury if he intended to, the evidence

is insufficient for a jury to find intent. This argument is unavailing for several reasons. First, Bottenfield cites no caselaw to support his contention. And second, merely because nothing happens to stop an assault from occurring does not mean that the assault did not occur and that a jury cannot reasonably find intent. Returning to *Cathcart*, in that case, nothing occurred that ended the assault, and Cathcart even got the victim a towel when he saw how much she was bleeding. 169 Md. App. at 384. Yet this Court had no issue affirming his conviction for first-degree assault.

Finally, the jury could have reasonably inferred intent from Bottenfield disposing of Wayerski's phone and ensuring that she would not be able to seek help following the assault. Moreover, "choosing between competing inferences is classic grist for the jury mill." *Cerrato-Molina v. State*, 223 Md. App. 329, 337 (2015). Whether Bottenfield's conduct demonstrates intent or lack thereof is not for us to decide. It is not our place as a reviewing court to review whether the jury's inferences were correct, only if there was sufficient evidence to support such inferences. Consequently, we hold that the evidence here was more than sufficient to sustain the conviction for first-degree assault.

II. The Trial Court did not Abuse its Discretion in Admitting the Jail-House Calls

A. Parties' Contentions

Bottenfield next argues that the trial court abused its discretion in admitting phone calls between him and Wayerski, made while he was detained pending trial. Due to the "complete lack of relevancy" and "enormous prejudice" in admitting the jail-house calls, Bottenfield contends that the calls should have been excluded under Maryland Rule 5-403.

Although Bottenfield did not explicitly state that he was in jail, Bottenfield argues that in context, it "would have been obvious to the jury" that by the words "in here," Bottenfield was referring to jail. Bottenfield lastly argues that any error committed by the trial court cannot be harmless because the case was entirely based on statements that Wayerski made to police.

The State counters initially by arguing that the issue of the jail-house calls is not preserved on appeal because Bottenfield's counsel failed to object to the admission of the calls at the time the calls were being introduced, even though Bottenfield's counsel did raise an objection to the introduction of the calls earlier at trial. The State then contends that if the issue is preserved for appeal, the trial court properly admitted the calls because they were relevant and the probative value was not outweighed by the risk of unfair prejudice.

B. Analysis

1. Preservation

As a threshold matter, the State argues that the issue of whether the trial court abused its discretion in admitting the transcript of the jail-house call is not preserved. At trial, the State sought to introduce the calls, to which Bottenfield's counsel objected, stating: "Your Honor, I'm going to object because I think the prejudice outweighs any probative value that that would have." In response, the court stated that because the probative value is "significant[,]" it would "allow it." The State then played the recordings, after which the jury was excused. After the jury was excused, the State then moved to introduce the jail-

house calls into evidence. The court asked defense counsel if it had any objection, to which defense counsel replied, "No, Your Honor."

Typically, we will not decide any issue "unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a). The State contends that because counsel for Bottenfield did not object when the State moved the calls into evidence, and affirmatively stated that the defense did not object ("No, Your Honor."), that Bottenfield has not preserved the issue and the issue is waived. The State argues that the exception carved out by the Court of Appeals in *Clemons v. State*, 392 Md. 339 (2006), does not apply here. We disagree.

In *Clemons*, the Court of Appeals held that an objection to testimony from an expert witness was preserved even though the objecting attorney did not raise the objection again after further voir dire of the witness. *Id.* at 362. The Court reasoned that to require Clemons to restate his objection only minutes after he originally made it "would be to elevate form over substance[.]" *Id.* at 363. The State distinguishes between *Clemons* and the present case because in this case, Bottenfield affirmatively stated that he did not object to the admission and in *Clemons*, Clemons merely failed to restate the objection after further voir dire. However, where the trial court in *Clemons* did not even offer a ruling at the time of the objection—merely permitting the attorney to conduct further voir dire before eventually "effectively overrul[ing] Clemons's prior objection[,]" *Id.* at 362,—here, the trial court provided a direct ruling immediately following Bottenfield's objection, stating that because the probative evidence was significant, the court would "allow it." To hold that Bottenfield should be required to restate his objection mere minutes after objecting and receiving a

ruling would "elevate form over substance[,]" *Id.* at 363, even more so than the Court of Appeals declined to in *Clemons*. Therefore, we conclude that Bottenfield has preserved the issue. We now address whether the trial court abused its discretion in admitting the jail-house calls.

2. Md. Rule 5-403 Analysis

Maryland Rule 5-403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The first step in a 5-403 analysis is determining whether the evidence is relevant. *WMATA*, 210 Md. App. at 451. We review the relevancy of evidence *de novo*. *Simms*, 420 Md. at 725. This step is not a high bar as relevant evidence is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401.

The relevancy of the jail-house calls is clear. As the State aptly highlights, the statements made by Bottenfield to Wayerski—intimating that he would "have nothing to worry about if my girlfriend just pled the Fifth on everything and didn't speak to nobody[,]" or that he "should be okay" "as long as [she] doesn't show up to any court proceedings" and "knows to plead the Fifth"—could be interpreted by the jury as an admission to the conduct and consciousness of guilt. *See Winston v. State*, 235 Md. App. 540, 576 (2018) ("an attempt by an accused to suborn a witness is relevant and may be introduced as an

admission by conduct, tending to show his guilt." (quoting *Saunders v. State*, 28 Md. App. 455, 459 (1975))). Thus, the evidence is relevant.

The next step is to determine whether, under Rule 5-403, the trial court abused its discretion in finding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. A trial court's decision constitutes an abuse of discretion when it is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Moreland v. State*, 207 Md. App. 563, 569 (2012) (quoting *Gray v. State*, 388 Md. 366, 383 (2005)). Further, the probative value is outweighed by the danger of unfair prejudice "when the evidence produces such an emotional response that logic cannot overcome prejudice or sympathy needlessly injected into the case." *Odum v. State*, 412 Md. 593, 615 (2010) (quoting Joseph F. Murphy Jr., *Maryland Criminal Evidence Handbook* § 506(B) (3d ed. 1993 & Supp. 2007)).

The complained of language in the calls includes the two references that Bottenfield makes to "the guys here." In his brief, Bottenfield suggests that the unfairly prejudicial language was "the guys *in* here." The actual language from the calls only refers to "the guys here." We point this out because Bottenfield highlights "in here" as being central to his argument, specifically, by asserting that "[f]rom context, it would have been obvious to the jury that Mr. Bottenfield was referring to jail when he said "in here."

Compared to "the guys *in* here," simply stating "the guys here" does not necessitate an inference of being incarcerated. And because the probative value of the phone calls is significant, the risk of unfair prejudice is diminished. *See Odum*, 412 Md. at 615 ("The

more probative the evidence is of the crime charged, the less likely it is that the evidence will be unfairly prejudicial.'"). Bottenfield suggests that it is "hard to overstate the prejudicial impact on a jury of the evidence that the criminal defendant has been previously incarcerated" and that references to Bottenfield's incarcerated status would only serve to demonstrate to the jury a criminal disposition or a history of criminal conduct. Yet there are varying degrees of references to a defendant's incarcerated status. Passing references to "the guys here[,]" or even jail calls themselves, do not rise to the level of showing a defendant in prison garb or having the defendant shackled in front of the jury. *See United States v. Arayatanon*, 980 F.3d 444, 450 (5th Cir. 2020) ("The admission of Arayatanon's jail calls did not pose the same constant and visible risk of prejudice as shackling, prison garb or other external signs of a defendant's incarceration or perceived threat to the community at large."); *United States v. Johnson*, 624 F.3d 815, 821–22 (7th Cir. 2010) ("[T]he occasional reference to the fact that Johnson had at some point been in jail is quite different than the constant reminder of the accused's condition implicit in such distinctive, identifiable attire that underlies the injustice inherent in requiring a defendant to stand trial in prison garb." (Internal quotation marks omitted)).

In *Johnson*, the Seventh Circuit addressed whether a trial court abused its discretion in admitting jail calls that "began with statements identifying them as calls made" from the local jail. 624 F.3d at 820. Observing that Johnson was subjected to a "much diminished form of prejudice" than appearing before the jury in prison garb, the Court held that trial court did not abuse its discretion in admitting the tapes. *Id.* at 822.

We are persuaded by the Seventh Circuit's reasoning. Whereas in *Johnson*, the Court held that the calls containing unambiguous references to the defendant's incarcerated status in explicitly stating that he was making the call from the local jail, here, the passing references to "the guys here" are far more vague indicators and is open to multiple interpretations. Accordingly, in admitting the calls after a careful weighing of the probative value against the danger of unfair prejudice, it cannot be said that the trial court's decision was so removed from any "center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Moreland*, 207 Md. App. at 569. Therefore, the trial court did not abuse its discretion in admitting the calls.

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