UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 536

September Term, 2016

WILLIAM SHEA ROHRBAUGH

v.

STATE OF MARYLAND

Wright,
Berger,
Shaw Geter,

JJ.

Opinion by Berger, J.

Filed: April 28, 2017

Tried by a jury in the Circuit Court for Montgomery County, appellant, William Shea Rohrbaugh, was convicted of second-degree assault.[1] The trial court sentenced appellant to ten years in prison, suspending all but three years, after which he timely noted this appeal, presenting the following questions for our consideration:

1. Did the trial court err in admitting hearsay statements of the alleged victim?

2. Did the trial court err in ruling inadmissible evidence of other recorded statements of the alleged victim?

3. Did the trial court err in refusing to propound jury instructions on self-defense and mutual affray?

For the reasons that follow, we shall affirm the judgment of the trial court.

FACTS AND LEGAL PROCEEDINGS

At 10:50 p.m. on July 25, 2015, a bystander walking his dog called 911 to report that he had heard a woman in an apartment in the building at 7 Pickering Court, Germantown, Montgomery County, screaming, "You hit my fucking face." Montgomery County Police Officer John Chucoski responded to the apartment building, and as he approached apartment 201, he heard a woman yell, "Look what you did to my face" and, "I'm not cheating on you."

Chucoski banged on the door to the apartment and announced himself as a police officer. He was met with silence, although seconds earlier he had heard crying, muffled voices, and one distinct thud. Although prepared to break down the door to investigate,

[1] The State *nolle prossed* two counts of the indictment at the start of trial, and the jury acquitted appellant of first-degree assault.

the police were able to identify another resident of the apartment, who arrived with a key to open the door.

As soon as Chucoski entered the apartment, a black female, later identified as Brittany Young, ran past him in an attempt to hide in a bathroom. Chucoski observed that Young had a large welt on her left cheek, a black eye, a cut and bruised lip, and blood on her face.

Chucoski thwarted Young's entrance to the bathroom and tried to speak with her, but she was uncooperative and refused to provide her name or to permit Chucoski to take photos of her injuries. It was clear to Chucoski that Young had been crying and was extremely upset and fearful, but she insisted that "[n]othing happened" and that she had come to the apartment for "comfort . . .and support." To Chucoski, it smelled as if Young had been drinking.

Appellant, Young's boyfriend, was also in the apartment when Chucoski entered. Chucoski observed blood and scratches or "a little bit of a red abrasion" on appellant's neck. From the smell, Chucoski believed that appellant had also been drinking.

Young was transported to the hospital, where she permitted Chucoski to take photos of her injuries.[2] The officer also helped Young fill out a domestic violence supplemental

[2] Young's medical records from Germantown Emergency Center were admitted into evidence as State's exhibit 6. The records indicated findings of soft tissue swelling to the nose, swelling of the lips, edema/bruising of the left cheek, and minimal left periorbital soft tissue swelling following an assault by fists. She was diagnosed with lip lacerations and a mandibular fracture.

form, on which she indicated that her phone number was 240-277-9265.[3]

Following the denial of appellant's motion for judgment of acquittal on the charge of first-degree assault at the close of the State's case-in-chief, appellant called as his only witness Dr. Jordan Haber, accepted by the court as an expert in the field of radiology and clinical imaging, presumably to rebut the serious bodily injury requirement of the first-degree assault charge.[4] Dr. Haber testified that, in his expert opinion, Young had sustained "a tiny fracture" to her jaw and to her nose, as well as an additional small facial fracture that had not been diagnosed during her hospital visit, all of which would have healed entirely on their own within weeks of the injury. He agreed, on cross-examination, that it was possible she had been punched in the face more than once.

DISCUSSION

I.

Appellant first contends that the trial court erred in admitting hearsay statements of Brittany Young, who did not testify at trial, via appellant's recorded jailhouse phone calls to her. The admission of the allegedly inculpatory statements as the adoption of his belief in the truth of the statements, appellant claims, violated his constitutional right to confront

[3] Young did not testify at appellant's trial. The State entered into evidence recordings of several phone calls made from appellant in jail within a day of the incident at issue to the phone number provided by Young. The inculpatory statements he allegedly adopted as admissions therein are at the heart of one of the issues he raises on appeal and will be discussed in detail, *infra*.

[4] Dr. Haber testified via Skype from New York.

a witness against him, as well as evidentiary rules governing hearsay statements, relevance, prior bad acts, and authentication of phone calls.

Prior to the presentation of evidence to the jury, defense counsel asked the trial court to make a ruling on the admissibility of recordings of four jail house phone calls allegedly placed by appellant to Young. Conceding that the calls were made from the Montgomery County Detention Center, were properly authenticated, and met the "foundation requirement," counsel objected to their admissibility as appellant's adopted admission of inculpatory hearsay statements made by Young during the calls, as he never specifically agreed with Young's statements and the calls did not make clear that they referred to the July 25, 2015 event.[5] Counsel also argued that parts of the calls were irrelevant, inflammatory, more prejudicial than probative, and confusing to the jury. As to the third and fourth of the calls, counsel further averred that the statements improperly referenced appellant's prior bad acts and conduct related to previous physical altercations between him and Young.

After listening to the recordings and to further comments from counsel, the trial court ruled it would permit the admission of all the recordings. With regard to the calls that arguably referenced appellant's prior bad acts, the court stated it would instruct the

[5] The prosecutor pointed out that the calls were made to a phone number identified by Young as hers, both in her hospital records and during her interview with the police. Moreover, according to the prosecutor, there was no question the calls were made from the Montgomery County jail, and the context of the conversations undertaken within one day of appellant's arrest "more than establish[ed] that it was the defendant" placing the calls.

jury that it could only consider the statements on the issue of appellant's intent.[6] Defense counsel asked for, and was granted, a continuing objection to each call.

Following the testimony of Officer Chucoski, the State moved into evidence its exhibit 7, which the prosecutor represented as recordings from the Montgomery County Correctional Facility to phone number 240-277-9265 on July 26, 2015, the day after appellant was arrested for the assault on Young; at that time, he remained in jail, unable to make bail. Subject to appellant's continuing objection, the recordings were played for the jury and transcribed on the record, as follows:

Call number 1—

> MS. YOUNG: You really don't know what? You really don't know what to say?
>
> MR. ROHRBAUGH:[7] I don't know, I really don't know, I really don't know what to say. I don't—I can't believe that, that it's come to this, but—
>
> MS. YOUNG: But what do you mean you can't believe? I'm sitting her with a broken fucking jaw.

[6] Indeed, the court instructed the jury, immediately following the playing of the fourth phone call:

> [Y]ou've just heard evidence that the defendant may have committed other bad acts which are not charged in this case. You may consider that evidence only on the question of intent with respect to the charge in this case. You may not consider that evidence for any other purpose. You may not consider it, for example, as evidence that the defendant is a bad character or has a tendency to commit crime.

[7] The court reporter indicated that the participants of the calls were Young and appellant. For the sake of argument at this point of our discussion, we will accept those designations as accurate.

MR. ROHRBAUGH: I know. I'm really, I mean—

MS. YOUNG: A broken fucking jaw.

MR. ROHRBAUGH: I'm really—I'm really sorry about that.

MS. YOUNG: Are you fucking kidding me? I never fucking cheated on you.

MR. ROHRBAUGH: Man, I don't—

MS. YOUNG: I've never—

MR. ROHRBAUGH: --I don't know, I don't know what, what, what that shit was about. Man, I really—I thought that you were—I thought—I don't think that shit is funny at all. You know, you know—

MS. YOUNG: You laughed at me last night while I laid in that hospital getting stitched up. I'm texting you while I'm in that hospital getting stitched up, and you're saying, LOL, fuck your face, and I'm sitting there and can't even move my fucking face. And then—

MR. ROHRBAUGH: Man, I really did not. I really didn't—I really thought that you were saying that shit to, to, to scare me.

Call number 2 (later during the same phone conversation)—

MS. YOUNG: And you know what—and you know what's crazy? Now I understand why you beat on me. You know, you know that I'm in love with you. You know that I have a soft spot to you, and you take your aggression and your anger and you take it out on me, all of it.

MR. ROHRBAUGH: I do.

MS. YOUNG: You take it out on my face. You take all of your problems, all your hurt, all your pain, and you throw it at me.

MR. ROHRBAUGH: I know.

Call number 3—

MS. YOUNG: Huh?

MR. ROHRBAUGH: (Unintelligible), but you know, I just want to, I just wanted to tell you that you're my only sister. Those two boys, whoever the fuck they are, whoever the fuck they were, man, you know, I just want you to tell them that I'm, that I'm sorry for me for what I did.

MS. YOUNG: You know, you know what's bad? When your little cousins see your fucking face and they're like, I don't care (unintelligible) because he can't do this to you, two little boys.

MR. ROHRBAUGH: I don't know them. I don't know them, but I'm up here. Tell them—you tell them what I said.

MS. YOUNG: Tell them—

MR. ROHRBAUGH: You tell them what I said, and if they don't—and if they don't accept it and they still, still (unintelligible), do whatever I can to (unintelligible).

MS. YOUNG: So are you apologizing to them?

MR. ROHRBAUGH: And you.

MS. YOUNG: You never apologized to me.

MR. ROHRBAUGH: Oh, I did when I—the first time I called, for real.

MS. YOUNG: I don't believe you, but okay.

MR. ROHRBAUGH: Well—

MS. YOUNG: I, you know, I expected apologies for this many times before.

MR. ROHRBAUGH: Yeah, and I, I lost it.

MS. YOUNG: When I, when I'm on my fucking way—

> MR. ROHRBAUGH: I lost it. I lost it. I lost it. That's all I, that's all I, that's all I can say, bottom line.

Call number 4—

> MS. YOUNG: When you get drunk and you get mad, you don't even know your own strength.
>
> MR. ROHRBAUGH: I don't.
>
> MS. YOUNG: And you, and—and I feared for my life.
>
> MR. ROHRBAUGH: Yeah. I don't, I don't know. I really don't.
>
> MS. YOUNG: Yes, and I feared for my life.
>
> MR. ROHRBAUGH: I know.
>
> MS. YOUNG: --so I don't know what to do anymore.
>
> MR. ROHRBAUGH: I wouldn't know, man. Damn.
>
> MS. YOUNG: You need another what?
>
> MR. ROHRBAUGH: Nothing, nothing. I understand.
>
> MS. YOUNG: Every time you do it, it gets worse.
>
> MR. ROHRBAUGH: Yeah. I mean it seems like it's out of control.

There is no question that Young's statements, evidenced by the recordings of her phone conversations with appellant, comprise hearsay. *See* Maryland Rule 5-801(c) (defining "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). And, pursuant to Md. Rule 5-802, generally "hearsay is not admissible."

There are, however, a variety of exceptions to the rule against the admission of hearsay. *See* Md. Rule 5–802. One of the "most important exceptions" is the statement by a party opponent. *Bellamy v. State*, 403 Md. 308, 319 (2008). Md. Rule 5–803 provides, in pertinent part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (a) Statement by party–opponent. A statement that is offered against a party and is:
>
> (1) The party's own statement, in either an individual or representative capacity;
>
> (2) A statement of which the party has manifested an adoption or belief in its truth;
>
> (3) A statement by a person authorized by the party to make a statement concerning the subject;
>
> (4) A statement by the party's agent or employee made during the agency or employment relationship concerning a matter within the scope of the agency or employment; or
>
> (5) A statement by a coconspirator of the party during the course and in furtherance of the conspiracy.

In this matter, the trial court admitted the calls as appellant's adoption of the truth of Young's accusations that he hit her in the jaw and injured her, pursuant to Rule 5-803(a)(2). Appellant argues, however, that his responses to Young's statements were insufficient to permit a jury reasonably to conclude that he unambiguously adopted Young's incriminating statements and that Young's statements are not specifically tied to the July 25, 2015 incident for which he was charged. We disagree.

The trial court's decision about whether a person made an adoptive admission is generally a factual one, and we will not disturb that decision absent clear error. *Gordon v. State*, 431 Md. 527, 550 (2013). But, the trial court's "ultimate determination of whether particular evidence is hearsay or whether it is admissible under a hearsay exception is owed no deference on appeal" and is reviewed *de novo*. *Id*. at 538.

When deciding whether to admit an adopted admission of a statement, the trial court "'must make a preliminary determination as a matter of fact whether a jury could reasonably conclude that the defendant unambiguously adopted another person's incriminating statement. If the judge answers that question in the affirmative and admits the evidence, then the jury's function is to decide whether it *should* reach the conclusion which the judge has held that it *may* reach, namely that there was unambiguous assent.'" *Id*. at 547 (quoting *Blackson v. United States*, 979 A.2d 1, 7 (D.C.2009)) (Emphasis in original). As such, on appeal of an allegedly erroneous admission of evidence as an adoptive admission, "the question is not whether the evidence before the judge clearly proved that the person against whom the statement was admitted unambiguously adopted the statement. Rather, the question is whether there is sufficient evidence from which a jury *could* reasonably conclude that the defendant unambiguously adopted another person's incriminating statement." *Id.* (Emphasis in original; internal quotation marks omitted).

Our courts have generally held that a defendant's failure to deny a charge against him during a conversation may permit an inference of his admission of guilt because it would be natural to make a reply if he disagreed with the inculpatory statement. *See, e.g.*, *Ewell v. State*, 228 Md. 615, 619 (1962); *Barber v. State*, 191 Md. 555, 565 (1948);

Darvish v. Gohari, 130 Md. App. 265, 277-78 (2000), *aff'd*, 363 Md. 42 (2001). In this matter, the evidence showed that Young suffered a broken jaw and other facial injuries on July 25, 2015. During the phone calls between her and appellant on July 26, 2015, Young referenced her broken jaw and her hospital visit the night before, and appellant did not deny Young's statements that: 1) he laughed at her when she was in the hospital with a broken jaw and receiving stitches; 2) he "beat on" her and took his aggression and anger out on her face; 3) she and her two small cousins who had seen her face were due apologies for what he had done to her; 4) she had expected apologies for "this many times before;" 5) when he is drunk he does not know his own strength and that she feared for her life; and 6) each time he does "it," it gets worse. And, appellant affirmatively stated that he was sorry about Young's broken jaw, that he "lost it," and that "it's out of control."

The record thus demonstrates that there was sufficient relevant evidence from which the jury reasonably could have concluded that appellant adopted the truth of Young's statements that he hit her and broke her jaw, requiring a hospital visit and stitches on July 25, 2015.[8] Therefore, the trial court's factual determination that appellant made an adoptive admission of the truth of Young's statements was not clearly erroneous.

Once the court made that factual determination, the legal conclusion that Young's statements during the telephone calls were admissible as exceptions to the hearsay rule

[8] And, despite appellant's claim that the calls were not specifically "rooted in time," we conclude that the jury reasonably could have determined that the calls that occurred the day after the assault and referenced Young's broken jaw and hospital visit "last night," related to the July 25, 2015 incident for which appellant was on trial.

called for a straightforward application of Rule 5–803(a)(2). *Gordon*, 431 Md. at 549. The evidence was admissible as an exception to the hearsay rule, and the trial court was legally correct in admitting into evidence the jailhouse calls.[9] The jury, of course, was then free to disbelieve Young's assertions and reach a different conclusion than the one she asserted regarding appellant's culpability.

Because we conclude that the trial court was correct in admitting the recorded calls as an adoptive admission by appellant, we find no violation of appellant's constitutional right to confront a witness against him in their admission. As we explained in *Cox v. State*, 194 Md. App. 629, 652–53 (2010), *aff'd*, 421 Md. 630 (2011),

> [a] statement admitted as a tacit admission is a statement that the defendant has adopted as his or her own. When such a statement is admitted into evidence, the 'witness' against the defendant, therefore, is the defendant. Thus, there is no violation of the right to confront 'the witnesses against him.' U.S. Const. amend. VI. As the Court of Appeals has noted, a party 'cannot be prejudiced by an inability to cross-examine him or herself.' Briggeman v. Albert, 322 Md. 133, 135, 586 A.2d 15 (1991).

Appellant's claim that the admission of the third and fourth jailhouse phone calls was improper because they referenced his prior bad acts fares no better. Although the trial court agreed with appellant's assertion that those calls arguably referenced prior physical

[9] As for appellant's claim that the statements were prejudicial, indeed they were, as most evidence against a criminal defendant is prejudicial. It was the trial court, however, that was in the best position to determine if the calls were *unfairly* prejudicial, and we find neither error nor abuse of discretion in its determination that the calls were more probative than prejudicial. *See Case v. State*, 118 Md. App. 279, 286 (1997).

altercations between him and Young and comprised prior bad acts that are generally inadmissible, the court nonetheless properly admitted the evidence.

Pursuant to Md. Rule 5-404(b), a court may not admit evidence of other crimes, wrongs, or acts that is offered "to prove the character of a person in order to show action in conformity therewith."[10] Prior bad acts evidence "refers to activity or conduct which although not necessarily criminal, after taking into consideration the facts of the particular case, is evidence that tends to reflect adversely on or impugns a person's character." *Snyder v. State*, 210 Md. App 370, 393, *cert. denied*, 432 Md. 470 (2013).

Prior bad acts or other crimes evidence may be admitted, however, if each requirement of the following three-step process is met. *Id*. "First, the evidence must be relevant to the offense charged on some basis other than mere propensity to commit crime. Second, the court must find by clear and convincing evidence that the defendant participated in the alleged acts. Third, the court must determine that the probative value of the evidence substantially outweighs its potential for unfair prejudice." *Id*. (Citations omitted). "'These substantive and procedural protections are necessary to guard against the potential misuse of other crimes or bad acts evidence and avoid the risk that the

[10] Rule 5-404(b) states:

> "Evidence of other crimes, wrongs, or acts . . . is not admissible to prove the character of a person in order to show action in conformity therewith. Such evidence, however, may be admissible for other purposes, such as . . . motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident."

evidence will be used improperly by the jury against a defendant.'" *Page v. State*, 222 Md. App. 648, 662 (quoting *Streater v. State*, 352 Md. 800, 807 (1999)), *cert. denied*, 445 Md. 6 (2015).

The admission of prior bad acts or crimes evidence under Rule 5-404(b) is a matter for the trial court's discretion. *Snyder*, 210 Md. App. at 393. If, as here, the trial court does not explain its ruling, the appellate court will itself do the balancing of the three steps *de novo*. *Id*.

Appellant argues that the trial court erred in concluding that the evidence of prior abuse fit within the intent exception of Md. Rule 5-404(b) and abused its discretion in admitting the statements because the unfair prejudice outweighed the probative value of the statements. Because he makes no claim that the evidence was not clear and convincing that he committed the prior bad acts, we focus only on the first and third steps of the three step analysis.

When the trial court commented that the third and fourth calls seemed to "bring in the past conduct," the prosecutor agreed but averred that the calls were specially relevant to appellant's intent to cause serious physical injury. To combat appellant's defense that Young's injury was not serious enough to warrant a charge of first-degree assault, the prosecutor argued that appellant's prior conduct established that his behavior was escalating, as he admitted that every time he assaulted Young, "it gets worse" and that it seemed like "it's out of control." As such, the prior conduct demonstrated that appellant was aware that the force he was using to assault Young was increasing each time they had

an altercation, which showed his intention to cause her serious bodily harm on July 25, 2015.

In permitting the admission of the phone call, the court implicitly determined that the prior acts committed by appellant were specially relevant to show appellant's intent.[11] We find no error in the court's ruling, for the reasons cited by the State.

We need not make a determination whether the prior bad acts evidence was more prejudicial than probative. Appellant complains only about the prior bad acts referenced in the third and fourth phone calls between him and Young, but another of the calls arguably referenced prior instances of physical altercations between the pair, without objection on that ground. During the second call, Young stated, "Now I understand why you beat on me. . . You know that I have a soft spot to you, and you take your aggression and your anger and you take it out on me. . . You take it out on my face."[12] Young's language suggests that more than one beating has occurred.

Our appellate courts have long held that "'[w]here competent evidence of a matter is received, no prejudice is sustained where other objected to evidence of the same matter is also received.'" *Yates v. State*, 429 Md. 112, 120 (2012) (quoting *Jones v. State*, 310 Md. 569, 588-89 (1987)). *See also DeLeon v. State*, 407 Md. 16, 31 (2008) ("Objections

[11] Indeed, the trial court instructed the jury that it could consider the prior bad acts "only on the question of intent with respect to the charge in this case."

[12] In his brief, appellant argues that this call also represents an example of the trial court's impermissible admission of a prior bad act, but he did not object to the admission of that call on that ground during trial, so that claim is waived.

are waived if, at another point during the trial, evidence on the same point is admitted without objection."). As such, any claim of unfair prejudice in the admission of the third and fourth phone calls is waived because another call presented un-objected evidence of the same matter to the jury.[13]

Finally, appellant's claim that the State failed to lay a proper foundation for the calls because no witness identified appellant's voice or represented that appellant was at the detention center when the calls were made is also waived. At trial, in arguing that the calls should not be admitted because they comprised inadmissible hearsay, defense counsel specifically conceded that the calls were made from the Montgomery County Detention Center, were properly authenticated, and met the "foundation requirement."

Although counsel did argue that "they're going to have to identify *the speaker*," (emphasis added), it would appear from the context of his explanation that he was referring not to appellant but to Young.[14] He made no specific argument that appellant was not one of the speakers, and in seeking a continuing objection to the later admission of the

[13] Moreover, any prejudice to appellant was limited, as the court instructed the jury, immediately after the playing of the recording of the fourth call, that it could only consider evidence of appellant's other bad acts "on the question of intent with respect to the charge in this case" and not "for any other purpose," such as evidence that he had a bad character or a tendency to commit crime. The court similarly instructed the jury again at the close of all the evidence. In the absence of evidence to the contrary, of which we have been presented none, we assume that juries follow the curative instructions they are given. *Cantine v. State*, 160 Md. App. 391, 409 (2004).

[14] Defense counsel went on to say, "*Ms.*, if *the speaker* is a witness who is not going to testify in court, I guess the State's argument is that whatever *the speaker* is saying is then agreed to by the defendant." (Emphasis added).

recordings of the phone calls into evidence, he did not assert that either speaker had not been identified. When defense counsel conceded that the foundation and authentication requirements had been met, he waived the right to argue on appeal that appellant had not been identified as one of the speakers on the phone calls, nor proven to have been at the jail when the calls were made. *See State v. Rich*, 415 Md. 567, 581 (2010) (discussing intentional waiver of right to appeal an issue).

Even were the issue preserved, appellant would not prevail. We have observed that the burden of proof for authenticating evidence under Md. Rule 5-901 is slight.[15] *Dickens v. State*, 175 Md. App. 231, 239 (2007). Indeed, the trial court "'need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence

[15] Md. Rule 5-901 sets forth several ways in which evidence can be authenticated. The Rule provides, in pertinent part:

> (a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> (b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Rule:
>
> * * *
>
> (4) Circumstantial Evidence. Circumstantial evidence, such as appearance, contents, substance, internal patterns, location, or other distinctive characteristics, that the offered evidence is what it is claimed to be.
>
> * * *

that the *jury* ultimately might do so.'" *Id*. (quoting *U.S. v. Safavian*, 435 F.Supp.2d 36, 38 (D.D.C. 2006)) (Emphasis in original).

The recordings of the phone calls comprising State's exhibit 7 were sufficiently authenticated as having occurred between appellant and Young by circumstantial evidence. The calls undisputedly originated from the Montgomery County Detention Center on July 26, 2015, the day after appellant was arrested and remained in that jail. The calls were made to the phone number Young had provided to the hospital and the police. The participants reference their ongoing relationship, as well as the female's broken jaw and her hospital visit "last night." The jury reasonably could have found that the calls were made by appellant to Young the day after the assault, and, if considered, the court did not abuse its discretion in admitting them on the basis of authentication.

II.

Appellant next claims that the trial court erred in excluding evidence of statements made by Young during another recorded jailhouse phone call to her from appellant, which were allegedly inconsistent with her prior statements that it was he who broke her jaw and that he initiated the physical altercation because he believed she was cheating on him. In his view, the prior inconsistent statements were admissible as an exception to the hearsay

rule, pursuant to Rule 5-802.1(a), or to Rule 5-803(b)(24),[16] the "catchall" exception to the hearsay rule. In addition, he claims that the statements were admissible as impeachment

[16] Rule 5-802.1(a) provides:

> The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:
>
> (a) A statement that is inconsistent with the declarant's testimony, if the statement was (1) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (2) reduced to writing and was signed by the declarant; or (3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement;

Rule 5-803(b)(24) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (b) Other Exceptions.
>
> *** * ***
>
> (24) Other Exceptions. Under exceptional circumstances, the following are not excluded by the hearsay rule: A statement not specifically covered by any of the hearsay exceptions listed in this Rule or in Rule 5-804, but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A

evidence under Rule 5-806,[17] or pursuant to his due process and sixth amendment rights to present a complete defense.

Following the denial of his motion for judgment of acquittal at the close of the State's case-in-chief, appellant sought a ruling from the trial court regarding the admissibility of a September 21, 2015 jailhouse call from appellant to Young. He proffered the substance of the call, as follows:

> Male voice, Mr. Rohrbaugh: I want to know if you forgive those girls for breaking your jaw.
>
> Female voice, Brittney Young: Yeah, I done forgave them.
>
> Male voice, Rohrbaugh: Do you forgive for [sic] cheating on you?

> statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

[17] Rule 5-806(a) provides:

> (a) In general. When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

> Complainant, female voice, Brittney Young: Yes, but it still hurts to think that the person I'm in love can just go out and give their body to other people.
>
> Defendant, Mr. Rohrbaugh: That's understandable.

Counsel argued that the court "should allow great room for impeachment" and admit the recording as "inconsistent statements by the State's hearsay declarant, Ms. Young, to show that she's. . . biased and that her testimony should not be believed."

The prosecutor argued that the evidence was barred by *Quiles v. State*, 4 Md. App. 354 (1968), as "self-serving hearsay by the defendant" in the absence of his testimony and with no hearsay exception to permit the admission of the statement.[18] The court declined to admit the recording.

The recording offered by appellant was not admissible either as impeachment of, or an inconsistent statement by, Young. As the State points out, appellant mischaracterizes its use of the recordings of the phone calls between him and Young. The trial court did not admit the statements of *Young* in the four recordings referenced in section I of this opinion as an exception to the hearsay rule; it permitted *appellant's adoption of the truth* of those statements as an exception to the hearsay rule. As noted in section 1, then, the witness

[18] In *Quiles*, this Court upheld the trial court's refusal to admit a partially exculpatory written statement the defendant gave to police after his arrest. 4 Md. App. at 362. In response to Quiles's argument that if the statement were admissible when offered by the prosecution, it should be admissible when offered by him, we explained that, "[w]hile a defendant cannot be compelled to testify he cannot preclude the State from its right to cross-examine him with respect to statements made by him not offered by the State by offering the statements by the testimony of a third party or by the written document." *Id*. at 361.

against appellant was himself, not Young. Therefore, there is no prior inconsistent statement by Young to be impeached, as she was not the declarant whose out-of-court statements were offered for their truth and she did not testify at trial. And, as the Court of Appeals made clear in *Conyers v. State*, 345 Md. 525, 544 (1997), a statement by a party may be offered against that party as a hearsay exception, but if the party tries to introduce his own statement, that is inadmissible hearsay. In other words, "'[a]n admission . . . may be admitted into evidence at trial when offered *against* the declarant. The same statement, however, is not admissible if it is offered *for* the declarant. Such statements are inherently suspect as being self-serving.'" *Id*. at 544-45 (quoting *Muir v. State*, 64 Md. App. 648, 656 (1985)) (Emphasis in original). For these reasons, we find no error in the court's decision declining to admit Young's statement.[19]

III.

Finally, appellant argues that the trial court abused its discretion in declining to instruct the jury on self-defense and mutual affray. In his view, there was sufficient evidence adduced at trial to support the giving of the instructions, as it was undisputed that he had scratches on his neck on the night in question, establishing that a fight had occurred. That evidence, which did not establish whether it was he or Young who was the aggressor,

[19] We do not consider appellant's argument that the failure to admit the statement violated his constitutional right of due process. He did not make that argument to the trial court. Therefore, pursuant to Rule 8-131(a), the issue is not properly before us. *See also Robinson v. State*, 404 Md. 208, 218 (2008) ("Appellant's constitutional argument, raised for the first time on appeal, was not raised in the trial court; it is not a jurisdictional argument, and we therefore will not consider it.").

did not preclude a finding that he acted in self-defense against Young or that their intent to fight was mutual. He concludes that those were questions for the jury to decide.

Defense counsel asked the court to give Maryland Pattern Jury Instruction—Criminal 5:07 on self-defense and non-pattern instructions on mutual affray and provocation.[20] The State argued that the instructions on mutual affray and provocation were not applicable to the evidence presented and opined that an instruction on self-defense had not been generated, as appellant did not testify, and no evidence had been otherwise generated to support the instruction.

The court was "inclined to agree that there has been no evidence to generate a self-defense instruction," rejecting defense counsel's further argument that the fact of injuries to both parties generated a jury question as to whether appellant acted in self-defense. With regard to appellant's argument to include a mutual affray instruction, the court declined to give the requested instruction because the second-degree assault instruction, which it

[20] Appellant's proposed jury instructions were not made part of the record. Because the State quotes the proposed instruction offered by appellant in his brief with no objection or correction, we accept appellant's recitation of it as accurate.

The instruction appellant requested on mutual affray read:

> In considering whether any offensive touching in this case was non-consensual, you must also consider whether the evidence shows that Ms. Brooks [sic] and Mr. Rohrbaugh agreed to enter into angry and unlawful combat with a mutual intent to fight. If you find that for a particular count, Ms. Brooks [sic] agreed to enter into a physical fight with Mr. Rohrbaugh and that the degree of force used by Mr. Rohrbaugh during the mutual combat was not excessive, you should [find] the Defendant not guilty as to that count.

would give, made clear that the physical contact be "not consented to" or "legally justified." Because mutual affray requires consent, the assault instruction made clear to the jury that it could not convict appellant if it found consent to the altercation by Young, and the separate instruction on mutual affray was unnecessary. The court noted that counsel was free to argue the consent issue to the jury but refused to give a separate instruction regarding an issue that was covered in the pattern jury instruction.

The purposes of jury instructions are to aid the jury in clearly understanding the case, provide guidance for the jury's deliberations, and help the jury arrive at a correct verdict. Jury instructions "'direct the jury's attention to the legal principles that apply to the facts of the case.'" *Dickey v. State*, 404 Md. 187, 197 (2008) (quoting *General v. State*, 367 Md. 475, 485 (2002)).

Md. Rule 4-325 governs instructions to the jury and states, in pertinent part:

> (c) How given. The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. The court may give its instructions orally or, with the consent of the parties, in writing instead of orally. The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.

A trial court must give an instruction "'on every essential question or point of law supported by the evidence'" when requested to do so in a criminal case. *Robertson v. State*, 112 Md. App. 366, 374 (1996) (quoting *Bruce v. State*, 218 Md. 87, 97 (1958)). However, the "threshold is low, as a defendant needs only to produce 'some evidence' that supports the requested instruction." *Bazzle v. State*, 426 Md. 541, 551 (2012). On the other hand, a trial court is not required to give a requested instruction unless: (1) the requested

instruction is a correct statement of the law; (2) it is applicable under the facts and circumstances of the case; and (3) it is not fairly covered in the instructions actually given. *Stabb v. State,* 423 Md. 454, 465 (2011).

A determination of whether the evidence is sufficient to generate the requested instruction is a question of law for the trial court. *Bazzle*, 426 Md. at 550 (quoting *Dishman v. State*, 352 Md. 279, 292 (1998)). Reversal is not required if the instructions, "taken as a whole, sufficiently protect the defendant's rights and adequately covered the theory of the defense." *Fleming v. State*, 373 Md. 426, 433 (2003). We review a trial judge's decision whether to give a jury instruction for abuse of discretion. *Albertson v. State*, 212 Md. App. 531, 551-52 (quoting *Arthur v. State*, 420 Md. 512, 525 (2011)), *cert. denied*, 435 Md. 267 (2013).

In this matter, the defense, over objection, requested that the self-defense and mutual affray instructions be given. Therefore, the trial court was required, under Rule 4-325(c), to so instruct the jury if the above requirements were met. We agree with the trial court's ruling that the requested self-defense instruction was not appropriate, on the ground that it was not generated by the evidence, and that the requested mutual affray instruction was fairly covered in the instructions actually given.[21] We explain.

There are four elements of self-defense:

> '(1) The accused must have had reasonable grounds to believe himself . . . in apparent imminent or immediate danger of death

[21] Neither side makes a specific argument that the requested instructions were not correct statements of the law.

> or serious bodily harm from his . . . assailant or potential assailant;
>
> (2) The accused must have in fact believed himself . . . in this danger;
>
> (3) The accused claiming the right of self defense must not have been the aggressor or provoked the conflict; and
>
> (4) The force used must have not been unreasonable and excessive, that is, the force must not have been more force than the exigency demanded.'

Johnson v. State, 223 Md. App. 128, 149 (quoting *Haile v. State,* 431 Md. 448, 472 (2013)), *cert. denied*, 445 Md. 6 (2015). Arguably, appellant failed to present evidence of any of the required elements. Appellant presented no evidence whatsoever that he had reasonable grounds to believe himself, or actually believed himself, to be in imminent danger of bodily injury from Young, who, according to the trial exhibits, was seven inches shorter and 25 pounds lighter than he. (State's exhibit 5, 6). He presented no evidence that he was not the initial aggressor of the altercation, and in his brief offers only that "[t]he evidence did not conclusively establish that Appellant was the aggressor." And, even assuming, *arguendo*, that Young was the aggressor and inflicted the light scratches or abrasions to appellant's neck, we cannot say that the force he used to combat her, which caused her three facial fractures and required stitches, was more than the exigency demanded.

With regard to the requested instruction on mutual affray, we similarly find no abuse of the trial court's discretion in ruling that the notion of mutual consent to the altercation was fairly covered by the instruction the court did give on second-degree assault, which stated:

> The defendant is charged with the lesser included crime of second-degree assault. Second-degree assault is causing offensive physical contact to another person. In order to convict the defendant of second-degree assault, the State must prove that the defendant caused physical harm to Brittney Young, that the contact was the result of intentional or reckless act of the defendant and was not accidental, and that the contact was not consented to by Brittney Young or was not legally justified. (Emphasis added).

"[I]t is well settled that if the instruction actually given adequately covers the subject, no particular additional instruction and no particular version of the instruction is necessary." *Robinson v. State*, 66 Md. App. 246 (1986). Under the facts and circumstances of this case, the assault instruction made clear to the jury that appellant could not be found guilty of assault based on Young's lack of consent to the physical contact if Young had consented to the fight and participated in it as a mutual combatant with him. The requested additional instruction on mutual affray was not necessary in light of the instructions actually given and was not adequately generated by the evidence. Therefore, the trial court did not abuse its discretion in declining to give it.

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