Circuit Court for Howard County
Case No. 13-K-16-56613

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2232

September Term, 2016

ROBERT NATHANIEL JONES

v.

STATE OF MARYLAND

Leahy,
Reed,
Zarnoch, Robert A.,
(Senior judge, specially assigned)

JJ.

Opinion by Leahy, J.

Filed: October 11, 2018

On the night of March 18, 2016, two Howard County police officers responded to a 9-1-1 distress call from a woman—later identified as the victim, Ms. C.—in a mobile home park in Jessup, Maryland. Police arrested Robert Jones ("Appellant") for the alleged physical and sexual assault of Ms. C. She was later examined and photographed by a forensic nurse examiner, who created a report ("the Examination Report") detailing Ms. C.'s injuries. Appellant was subsequently indicted on charges stemming from the assault.

Appellant filed several motions *in limine* to exclude a series of text messages between him and Ms. C., as well as Ms. C.'s medical records, including the Examination Report. The motions court denied the motions prior to trial. Following his trial in the Circuit Court for Howard County on September 12 and 13, 2016, a jury convicted Appellant of attempted second-degree sexual offense[1] and second-degree assault. He was then sentenced to 20 years' incarceration for the attempted second-degree sexual offense and a consecutive term of 10 years for second-degree assault. This timely appeal followed.

Appellant presents the following questions for our consideration:

> "1. Did the circuit court abuse its discretion in admitting text messages about [Appellant's] future incarceration?"
>
> "2. Did the circuit court abuse its discretion in admitting State's Exhibit 42, the report of the forensic nurse examiner?"
>
> "3. Is the evidence sufficient to sustain the conviction for attempted second degree sexual offense[?]"

[1] Appellant was charged with and convicted of attempted second-degree sexual offense under Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CL"), § 3-306. In 2017, CL § 3-306 was repealed and the crime of second-degree sexual offense was subsumed into the crime of second-degree rape under CL § 3-304 (2017 Supp.). *See* 2017 Md. Laws Ch. 161, 162 (S.B. 944, H.B. 647).

> "4. Did the circuit court err in refusing to merge the sentence for second degree assault into the sentence for attempted second degree sexual offense pursuant to principles of fundamental fairness?"

We discern no error or abuse of discretion in the circuit court's rulings, and affirm Appellant's conviction and sentence.

BACKGROUND

A. Motions *in Limine*

Appellant filed several motions *in limine* prior to trial. Relevant to this appeal are Motion in Limine II, seeking to exclude a long series of text messages exchanged between Appellant and Ms. C. during the weeks following the alleged assault; and Motion in Limine III, seeking to exclude the Examination Report and any testimony by the forensic nurse examiner, Ms. Jean Britton.

In Motion II, Appellant argued, among other things, that the text messages contained impermissible prior acts and improper character evidence, were generally irrelevant, and were more prejudicial than probative. At the motions hearing on September 8, 2016, the suppression court observed that the text messages appeared to fall into three broad categories: 1) statements of anger from C. towards Appellant and contriteness or apology from Appellant; 2) statements about calling the State's Attorney to dismiss the case; and 3) angry exchanges between C. and Appellant after C. decided not to try to get the case dismissed. Appellant argued for the exclusion of all messages that referenced prior drug charges or "Ms. [C.'s] efforts to have these charges dropped by the State" as they did not necessarily demonstrate consciousness of guilt. In response, the State indicated that the messages that it intended to introduce had "been limited to either admissions of [Appellant]

and the relevant . . . text messages around that [time] that helped to explain it. The coaching on how to drop the charges, and then a handful that would only be used should they become relevant. . . . Nothing that shows a [] prior bad[act]." The court agreed to allow Appellant and the State to decide which text messages would be shown to the jury, and indicated that it would examine the proposed exhibit prior to trial.

In Motion III, Appellant argued, among other things, that "the Report that was completed by Ms. Britton is replete with observations and perceptions which are not from Ms. Britton[.]" Appellant contended more specifically that "[t]he third page of the document contains only the statement of Ms. C.," which is "inadmissible hearsay," and that "[t]he final page is the 'female body map' which includes numerous instances of inadmissible hearsay . . . it contains mention of both the Ellis and Mandible Fractures, as well as numerous indicators that can only have been known through the statement of others." At the motions hearing, the court denied the motion after the parties worked out a number of redactions of the Examination Report and the court ordered that the references to "strangulation" (as opposed to evidence of injury to the neck) be redacted from the report.

B. Trial

Before the first day of trial began, a bench conference occurred at which the court considered the text message exhibit that the State intended to show the jury. Defense counsel took issue with the inclusion of two text messages that Appellant had sent Ms. C.:

> "Say they don't need you to testify. They will simply go with your statement and the picture that was taken. That'll be enough to get me fifteen years."

* * *

> "All I am simply trying to do is shore up the chances that I don't go to prison so I can remain successful and travel on the path that you've helped me see."

Defense counsel argued that these specific messages should have been excluded because

> they both speak specifically of punishment, Your Honor. It would allow the jury to infer that there is something in [Appellant's] past that may lead to this being a fifteen year offense. Fifteen years to a standard lay person, I would imagine seeing this very long period of time – it's a long period of time for a lawyer who sees people receive fifteen years but to a lay parson, it would allow them to ruminate on [Appellant's] past and to inquire of themselves as to why this would give him fifteen years. And the second portion just deals with punishment, in general.

In response, the State argued that the text messages demonstrated Appellant's efforts "to get the victim to drop the charges" and "trying to coach her into calling the prosecutor to get the charges dropped and he's trying to manipulate her throwing that number out and by saying that he's trying to get out of prison." Additionally, the State contended that these messages were "admissible as statements of the party opponent, statements of the defendant, statements against penal interest. And they go to consciousness of guilt[.]" The court suggested that the State "just blank out the number and just have, get me blank years[,]" which the State agreed to. Defense counsel then indicated that despite the redaction, "it could put the punishment in the jury's mind." Counsel pressed: "I don't believe the jury should rule on punishment. It indicates that offenses like this may include prison. I would put forth I believe it does put their mind to how will he be punished." The court then made the following ruling:

> Well, the possibility that a person goes to prison, may go to prison, is often the reason that he or she works to suppress evidence. That's a proper motive, since [Appellant] found issues with the number fifteen, I'll direct that the

> State do whatever you do to make the number disappear in its entirety. And I'll deny the motion as to the balance of it.

Shortly after making its ruling, the jury was sworn in and trial began.

Ms. C. testified that she met Appellant in 2015. After roughly a week of dating, he moved into Ms. C.'s mobile home in Howard County. Near the beginning of 2016, Ms. C. asked him to move out of her house. On March 16, 2016, Appellant moved, although the couple did not break up at that time.

On the evening of March 18, 2016, Ms. C. left work for the day and decided to meet one of her adult daughters for drinks around five o'clock. Ms. C. had one shot of vodka and left the bar around six. Ms. C. and her daughter then went to another bar for approximately an hour, where she had another shot of vodka. After leaving the second bar to go home, Ms. C. called Appellant and invited him over.

Ms. C. testified that when Appellant arrived, he told her that he wanted to take some shots of vodka. She estimated that Appellant consumed four shots of vodka while she had one or two. When they went to bed, Appellant indicted that he wanted to have sex, but Ms. C. expressly declined and went to sleep. According to Ms. C., the next thing she knew she was lying on the floor of her bedroom on her left side with her right leg up and Jones was on top of her with his hand around her throat. While she was on the floor, Appellant repeatedly hit Ms. C. in her "rear end and [her] vagina" with something that "felt like hard and glass. Very hard." Ms. C. related that during the attack, the glass object had penetrated her vagina.

When the beating subsided, Ms. C. testified that Appellant stood up and she saw a bottle of Clinique "Happy" perfume in his hand. Ms. C. got dressed quickly and asked Appellant if she could go outside to her car to retrieve her cigarettes. While outside, Ms. C. dialed 9-1-1 and spoke briefly with an operator. She recalled that she was able to ask for help and provide her address but was afraid to stay on the phone because she was unsure where Appellant was.

After getting off the phone with the emergency dispatcher, Ms. C. returned to her mobile home. When asked what she remembered next, Ms. C. recalled "[b]eing on the floor[] . . . [i]n the kitchen" and that Appellant was on top of her "banging [her] head into the floor." In the midst of the affray, Appellant removed the back of one of the chairs in the kitchen and struck her with it. Ms. C. remembered hearing police officers knocking on her door and she began yelling for help. The officers offered Ms. C. transportation to the hospital that night, but she chose not to go because she "was tired and humiliated and [] just wanted to go to bed." During cross-examination, Ms. C. admitted that she was "prescribed medications that would have had a negative impact on [her] memory[,]" but could not recall whether she had taken those medications that night.

The State then introduced State's Exhibit 10,[2] which was a packet of redacted text messages that Ms. C. and Appellant sent each other during the weeks following the assault.

[2] State's Exhibit 9, a packet of screenshots of text message conversations from Ms. C.'s cellphone, was marked for identification purposes during the trial. However, only State's Exhibit 10—the redacted packet of text messages—was admitted into trial and published to the jury.

(continued)

To introduce these messages, the State read the portions sent by Appellant, while Ms. C. read the portions that she had sent:[3]

> [APPELLANT]: "Say that they don't need you to testify, they will simply go with your statement and the pictures that was [sic] taken. That will be enough[] . . . to get me years."
>
> [MS. C.]: "What else can I do? I'm trying."
>
> [APPELLANT]: "What I need for you to do is let me tell you verbally what needs to be done. All I'm simply trying to do is shore up the chances that I don't go to prison so I can remain successful and travel on this path that you've helped me see."

After the text messages were read into the record, the responding officers both testified about their role in the investigation. Officer Patrick Rafferty testified that he and Officer Byung Moon responded to a 9-1-1 "unknown trouble call" at roughly 10 o'clock in a mobile home park in Jessup. Upon arrival, he heard a woman crying inside of the trailer and heard a male voice. He testified that when he entered the mobile home, he observed Ms. C. sitting on the floor crying and a male suspect, later identified as Appellant, standing over top of her. The officers separated Appellant and Ms. C., and Off. Rafferty spoke with Appellant outside of the mobile home while Off. Moon remained inside the trailer with Ms. C.

Off. Rafferty testified that Appellant told him that he and Ms. C. had been involved in an argument that evening because "she believed that he was cheating on her[.]" Off. Rafferty also observed that Appellant was intoxicated, and "detected the odor of an

[3] Due to the volume of text messages sent and the number of messages read into the record, we include only the text messages at issue in this case.

alcoholic beverage emanating from his person." Appellant also told Off. Rafferty that "during the argument [Ms. C.] began to throw herself around the . . . trailer." Off. Rafferty then testified that Off. Moon came out of the trailer and informed him that Ms. C. had sustained injuries during the argument and that Appellant was under arrest. Off. Rafferty and another officer transported Appellant to central booking for questioning.

According to Off. Moon, during his interview with Ms. C. inside the mobile home, he noticed that she "appeared to have swelling in her nose and upper lip area" as well as a "small cut on the upper lip and [a] cut in the left elbow area." Ms. C. told him that she "could feel a bump in the back of her head." Off. Moon testified that he called emergency medical services to the trailer, but that Ms. C. declined to go to the hospital that night. Before departing, Off. Moon took pictures of Ms. C.'s bedroom and seized the bottle of perfume for analysis. On cross-examination, Off. Moon testified that upon entering the trailer, he did not observe Appellant standing over top of Ms. C., nor did he observe that a chair had been broken.

The next day, Ms. C. awoke in pain and decided to go to the hospital. Ms. Jena Ann Britton, R.N., a forensic nurse examiner at Howard County General Hospital, examined Ms. C. and testified that she "had bruising to her face and swelling to her face, [and] had blood on her lips." Ms. Britton testified that during the examination, she took numerous pictures of Ms. C. according to a standard procedure used by the hospital:

> We do 2 sets of photographs, so we do the body and then cause it's a head to toe assessment, and then we also use a copascope which is kind of like a microscope and a camera and that's [for taking pictures of] genitalia.

The State then offered into evidence, without objection, 15 pictures of Ms. C. taken at the hospital.

The State then asked Ms. Britton whether she had created a report during the examination, and the following dialogue occurred:

> [THE STATE]: . . . Ms. Britton do you prepare a report in conjunction with your examination?
>
> [MS. BRITTON]: Yes.
>
> [THE STATE]: And is that a report that's part of the medical records of the hospital, is it kept by the hospital?
>
> [MS. BRITTON]: Yes.
>
> [THE STATE]: And did you make the report contemporaneous to evaluating Ms. C[.]?
>
> [MS. BRITTON]: Yes.
>
> [THE STATE]: And it's based on the information that you observed during her examination?
>
> [MS. BRITTON]: Yes.

Appellant objected to the introduction of Exhibit 42, the Examination Report, into evidence, reiterating his argument from the hearing on his motion *in limine*. The State then asked the following:

> [THE STATE]: Ms. Britton is part of this – the information contained – is the information contained in your report, is that information used to treat Ms. C[.]'s medical conditions?
>
> [MS. BRITTON]: Yes.
>
> [THE STATE]: And do other members of the hospital rely on the information contained within the report for their treatment of the patient?

[MS. BRITTON]: Yes the physician.

The court overruled Appellant's objection and admitted the Examination Report into evidence.

Ms. Britton first reviewed each of the photographs of Ms. C., explaining how she diagnosed each of her injuries. Ms. Britton then testified to injuries that she noted on the body map—a drawing of a female body used to label injuries on a patient's body—included in the Examination Report. Ms. Britton explained how she documented each injury on the body map, which largely aligned with her testimony concerning the pictures that she had taken of her body, with the exception of a "chipped tooth [that] was lose [sic] and bleeding at the top" and a "looseness to her jaw area[.]"

Detective Ryan McCrone of the Howard County Police then testified that he interviewed Appellant several weeks after Ms. C.'s medical examination, on April 7, 2016. Appellant told Det. McCrone that on the night of March 18, Ms. C. sustained her injuries—including the "injuries to her vaginal and butt area"—while attempting to step over a dog gate in her home. Det. McCrone also testified that Appellant denied making "any physical contact" with Ms. C. "[o]ther than helping her up" after she fell, and that "his fingerprints would be on the perfume bottle because he cleans the house and that's an item that he would of [sic] touched [while] cleaning the house."

Appellant testified on his own behalf. He related that on the night of March 18, he arrived at Ms. C.'s residence at approximately 8:15 p.m. and took two shots of vodka. According to Appellant, that while they were in the bedroom, he showed Ms. C. a video that he had taken on his phone while driving for Uber and that she became angry and

knocked the phone from his hand. He then left the bedroom and when he came back in, Ms. C. was sitting on the floor. While he was attempting to help her up, "she yanked away, when she yanked she struck her left arm . . . against the door jam of the bathroom[.]" Appellant stated that Ms. C. then went into the kitchen and that he heard her stumble and fall. He said that he helped Ms. C. up and told her to go to bed. While the two were talking, Appellant testified that Ms. C. stumbled backwards and bumped into a dog gate. He then recalled that Ms. C. went out to her car to get cigarettes, and when she came back inside, she attempted to sit on a chair at the kitchen table and "somehow missed the chair and landed on the floor[.]" According to Appellant, "a couple minutes" after Ms. C. fell, the police officers arrived at the residence. He also testified that he "observed Ms. C. have imperfect motor skill control" on nearly a daily basis, "generally occur[ing] at points when she was drinking and taking medication."

On cross-examination, Appellant testified that he did not notice that Ms. C. had any injuries on her body on the night of the alleged assault. When the State asked Appellant about the text messages that he sent Ms. C., he testified that "none of the[] text messages are – were intended as an admission or an apology" and denied causing any of the injuries. Appellant claimed that he sent the text messages in an attempt to "appeas[e]" Ms. C. and that he was trying to avoid "be[ing] combative" with her.

The jury found Appellant guilty of attempted second-degree sexual offense for attempted anal penetration and second-degree assault. On December 8, 2016, the court sentenced Appellant to 20 years for attempted second-degree sexual offense and a consecutive 10-year sentence for second-degree assault.

Appellant noted a timely appeal to this Court. We will include additional facts in the discussion as necessary.

DISCUSSION

I.

Inclusion of the Text Messages

A. Preservation

Before we consider Appellant's claim that the text messages were erroneously admitted, we address the State's contention that the issue was not preserved. The State maintains that Appellant failed to preserve the issue of the inclusion of the text messages as he did not object to the admission of State's Exhibit 10 into evidence during trial, and further waived his right to appeal by failing to object when Ms. C. and the State read the messages at issue into the record during direct examination. We disagree.

On direct examination of Ms. C., the State began a line of questioning to introduce the text messages between her and Appellant:

> [THE STATE]: Okay. Now, Ms. C[.] , did there come a time when you began to communicate, again, with [Appellant]?
>
> [MS. C.]: After that night?
>
> [THE STATE]: Yes.
>
> [MS. C.]: Yes.
>
> [THE STATE]: And when was that?
>
> [MS. C.]: The following Friday I called him.
>
> [THE STATE]: Okay. And after [you] called him, did you all speak that night?

[MS. C.]: Yes.

[THE STATE]: And what did you talk about?

[MS. C.]: I was angry and hurt that he hadn't called after he had done what he had done to see how I was doing, if I was okay.

[THE STATE]: And did you exchange text messages?

[MS. C.]: Multiple times.

At this time, State's Exhibit 9—a packet with all of the text messages between Ms. C. and Appellant—was marked for identification and shown to Ms. C.

[THE STATE]: And do you recognize those text messages?

[MS. C.]: They're between myself and [Appellant].

[THE STATE]: And did you provide those to Detective McCrone in this case?

[MS. C.]: Yes, I did.

[THE STATE]: Now, in these text messages, what did you and [Appellant] discuss?

[DEFENSE COUNSEL]: I'm going to object.

[THE STATE]: I'll rephrase, Your Honor.

THE COURT: All right. She withdrew the question.

[THE STATE]: Did you and [Appellant] discuss whether or not you would go forward with these charges?

[MS. C.]: Yes.

[THE STATE]: And what –

[DEFENSE COUNSEL]: Objection, Your Honor. If we [may] briefly approach?

A bench conference occurred and the following transpired:

> [DEFENSE COUNSEL]: Your Honor, I would object in motion *in limine* in general to the text messages. . . .
>
> THE COURT: **So, you're imposing the objections made *in limine* last Thursday?**
>
> [DEFENSE COUNSEL]: **That's correct.**
>
> THE COURT: All right. Any response to that?
>
> [THE STATE]: Incorporate my argument from the motions hearing.
>
> * * *
>
> THE COURT: All right. Anyway, forward moving, . . . what you're doing **is you're preserving the objection made at the motion *in limine* hearing. And I'll overrule for the same reasons stated when we did the motions hearing on Thursday.** Okay? And I'm going to take a break now.

After a brief recess, the State resumed its questioning of Ms. C. regarding the text messages:

> [THE STATE]: Ms. C[.], when we left off, I had shown you State's Exhibit Nine, text messages. Is that correct?
>
> [MS. C.]: Correct.
>
> [THE STATE]: And they are text messages between you and [Appellant]?
>
> [MS. C.]: Correct.
>
> [THE STATE]: Now, during those text messages, did you discuss whether or not you wished to pursue these charges?
>
> [MS. C.]: We did.
>
> [THE STATE]: And did you want to pursue them?
>
> [MS. C.]: On and off.

* * *

> [THE STATE]: . . . Did you discuss [obtaining a protective order] in the text messages?
>
> [MS. C.]: I don't remember.
>
> [THE STATE]: Okay.

At this point, the Assistant State's Attorney indicated that she intended to show Ms. C. State's Exhibit 10, and a bench conference occurred:

> [THE STATE]: I guess – can I say extractions from the text messages? I don't know how to phrase that so it's not objectionable. That's why I'm asking. I'm going to ask her to read some extractions from the text messages. Is that all right.
>
> THE COURT: Well, what these are are – **it's her text messages that are included in State's Exhibit Nine. Right?**
>
> [THE STATE]: **Yes.** Okay.
>
> THE COURT: Okay.

Counsel then returned to their respective counsel tables and the following occurred:

> [THE STATE]: I'm going to show you – so, I've shown you **State's Exhibit Ten and these are text messages included in State's Exhibit Nine.** Can you flip through them, please, and see – make sure that they are accurate as you recall the text messages. Do you recognize those text messages?
>
> [MS. C.]: Yes.
>
> [THE STATE]: Your Honor, the State would move State's Exhibit Ten in to evidence.
>
> THE COURT: Any objection to State's Ten?
>
> [DEFENSE COUNSEL]: No objection, Your Honor.
>
> THE COURT: All right. So admitted.

We ordinarily "will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a). *See Nalls v. State*, 437 Md. 674, 691 (2014) ("Generally, in order to 'preserve' an issue for appellate review, the complaining party must have raised the issue in the trial court or the issue was decided by the trial court."). To preserve an evidentiary admission issue for appeal, "[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). Additionally, "where a party makes a motion *in limine* to exclude irrelevant or other inadmissible evidence, and that evidence is subsequently admitted, 'the party who made the motion ordinarily must object at the time the evidence is actually offered to preserve [its] objection for appellate review.'" *Reed v. State*, 353 Md. 628, 637 (1999) (quoting *Prout v. State*, 311 Md. 348, 356 (1998)) (additional citations omitted) (alteration supplied in *Reed*). A contemporaneous objection, however, "need not be made when requiring [the defendant] to make 'yet another objection only a short time after the court's ruling to admit the evidence would be to exalt form over substance.'" *Norton v. State*, 217 Md. App. 388, 396 (2014) (quoting *Watson v. State*, 311 Md. 370, 372 n.1 (1988)) (additional citation and internal quotation marks omitted).

In this case, Appellant had clearly noted his objection to the admission of the text messages, including the text messages at issue in this case, by filing Motion in Limine II, by objecting again at the outset of the trial, and by objecting again when the State began to question the witness about the text messages contained in State's Exhibit 9. After the parties invoked the same arguments raised at the motions hearing and before trial regarding

the admission of the text messages, the court noted that defense counsel was preserving those objections and overruled the objection. We agree with Appellant that when viewed in context, defense counsel had already objected to the admission of the text messages and did not object to State's Exhibit 10 only "to the extent that it was an accurate redaction based on the court's previous rulings." Furthermore, it is likely, as Appellant argues, that when defense counsel stated there was no objection to State's Exhibit 10 (immediately following the court's ruling as to Exh. 9), that defense counsel meant there was no "no objection . . . to the extent that it was an accurate redaction based on the court's previous rulings." We also agree with Appellant regarding his failure to object when the content of the text messages was read to the jury: in light of the close temporal proximity between the trial court's rulings and the admission of the text message evidence, to require counsel to make "yet another objection only a short time after the court's ruling to admit the evidence would be to exalt form over substance." *Norton*, 217 Md. App. at 396-97 (internal quotations and citation omitted). Therefore, we hold that Appellant preserved the issue for our review.

B. Admissibility of the Text Messages

Appellant contends that the circuit court abused its discretion in admitting text messages about his potential punishment in the instant case. He argues that his "concern over going to prison" was irrelevant as to the question of guilt or innocence, and to the extent that it was relevant at all, its prejudicial effect outweighed its probative value. Appellant further avers that because the State had already introduced text messages evidencing his attempts to encourage "Ms. C. to do what she could to get the State to drop

the charges" and apologizing to her, messages demonstrating his desire to avoid jail time were unnecessary and cumulative.

In response, the State contends that Appellant's attempts to "shore up" his defense to avoid jail time is demonstrative of his consciousness of guilt. The State avers that any perceived prejudice Appellant would have suffered was sufficiently remediated by the court's decision to redact the number of years that Appellant believed that he would receive. Specifically addressing Appellant's contention that the messages were unnecessary and cumulative, the State asserts that simply because the messages were redundant "does not lessen their probative value."

On review of a trial court's decision to admit or exclude evidence, two standards of review are applicable. First, we consider "whether the evidence is legally relevant[.]" *State v. Simms*, 420 Md. 705, 725 (2011) (citations omitted). Relevance is a legal conclusion that we review *de novo*. *Williams v. State*, 457 Md. 551, 562-63 (2018). 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 the admitted evidence is relevant, we then determine "whether the evidence is inadmissible because its probative value is outweighed by the danger of unfair prejudice, or other countervailing concerns outlined in Maryland Rule 5-403." *Simms*, 420 Md. at 725 (citation omitted). We will not disturb the trial judge's "decision to admit relevant evidence" over an objection that the evidence is should be excluded under a Rule 5-403 balancing test "absent an abuse of discretion." *Merzbacher v. State*, 346 Md. 391, 405 (1997) (quotation marks and citations omitted). "An abuse of

discretion occurs where no reasonable person would take the view adopted by the circuit court." *Williams*, 457 Md. at 563.

We address the relevance prong first and observe that the messages at issue detailed Appellant's attempts to coach Ms. C. on how to persuade the State to drop the criminal proceedings against him, as well as how to "shore up the chances" that he would not be sent to prison. These messages that Appellant sent detailing his efforts to avoid jail time were relevant to his consciousness of guilt. *See Decker v. State*, 408 Md. 631, 641 (2009) ("Consciousness of guilt evidence is 'considered relevant to the question of guilt because the particular behavior provides clues to the persons' state of mind[,]' and state of mind evidence is relevant because 'the commission of a crime can be expected to leave some mental traces on the criminal.'" (citation omitted)).

Under Rule 5-403's balancing prong, "'[e]vidence is prejudicial when it tends to have some adverse effect . . . beyond tending to prove the fact or issue that justified its admission.'" *Hannah v. State*, 420 Md. 339, 347 (2011) (quoting *King v. State*, 407 Md. 682, 704 (2009) (additional citation omitted)). Although the messages detailing Appellant's fear of incarceration may have been prejudicial, he failed to demonstrate that those messages were *unfairly* prejudicial. *See Odum v. State*, 412 Md. 593, 615 (2010). "[T]he fact that evidence prejudices one party or the other, in the sense that it hurts his or her case, is not the undesirable prejudice referred to in Rule 5-403." *Id.* (citations omitted). Rather, evidence is said to be prejudicial "if it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which he is being charged" or "the evidence produces such an emotional response that logic cannot overcome

prejudice or sympathy needlessly injected into the case." *Id.* (citations and internal quotation marks omitted). Moreover, "[t]he more probative the evidence is of the crime charged, the less likely it is that the evidence will be unfairly prejudicial." *Id.*

The messages demonstrating Appellant's fear of incarceration were not so prejudicial that they outweighed their probative value. As the Court of Appeals noted in *Mitchell v. State*, 338 Md. 536 (1995), "the jury should be focused on the issue before it, the guilt or innocence of the defendant, and not with what happens as a result of its decision on that issue." *Id.* at 540 (citations omitted). This general prohibition is designed to prevent a jury from improperly exceeding its role as the factfinder and taking on a sentencing function, which is specifically reserved for the sentencing judge. *See Chambers v. State*, 337 Md. 44, 48 (1994) (noting that "the mission of the jury is to evaluate guilt, not set punishment"). In response to Appellant's assertion that the jury might focus on punishment and speculate as to why he might fear a lengthy sentence, the trial judge required the reference to "fifteen" years to be redacted. The jury was then left with Appellant's own fear of incarceration and belief that the evidence was enough to get him jail time, which was highly probative of his involvement in the accused crimes.

Additionally, we are unconvinced by Appellant's argument that the text messages should have been excluded as cumulative evidence. Evidence is deemed cumulative when it "tends to prove the same point as other evidence presented during the trial[.]" *Dove v. State*, 415 Md. 727, 744 (2010). Although many of the admitted text messages involve Appellant apologizing to Ms. C. and persuading her to cooperate in attempting to get the charges dropped, the messages at issue here are unique as they demonstrate his

acknowledgement of the weight of the evidence against him, as well as his fear of serving jail time if he was convicted. The court's determination that the probative value of the subject text messages was not outweighed by their prejudicial effect was not "well removed from any center mark" we might imagine or "beyond the fringe" of what we deem minimally acceptable. *See Cousins*, 231 Md. App. at 438. Therefore, we hold that the circuit court did not abuse its discretion in admitting the text messages at issue.

II.

Inclusion of the Examination Report

A. Hearsay

Appellant maintains that the Body Map contained within the Examination Report contained inadmissible "hearsay statements regarding injuries that could not have been observed by [Ms.] Britton[,]" including evidence that Ms. C. had a fractured jaw and a broken tooth.

In response, the State argues that information contained in the Body Map was not hearsay because "the out-of-court statements contained therein were given for the purpose of treatment."

When evaluating whether certain admitted evidence constituted inadmissible hearsay or whether an exception to the hearsay rule applies, "the trial court's legal conclusions are reviewed de novo, but the trial court's factual findings will not be disturbed absent clear error." *Gordon v. State*, 431 Md. 527, 538 (2013) (internal citations omitted).

"Hearsay" is defined 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." Md. Rule 5-801(c). A "statement" is "an oral or written assertion or [] nonverbal conduct of a person, if it is intended by the person as an assertion." Md. Rule 5-801(a). Evidence that is classified as hearsay is generally inadmissible in a trial unless a specific exception applies. Md. Rule 5-802. Maryland Rule 5-803 exempts several types of statements from the hearsay rule, including

> [s]tatements made for purposes of medical treatment or medical diagnosis in contemplation of treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external sources thereof insofar as reasonably pertinent to treatment or diagnosis in contemplation of treatment.

Md. Rule 5-803(b)(4).

In this case, the court admitted the Examination Report, which included the Body Map, after Ms. Britton testified that she created it during her examination of Ms. C. , it was based on her observations during the examination, and that it was used and relied upon "to treat Ms. C[.]'s medical conditions[.]" Ms. Britton also testified that she was present in the room when the doctor examined Ms. C. We discern no error in the trial court's factual findings that the Examination Report was used for the treatment of Ms. C., and hold that the Examination Report was admissible as a statement for purposes of a medical diagnosis or treatment under Maryland Rule 5-803(b)(4).

B. Cumulative Evidence

Appellant next contends that the Examination Report should have been excluded as cumulative evidence because the State had already introduced Ms. C.'s medical records, and because Ms. Britton had testified relying on 15 photos to document Ms. C's injuries. The State responds that the Examination Report was not cumulative to the medical records

and photographs of Ms. C.'s individual injuries because it "provided the jury with a visual diagram of the collection of injuries that [Appellant] inflicted on [her.]"

The State bears the burden of "present[ing] sufficient evidence to convince the jury of appellant's guilt[,] . . . [and] may occasionally present redundant evidence" in order to satisfy that burden. *Lucas v. State*, 116 Md. App. 559, 573 (1997). Although the pictures of Ms. C. and the Examination Report both depict the same general subject matter, they did so using different methods. On direct examination, Ms. Britton explained to the jury what they were observing in each picture. Then, Ms. Britton, using the Body Map, testified to the injuries that she observed on Ms. C.'s body and described how she diagnosed each injury. We disagree with Appellant's insistence that the Examination Report should have been excluded as cumulative evidence because the State was well within its right to bolster its case against Appellant by varying the way in which the jury received the evidence. We hold that the trial court did not abuse its discretion in admitting the Examination Report.

III.

Sufficiency of the Evidence

Appellant argues that the evidence was insufficient to sustain his conviction for attempted second-degree sexual offense because the State failed to adduce evidence that Ms. C. resisted physically or was too afraid to resist.

The State responds that, in Maryland, no particular amount of force is required to sustain a conviction for second-degree sexual offense and that the evidence clearly established that Appellant used force to confine Ms. C. during the assault in the bedroom,

and that "a rational trier of fact could infer that [Ms. C.] resisted [Appellant]'s attack to the best of her ability."

The applicable standard of review for "'a question regarding the sufficiency of the evidence in a jury trial [is] 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.'" *Grimm v. State*, 447 Md. 482, 500 (2016) (quoting *Cox v. State*, 421 Md. 630, 656-57 (2011)). "'We give due regard to the [fact finder's] findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *State v. Suddith*, 379 Md. 425, 430 (2004) (quoting *State v. Smith*, 374 Md. 527, 534 (2003)) (additional citations and quotation marks omitted).

As the Court of Appeals stated in *Hazel v. State*, 221 Md. 646 (1960), when discussing the need for proof of force in the context of rape,

> the evidence must warrant a conclusion either that the victim resisted and her resistance was overcome by force or that she was prevented from resisting by threats to her safety. *But no particular amount of force*, either actual or constructive, is required to constitute rape. Necessarily that fact must depend upon the prevailing circumstances.

Id. at 469 (emphasis added). Under CL § 3-306(a)(1), "[a] person may not engage in a sexual act with another[] . . . by *force*, or the *threat of force*, without the consent of the other[.]"[4] (Emphasis added). Moreover, the amount of resistance exhibited by the victim

[4] As we explained in footnote 1, *supra*, the Maryland General Assembly, in 2017, repealed CL § 3-306 (formerly second-degree sexual offense) and modified CL § 3-304 (second-degree rape) to include acts that were prohibited as second-degree sexual offenses. (continued)

"is relative and should be measured by the fact-finder." *State v. Mayers*, 417 Md. 449, 468 (2010).

Here, the record reveals that Appellant laid on top of Ms. C. on the floor between a bed and a dresser in a space that was "[a] little wider" than Ms. C. Ms. C. testified that, while on top of her, Appellant placed one hand around her throat and proceeded to choke her, while using his other hand to sexually assault her with a perfume bottle. Ms. C. additionally testified that she pleaded with him to stop but she "couldn't move" because Appellant was laying on top of her and choking her while striking her with the perfume bottle. Given the record before us, we hold that there was sufficient evidence for a rational jury to find that Appellant committed a sexual act by force without Ms. C.'s consent.

IV.

Merger Pursuant to Fundamental Fairness

Appellant argues that the sentencing court erred in refusing to merge the sentence for second degree assault into the sentence for attempted second degree sexual offense pursuant to principles of fundamental fairness. In furtherance of this argument, Appellant

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The crime of second-degree rape under CL § 3-304(a)(1) now prohibits "a sexual act with another[] . . . by force, or the threat of force, without the consent of the other[.]" At the time that CL § 3-306 was repealed, the Maryland General Assembly passed Senate Bill 217, 2017 Md. Laws, ch. 160, to add section 3-319.1 to the Criminal Law Article, subtitle 3 "Sexual Offenses." The statute provides that evidence of physical resistance is no longer required:

> 3-319.1
> (a) Evidence of physical resistance by the victim is not required to prove that a crime under this subtitle was committed.
> (b) The provision of subsection (a) of this section may not be construed to affect the admissibility of evidence of actual physical resistance by the victim.

contends that because "[t]he two offenses were assaultive in nature and allegedly committed upon the same person within the span of a few minutes[,]" the offenses were part and parcel of one another and should have been merged.

The State responds that the court correctly denied Appellant's request to merge the sentences under principles of fundamental fairness. The State cites evidence established in the record to rebuff Appellant's contention that Ms. C.'s injuries were sustained during one continuous assault, including the fact that Appellant completed the first assault in the bedroom before a separate, second assault occurred in the kitchen and that these assaults were separated by her trip outside make a 9-1-1 call.

In our system of justice, "[f]undamental fairness is '[o]ne of the most basic considerations in all our decisions . . . in meting out punishment for a crime.'" *Carroll v. State*, 428 Md. 679, 694 (2012) (quoting *Monoker v. State*, 321 Md. 214, 223 (1990)) (additional citation omitted). The so-called "fundamental fairness" merger rule, which Appellant relies on, has gained marginal prominence in Maryland in the last few decades, but has rarely been a standalone criterion for determining whether multiple sentences should be merged. *Pair v. State*, 202 Md. App. 617, 643-44 (2011) (noting that there are only two Maryland "cases wherein a merger was actually dictated by 'fundamental fairness' as an autonomous criterion"). In *Monoker*, for example, the Court of Appeals held that while convictions for solicitation and conspiracy to commit the solicited crime did not merge under the required evidence test or the rule of lenity, merger was required

by "the principle of fundamental fairness[.]"[5] 321 Md. at 223. Monoker, while awaiting his sentence for convictions of fraud and theft offenses, enlisted the assistance of several fellow inmates in the Baltimore County Detention Center to burglarize the home of the principal witness in his case. *Id.* at 216. The would-be burglars, however, were thwarted by police prior to breaking into the home. *Id.* at 217. Monoker, for his participation in the scheme, was convicted of "solicitation and conspiracy to commit daytime housebreaking" and given a 10-year sentence for each offense to run concurrent to his then-current sentence for the fraud and theft convictions. *Id.* Monoker's sentence was approved in an unreported opinion from this Court, and Monoker appealed.

The Court of Appeals reversed, holding that it was fundamentally "unfair to uphold convictions and sentences for both crimes." *Id.* at 223. The Court reasoned that "[a]lthough solicitation is not always a lesser included offense of conspiracy, in Monoker's case the conspiracy to burglarize the [witness's] home certainly did ripen from the solicitation of [the inmates] to commit that same crime." The Court concluded that his sentences should merge because "solicitation was part and parcel of the ultimate conspiracy and thereby an integral component of it, it would be fundamentally unfair to Monoker for

[5] Judge Moylan, writing for this Court in *Pair*, points out that the "fundamental fairness" test is actually "a pseudonym for the long-rejected 'actual evidence' test" and should not be applied to merger of sentences in Maryland. 202 Md. App. at 648-49. Judge Moylan suggests, based on the Court of Appeals' opinion in *Brooks v. State*, 284 Md. 416, 420-21 (1979), that the "actual evidence [test] not only was not 'the Maryland test for merger' but never had been." *Pair*, 202 Md. App. at 648. Therefore, according to language in *Pair*, the fundamental fairness test should *not* be adopted as a standalone merger test in Maryland as applied in *Monoker*. However, because no Court of Appeals opinion has expressly overruled *Monoker*, we apply the fundamental fairness test as described by the Court in that case.

us to require him to suffer twice, once for the greater crime and once for a lesser included offense of that crime." *Id.* at 223-24.

Subsequently, in *Marquardt v. State*, 164 Md. App. 95 (2011), this Court determined that the rule of fundamental fairness described in *Monoker* required that a malicious destruction of property conviction be merged into a conviction for fourth-degree burglary after the defendant destroyed a door in the process of gaining access to an apartment. *Id.* at 111, 152-53. The Court reasoned that "[u]nder the facts of the present case, the malicious destruction of property was clearly incidental to the breaking and entering of [the residence]" and that the sentences for each should merge. *Id.* at 152.

As evidenced by *Monoker* and *Marquardt*, whether merger is required due to the principles of fundamental fairness "depends on the circumstances surrounding the convictions, not solely the elements of the crimes." *Latray v. State*, 221 Md. App. 544, 558 (2015). Therefore, it follows that "[m]erger by virtue of the fundamental fairness test[] . . . is heavily and intensely fact-driven." *Pair*, 202 Md. App. at 645.

In the present case, prior to sentencing, Appellant asked the court to merge his sentence for second-degree assault into his sentence for attempted second-degree sexual offense under the principle of fundamental fairness. The sentencing court declined to do so and, instead, sentenced Appellant to 20 years for the attempted second degree sexual offense and a consecutive term of 10 years for second degree assault. In rejecting Appellant's request, the court explained:

> There doesn't seem to be any relationship in my mind that the evidence presented between the first attack, which was sexual in nature and the second

> attack which was at a later time and a different place by different means and it seems to me that they're two separate events.
>
> * * *
>
> I think that the evidence is clear that there were two separate criminal acts that were involved. And from that there was a conviction for an attempted second degree sex offense from one criminal act and a separate unrelated criminal act for merger purposes. There was a conviction for second degree assault. I'll deny the motion and the request to merge the offenses.

Given the record before us, we cannot say the court abused its discretion in finding that Appellant committed separate crimes at different times in different places. As the sentencing court noted correctly, the acts that occurred in the bedroom were of a sexual nature and were completed before the later assaultive acts that occurred in the kitchen began. At some point during the episode in the bedroom, Appellant ceased the assault on Ms. C. with the perfume bottle and stood up, at which point Ms. C. was able to exit her residence. When Ms. C. returned to the home, a new assault began in the kitchen, which was separate and distinct from the assault that occurred in the bedroom.

Contrary to the circumstances in *Monoker* and *Marquardt*, Appellant's crimes were neither "part and parcel" of one another, *Monoker*, 321 Md. at 223, nor was the commission of one crime "clearly incidental" to the commission of the other. *Marquardt*, 164 Md. App. at 152. For the foregoing reasons, we hold that the court did not err in denying Appellant's request to merge his sentences under the principles of fundamental fairness.

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