Circuit Court for Baltimore City
Case Nos: 113093032, 113093033
113093034 & 113093037

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1143

September Term, 2015

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JAMIE WILSON

v.

STATE OF MARYLAND

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Berger,
Arthur,
Reed,

JJ.

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Opinion by Reed, J.

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Filed: September 26, 2017

Jamie Wilson, the appellant, was tried before a jury in the Circuit Court for Baltimore City on thirteen charges beginning April 14, 2015. The appellant was convicted of two counts of second degree assault, one count of use of a knife as a deadly weapon with intent to injure, and one count of false imprisonment, but acquitted of the following counts: first degree rape, sexual offense in the first degree-fellatio, sexual offense in the second degree, sexual offense in the first degree-anal penetration with penis, sexual offense in the first degree-anal penetration with a bottle, sexual offense in the second degree, assault in the first degree, use of a phone cord as a deadly weapon with intent to injure, and use of a bottle as a deadly weapon with an intent to injure. The appellant received concurrent sentences of 10 years for the two counts of second degree assault, a consecutive sentence of 3 years for use of a deadly weapon with intent to injure, and another consecutive sentence of 30 years, with all but 20 years suspended, for false imprisonment. The appellant was placed on 5 years' supervised probation upon release. On appeal, he presents the following four questions for our review:

1. Did the trial court err in limiting the cross-examination of the State's key witness?

2. Did the trial court err in permitting the prosecutor to make an improper comment during closing argument?

3. Did the trial court err in permitting the State to introduce inadmissible hearsay?

4. Did the trial court err in failing to merge the two convictions for assault in the second degree?

For the following reasons, we answer all four question in the negative and affirm the judgment of the trial court.

## FACTUAL AND PROCEDURAL BACKGROUND

The appellant and the victim had been in an on and off relationship for about seven and a half years at the time of the incident on March 7, 2013. They had two children together, who, luckily, were not at the scene when the incident in question took place.

The following is the victim's version of the incident, to which she testified at trial: Around 11 a.m. on March 7, 2013, she left the appellant's residence at 629 Annabel Street in Baltimore to purchase drugs. She testified that she consumed $10 worth of heroin before returning to the appellant's residence sometime between 2:00 p.m. and 2:30 p.m. At that time, an argument ensued between her and the appellant. The victim testified that the argument started because she had taken too long to buy drugs and did not answer her phone while she was out. The argument between them escalated until it reached a point where the appellant "became physical." The victim testified that the appellant slapped her on her face and chest. The appellant retrieved different objects, such as a blue plastic hanger and knives, to strike her. The appellant then put the victim in a choke hold with a phone charger, causing her to almost pass out.

The victim continued to testify that the appellant then told her to remove her clothing and proceeded to duct tape her legs and hands. The appellant also duct taped her mouth because she was screaming, but he then ripped it off and demanded that she perform oral sex on him. The victim could not stop the appellant because he grabbed her head and pushed her down. The appellant continued to assault her by penetrating her vagina with his penis after demanding she turn over on her stomach. The appellant fetched a bottle and used it to shove into her vagina and anus. The appellant also penetrated the victim's anus

with his penis after making her look at the bottle with her blood and feces on it. Meanwhile, the appellant told the victim that he loved her and that it was her making him take these actions. The appellant also told the victim that she was a junkie and that she did not deserve to live.

At some point, the appellant left the room where the incident took place, saying he was going to leave by taking the victim's car key. While the victim was still duct taped, she was able to free her left pointer finger and call 911. As the victim was yelling out the address to the 911 operator, the appellant came back into the room and took the phone from her. The appellant finally cut the victim's hands and feet free after slapping her with the knife and striking her a few more times. Once the victim was free, she grabbed her clothes and tried to leave, but the appellant kept blocking her. When he finally let her go, she got out of the house and ran up the street. The victim found a girl on the street, asked to use the girl's phone, and called 911 again. At that time, the police had begun arriving at the appellant's residence. The victim was then taken to the hospital for medical examination.

At trial, the appellant testified to a different version of the story and denied all of the victim's allegations. The appellant agreed that the victim came to his house on the morning on March 7, 2013. The appellant also agreed that he gave the victim money to purchase "Coke and Heroin." However, the appellant testified that the victim returned to his residence between 4:30 p.m. and 5:00 p.m. When the victim returned, she already had bruises on her legs and a mark on her neck. The victim sat on the couch and injected heroin into her arm while he was present. The appellant and the victim argued and the appellant asked her to leave. Then the appellant left the house to take a walk. During the walk, the

appellant received a call from the police. The appellant denied causing any harm, including duct taping the victim, striking her with any objects, and engaging in any form of sexual acts with her on the date of the incident. The appellant stated that all he did on the night of the incident was ask her to leave his house.

Three expert witnesses were admitted to prove the State's case. The State's expert witness, Erin Lamar, was a forensic nursing examiner at Mercy Medical Center. Ms. Lamar examined the victim on March 7, 2013, the day the victim was taken to the hospital. Ms. Lamar testified that the victim's blood test was negative for alcohol, but positive for cannabinoids, cocaine, opiates, and benzodiazepines. Ms. Lamar continued to testify that she observed redness to the victim's face, multiple areas of injury on her neck, and injuries on both legs, arms, torso, and breast area during the assessment. Ms. Lamar also observed injuries around the victim's neck consistent with strangulation, as well as several patterned injuries on the victim's body that could have been caused by being struck by an object or blunt force. In addition to the body surface examination, Ms. Lamar performed swabbing of the pertinent areas, a pelvic examination, and a genital examination on the victim. Ms. Lamar also found multiple tears and bruising throughout the entire circumference of the victim's anal area. Ms. Lamar testified that the injuries she observed during the examination were from penetration.

Ms. Lamar also conducted a forensic examination on the appellant at Mercy Medical Center. In doing so, she collected swabs from his mouth, fingernails, and genitals and gathered his boxer shorts.

The State also called William Young, a criminalist II, in the Forensic Biology Unit of the Baltimore Police Department's Forensic Laboratory Section, to the stand. Mr. Young examined the swabs he received from the victim's SAFE kit. Mr. Young observed sperm cells on the peri-anal swab. In addition, the lacy areas on the front of the victim's underwear tested positive for seminal fluid and sperm. Mr. Young cut a portion of the stain that tested positive and packaged it for DNA analysis. Mr. Young also received the appellant's kit containing his swabs and boxer shorts. When a stain on the appellant's boxer shorts tested positive for the presence of human blood, Mr. Young cut a portion of that stain and packaged it for DNA analysis as well. Mr. Young also received an Old English brand 800-malt liquor 22-ounce bottle, a phone charger, and a blue plastic hanger. The bottle tested negative for the presence of both seminal fluid and human blood.

The State also called Jennifer Bresset, a DNA analyst with the Baltimore City Police Department. Ms. Bresset testified to her DNA analysis results on the known standard for the victim and the appellant based on the peri-anal swabs, the peri-oral swabs, a portion of a stain from the victim's underwear, a portion of a stain from the appellant's boxer shorts, and swabs from the bottle. The DNA collected from the victim's peri-anal swab was consistent with that of the victim.[1] The DNA of the sperm fraction collected from the peri-oral swab matched with the victim's. The DNA of the sperm fraction collected from the

[1] The DNA in the sperm fraction was consistent with the victim's because it was collected from her. There was at least one indeterminate minor contributor found on this DNA sample as well. However, because the presence of this second contributor was so low, Ms. Bresset was unable to determine whether or not a contributor existed, and if it did, whether the contributor was another individual or item. Ms. Bresset stated that she could not really "do anything with that portion."

stain on the victim's underwear belonged to the victim. From the boxer shorts taken from the appellant, Ms. Bresset found a DNA profile consistent with a mixture of two individuals, the victim and the appellant. Ms. Bresset found a male DNA profile on the bottle. The appellant was identified as the source of the male profile, but the victim's DNA was not found on the bottle.

Ultimately, the jury found the appellant guilty of two counts of second degree assault, one count of use of a knife as a deadly weapon with intent to injure, and one count of false imprisonment. The appellant received the following sentence: 10 years for second degree assault; 10 years, concurrent, for second degree assault; 3 years, consecutive, for the use of a knife as a deadly weapon; and 30 years, with all but 20 years suspended, consecutive, for false imprisonment.

The circumstances surrounding the ruling on evidentiary issues and additional facts pertinent to the appellant's appeal are described in greater detail in conjunction with the analysis of those issues later in this opinion.

## DISCUSSION

### I. LIMITATION ON THE SCOPE OF CROSS-EXAMINATION

#### Standard of Review

An appellate court should review the trial court's restrictions on cross-examination under an abuse of discretion standard. *Peterson v. State*, 444 Md. 105, 124 (2015). In *Peterson* the Court of Appeals explained that,

> [i]n controlling the course of examination of a witness, a trial court may make a variety of judgment calls under Maryland Rule 5-611 as to whether particular questions are repetitive,

> probative, harassing, confusing, or the like. The trial court may also restrict cross-examination … based on its understanding of the legal rules that may limit particular questions or areas of inquiry. Given that the trial court has its finger on the pulse of the trial while an appellate court does not, decisions of the first type should be reviewed for abuse of discretion.

*Id.*

The standard of appellate review for an appellant's allegation of a Confrontation Clause violation is as follows:

> [W]hen an appellant alleges a violation of the Confrontation Clause, an appellate court must consider whether the cumulative result of those decisions, some of which are judgment calls and some of which are legal decisions, denied the appellant the opportunity to reach the "threshold level of inquiry" required by the Confrontation Clause.

*Peterson*, 444 Md. at 124.

In *Dorsey v. State*, the Court of Appeals further explained that, if the error alleged by an appellant in a criminal case has been established, the reviewing court looks at whether such error is harmless, or, in the alternative, require reversal:

> Unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict … Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of – whether erroneously admitted or excluded – may have contributed to the rendition of the guilty verdict.

*Dorsey*, 276 Md. 638, 659 (1976).

*i. Trial Court's Restriction on Cross-Examination of the Victim About the Location of Her Children*

**A. The Contentions of the Parties**

The appellant argues that the right to cross-examine adverse witnesses is guaranteed by the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights. (Quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986); *Marshall v. State*, 346 Md. 186, 192 (1997)). Therefore, the appellant asserts that the trial court made a reversible error by preventing defense counsel from cross-examining the victim. The appellant specifically addresses two separate issues regarding the scope of cross-examination that would have established the victim's lack of credibility and possible motive for giving false testimony to the jury. First, the appellant argues that the victim's children were not in her custody because of her drug addiction. Second, the appellant asserts that the victim's suspicion that the appellant was having an affair with another woman would also provide her a motive to give false testimony.

Regarding the victim's alleged drug addiction, the appellant argues that there is a difference between someone who uses controlled substances on a regular basis and someone who only uses them occasionally. Because the victim's drug addiction was not presented to the jury, the jury was not able to develop "a fuller understanding of the victim's drug use." The appellant also argues that the victim's addiction was relevant to her credibility, and that the trial court erred in preventing defense counsel from further explaining why the children lived with the victim's mother.

The State responds that the appellant failed to demonstrate during trial the factual basis for his children's living arrangement being due to the victim's drug use. Thus, the State argues that the fact that the children were not living with the victim were neither relevant to the case nor probative of the victim's truthfulness. The State argues that defense counsel had ample opportunity to cross examine the victim regarding the fact that she was a drug addict and was untruthful in her testimony about her drug use. Further, the State argues that the appellant failed to establish "how further questioning about her children's living arrangements would have exposed the jury to additional facts that might legitimately cause it to question the victim's reliability or truthfulness."

**B. Analysis**

We are asked to determine whether the trial judge abused his discretion in curtailing the cross-examination of a victim as to why her children did not stay with her. A criminal defendant's right to confront the witnesses against him is guaranteed by the Confrontation Clause of the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights. *Pantazes v. State*, 376 Md. 661, 680 (2003); *Marshall v. State*, 346 Md. 186, 192 (1997); *Smallwood v. State*, 320 Md. 300, 306 (1990). One of the most effective means of attacking the credibility of a witness is cross-examination. *Pantazes*, 376 Md. at 680. Through cross-examination, a defendant is able to impeach the credibility of a witness and to establish a witness's possible biases, prejudices, motives to testify falsely, or ulterior motives pertaining to the outcome of the trial. *Marshall,* 346 Md. at 192. Although the purpose of the Confrontation Clause is to provide a fair trial, *Pantazes*, 376 Md. at 682, a trial does not necessarily have to be perfect. *State v. Babb*, 258 Md. 527,

552 (1970). In addition, the Confrontation Clause does not guarantee "cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Washington v. State*, 180 Md. App. 458, 489 (2008) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per curiam)).

The constitutional right of a defendant to cross-examination is not unlimited, but rather is subject to the trial judge's discretion. *Pantazes*, 376 Md. at 680; *Marshall*, 346 Md. at 192. The trial judge must exercise his discretion to "establish reasonable limits on cross-examination based on concerns about … harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant." *Pantazes*, 376 Md. at 680. Such discretion is "exercised by balancing 'the probative value of an inquiry against the unfair prejudice that might inure to the witness. Otherwise, the inquiry can reduce itself to a discussion of collateral matters which will obscure the issue and lead to the fact finder's confusion.'" *Pantazes*, 376 Md. at 681 (quoting *State v. Cox*, 298 Md. 173, 178 (1983)). Although the scope of cross-examination is within the trial court's discretion, the trial court is bound by the constitutionally required threshold level of inquiry to be met by a defendant to avoid violating his right to confrontation. *Marshall*, 346 Md. at 193. Determination of "whether there has been an abuse of discretion depends on the *particular circumstances of each individual case*." *Pantazes,* 376 Md. at 681 (emphasis added). *See Ebb v. State*, 341 Md. 578, 587-88 (1996).

Here, defense counsel failed to establish a reasonable factual basis for how the children's living arrangement affected the victim's credibility, making this case similar to *Pantazes* and *Washington*. *Pantazes*, 376 Md. 661 (2003) (holding that the trial court

properly limited cross-examination on the witness, regarding prior misconduct, because the defendant could not establish a reasonable factual basis); *Washington*, 180 Md. App. 458 (2008) (holding that the trial court did not abuse its discretion in limiting cross-examination when the defendant failed to proffer how a particular fact, a police officer's membership in a squad that had illicit drugs in its office, would be relevant to the witness's credibility). In addition, the appellant did not provide how the children's living arrangement was *relevant* to the victim's credibility. Any probative value of such testimony was not substantially outweighed by the risk of unfair prejudice in suggesting that the victim was not capable of taking care of her children because of a drug addiction. Even if that is true, her inability to care for her children has no relevancy to how the appellant physically assaulted her, which was the primary issue of this case during trial.

Defense counsel also argues that the trial court erred in preventing defense counsel from providing "a fuller understanding of [the victim's] drug use." We find this unpersuasive. The trial court gave the appellant a wide opportunity during cross-examination to establish the victim's habitual drug use for the purposes of discrediting her. The victim testified that she started using heroin "frequently" in the three months before the appellant assaulted her on March 7, 2013. At trial, defense counsel indicated that the victim had marijuana, opiates, heroin, and cocaine in her system when a toxicology was done on her at the hospital on the night of the incident, and that the victim denied using drugs other than heroin on the same day. Defense counsel also elicited the victim to testify that she used as little as one, and as many as four, doses of heroin four to five times a week. We find that defense counsel was permitted to, and indeed did, expose to the jury multiple

facts pertaining to whether the victim was a drug addict, rather than an occasional drug user, from which the jury could have appropriately inferred that the victim lacked credibility. That the jury did not take the inference to exonerate the appellant, is not indicative of error on the part of the trial court.

For the reasons above, we hold that the trial court properly exercised its discretion in preventing defense counsel from inquiring about the living arrangement of the victim's two children. The children's living arrangement was not relevant to the issue at trial, and any probative value it might have had was not substantially outweighed by its prejudicial effect on the jury. We also hold that the constitutionally required threshold level of inquiry to satisfy the Sixth Amendment was offered to the appellant to attack the victim's credibility, and that the appellant indeed took advantage of that offering by presenting evidence of the victim's drug use to the jury through extensive cross-examination.

*ii. Trial Court's Restriction on Cross-Examination about the Victim's Knowledge of an Alleged Relationship Between the Appellant and Another Woman*

**A. The Contentions of the Parties**

This part of our analysis pertains to whether the victim knew about a woman named "Teedy." During a pre-trial hearing, defense counsel made a motion in *limine* requesting to redact a portion of the victim's SAFE examination report containing the victim's mention of the appellant's affair. Later, defense counsel made a subsequent motion to withdraw his pre-trial motion in *limine* during the victim's cross-examination at trial. The trial court denied the defendant's motion to withdraw and kept the pertinent portion of the victim's SAFE examination report out of the evidence.

The appellant contends that the trial court committed a "constitutional error of first magnitude" in preventing defense counsel from asking the victim about "Teedy," who had an alleged relationship with the appellant. (Quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974)). Before trial, defense counsel moved to redact a statement in the victim's medical reports in which she told the SAFE nurse, Ms. Lamar, that the appellant told her he was cheating on her. The trial court granted defense counsel's motion in *limine* upon the agreement that defense counsel would not ask the victim about the redacted information on cross-examination. Defense counsel also agreed not to ask the victim about the redacted information as long as she did not mention it in her testimony. The appellant argues that, even though his motion in *limine* was granted, the trial court should have allowed defense counsel to cross-examine the victim about "Teedy" because such evidence could provide the jury a possible motive for her to testify falsely against the appellant.

The State responds that defense counsel engaged in "gamesmanship" by leading the prosecutor to believe that he sought to keep the evidence about "Teedy" from coming in at trial. The State argues that defense counsel's tactical move was unfair to the State because it lost an opportunity to bring "Teedy" up during direct-examination. Furthermore, the State asserts that the jury could be misled to infer that the State tried to hide this evidence, which would result in more weight being put on the defense counsel's theory. The State continues that, even if the trial court erred, the error was harmless beyond a reasonable doubt.

For the following reasons, we agree with the State that the trial court properly exercised its discretion in preventing defense counsel from asking the victim about her knowledge of an alleged relationship between the appellant and another woman.

**B. Analysis**

Maryland Rule 5-616(a)(4) grants a criminal defendant the right to attack the credibility of a witness through questions directing at "proving that the witness is biased, prejudiced, interested in the outcome of the proceeding, or has a motive to testify falsely." The trial judge exercises his discretion in deciding whether to allow or limit cross-examination. *Calloway v. State*, 414 Md. 616, 633 (2010). To aid in making this determination, the petitioner should properly lay a "foundation to entitle him to cross-examine the witnesses." *Id*. at 635. The court also looks at "the witness's state of mind," *Ebb v. State*, 341 Md. 578, 585 (1996), in determining "whether a witness has a possible bias that would be the proper subject of cross-examination." *Calloway*, 414 Md. at 622 (quoting *Ebb*, 341 Md. at 578). The Court in *Calloway* has further explained that the trial court should consider if the witness's self-interest can be established by other items of evidence in determining whether particular circumstantial 'bias' evidence should be excluded. *Id.* at 639.

The Court has articulated which instances a witness's self-interest should be deemed as circumstantial evidence to establish a bias. In three instances, the trial court must allow a party to present such evidence to the jury. The Court of Appeals, in *Ebb,* held that the trial judge did not abuse his discretion in precluding the cross-examination of the witness about his pending charges when *a witness denied any expectation in return for his*

*testimony*. 341 Md. at 585. In *Watkins*, the Court also affirmed the trial court's decision to limit cross examination by precluding defense counsel's inquiry about a witness's pending criminal charge because the witness *did not make a deal with the State in connection with his pending criminal charge, nor had any expectation of leniency from the State in return for his testimony. Watkins v. State*, 328 Md. 95, 100-103 (1992).

Here, the appellant failed to establish that the victim had a self-interest that the Court could perceive to be circumstantial 'bias' evidence to corroborate the appellant's argument that the victim had motive to testify falsely. The record reflects that the victim was not facing any criminal charges and did not have any expectation from the State in return for her testimony, which is identical to the witnesses in *Ebbs* and *Watkins*. Where defense counsel failed to lay a factual foundation at trial for potential bias of the witness, the appellant would not be entitled to cross-examine the victim regarding her knowledge about another woman who allegedly was having a relationship with the appellant.

The appellant also cited *Martinez v. State*, 416 Md. 418 (2010), *Calloway v. State*, 414 Md. 616 (2010), *Martin v. State*, 346 Md. 692 (2001), *Marshall v. State*, 346 Md. 186 (1997), and *Smallwood v. State*, 320 Md. 300 (1990) in support of his argument. We find these cases to be distinguishable from the case at bar and, therefore, not persuasive. The Court of Appeals, in *Martinez*, held that the trial court erred in prohibiting a defendant from cross-examining the surviving victim about his potential bias. 416 Md. at 432. The Court found that there was a "solid factual foundation" for the defense's inquiry into the victim's potential bias because the victim had an expectation of leniency for the charges filed against him, which could be circumstantial evidence of bias motivated by self-interest. *Id.* at 431.

In *Calloway v. State*, the Court also found that the State's witness could have a self-interest in an expectation of leniency from the State in the hope of being released from detention. 414 Md. 616, 638 (2010). The Court found that the circumstantial evidence of the witness's self-interest was not substantially outweighed by unfair prejudice to the State, and held that such facts should have been decided by the jury rather than by the trial court. *Id.* at 637.

In addition, the Court considers a victim having filed a civil lawsuit as a potential bias. The defendant in *Martin v. State* argued on appeal that the trial court erred in prohibiting defense counsel from cross-examining the victim on whether he had hired a lawyer in the civil action. 364 Md. 692, 695 (2001). The Court of Appeals found that such evidence could be relevant to impeach the victim on bias or motive to lie. *Id.* at 703. The Court held that the trial court erred in preventing defense counsel from questioning the victim about his civil lawsuit and that the error was not harmless beyond a reasonable doubt. *Id.* at 695.

The case at bar is distinguishable from the cases cited by the appellant. The appellant failed to establish a "solid factual foundation" that the victim had either a motive to testify falsely or a self-interest other than mere speculation about her knowledge of the appellant's cheating, which are without any corroborating evidence. The victim was not in the same position as the witnesses in *Martinez* and *Calloway*, because she did not have a self-interest, such as an expectation of leniency from the State resulting from any criminal charges or pending detention. The victim also had not filed a civil action at the time of trial like the witness in *Martin* whose interest in the outcome of the civil trial suggested bias or motive to testify falsely.

For the reasons above, we hold that the trial court did not abuse its discretion in limiting the appellant's cross-examination on the victim's knowledge of an alleged relationship with another woman.

## II. IMPROPER COMMENT DURING CLOSING ARGUMENT MADE BY THE PROSECUTOR

### A. The Contentions of the Parties

Next, the appellant argues that the trial court committed reversible error by permitting the prosecutor to present a comment to the jury about alleged facts not in evidence during her closing argument. The appellant contends that the prosecutor's comment about the appellant cleaning the bottle that was allegedly inserted into the victim's rectum was not based on evidence from the trial, but rather was mere speculation based on the prosecutor's imagination. The prosecutor was attempting to explain why no DNA was recovered from the bottle. The appellant adds that the prosecutor's improper statements both crossed the boundaries permitted by law and were prejudicial to the appellant.

The State responds in three ways. First, the State argues that the appellant's argument is not preserved for appellate review because the appellant did not object or move for mistrial when the prosecutor made the same argument about the bottle during rebuttal. Second, the State argues that, even if this issue is preserved, the prosecutor's comment about the bottle was a fair inference from the evidence. Lastly, the State argues that, even if the trial court committed error in this regard, such error was harmless because the jury acquitted the appellant of all charges related to the comment.

We agree with the State that the appellant failed to preserve his claim for appeal. Even assuming, *arguendo*, that the claim was preserved and that the trial court abused its discretion in permitting the prosecutor's comment to be presented to the jury, such error was harmless because the appellant was acquitted of all charges related to the bottle.

### B. Standard of Review

A reviewing court may reverse a conviction due to a prosecutor's improper comment or comments only when "there has been an abuse of discretion by the trial judge of a character likely to have injured the complaining party." *Donaldson v. State,* 416 Md. 467, 496 (2010) (quoting *Wilhelm v. State*, 272 Md. 404, 413 (1974)) (internal quotation marks omitted). In determining whether there was an abuse of discretion, if the reviewing court,

> upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed 'harmless' and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of-whether erroneously admitted or excluded-may have contributed to the rendition of the guilty verdict.

*Dorsey v. State*, 276 Md. 638, 659 (1976).

### C. Analysis

First, we must determine if the appellant preserved his claim of error regarding the prosecutor's statement when he made a one-time objection during the prosecutor's closing argument but failed to object in the prosecution's rebuttal.

Maryland Rule 8-131(a) provides that, except for issues pertaining to subject matter and personal jurisdiction "the appellate court will not decide … [an] issue unless it plainly appears by the record to have been raised in or decided by the trial court." This Court has been consistent in holding that "a defendant must object during closing argument to a prosecutor's improper statements to preserve the issue for appeal." *Shelton v. State*, 207 Md. App. 363, 385 (2012). Also, this Court has held that a defendant failed to preserve for appeal his claim on the first of two of the prosecutor's allegedly improper statements during closing argument because the "defendant failed to object to that portion of the State's closing argument." *Purohit v. State*, 99 Md. App. 566, 586 (1994). In order to preserve a claim for appeal on the issue of whether a prosecutor's closing argument improperly invited the jury to draw inferences from facts not in evidence, a defendant must make a timely objection during closing argument. *Shelton v. State*, 207 Md. App. 363, 385 (2012). To satisfy the timely objection requirement, *a party must object whenever evidence on the same point is admitted during the trial*. *DeLeon v. State*, 407 Md. 16, 31 (2008). In *Warren v. State*, this Court held that, because they "failed to lodge any objection whatsoever during the State's closing argument and *failed to object to the comments at issue during the State's rebuttal closing argument*," he did not preserve the issue for appeal. *Warren v. State*, 205 Md. App. 93, 133 (2012), *cert. denied*, 427 Md. 611 (emphasis added).

During closing argument in the instant case, the following colloquy occurred:

> [Prosecutor]: The Defendant also forced his penis into her anus. Of course, that was after he forced this in her. And again, well; [the victim] told you. But, it's not just her testimony. You heard the testimony of Erin Lamar. You saw a diagram of the anal trauma.

> Multiple areas of anal trauma. Erythema, redness, bruising, tears, stool; because he put this in her rectum. Now, they weren't able to take any DNA off of this because, I would imagine, while [the victim] was tied up in the bedroom, he was downstairs washing it off, where they find it –
>
> [Defense Counsel]: *Objection*
>
> [THE COURT]: *Overruled.*
>
> [Prosecutor]: – (continuing) in the kitchen; next to a whole bunch of cleaning supplies; drops of blood leading up to it.

(The victim's name is omitted) (Emphasis added).

In response, defense counsel argued that there was no evidence that the bottle was used by the appellant to assault the victim:

> [Defense Counsel]: The bottle has absolutely no evidence whatsoever that it was used in an assault. We look at what is in evidence … Let's look at what's in evidence … Let's look at what's in evidence as Court's [sic] 1CC; the bottle on the countertop; the alleged weapon that assaulted – that was used to assault [the victim], allegedly. Another picture. Normally placed bottle. If this was an instrument of brutality that Ms. [the victim] claims it is, why would it be on the kitchen counter? Especially after, supposedly, Mr. Wilson left the house?... And, then, also, you can look at the bottle. The bottle is clean.
>
> There was no evidence introduced, whatsoever, that anybody cleaned anything off. Absolutely no evidence, whatsoever. That bottle was sitting right there, like that.
>
> And, what I would argue to you is that these are little types of things that go directly to [the victim]'s credibility; or, in fact, lack thereof.

(The victim's name is omitted).

Later, during rebuttal, the prosecutor made the following argument without objection:

> [Prosecutor]: The bottle; a normally placed bottle. Okay. Next to the Spic-N-Span and the Arm and Hammer; some detergent soap down there by the sink. It's not placed in what looks to be a (inaudible) picture. It's placed on the counter, with a trail of blood leading up to it.
> Defense counsel asked: Well, why did he leave the bottle if he knew that he had just committed a crime with it? I don't know. Probably for the same reason that he left his bloody boxer shorts [on].
>
> He didn't have a lot of time to clean up. He knew how (inaudible) was. He knew she was going to call the police. He had to (inaudible). Of course, the bottle was clean. He made sure of it. And, that would be consistent with why there was only his DNA on the bottle; because he was the only one who handled it after [he] washed it off.

Here, the appellant objected to the prosecutor's comment about the bottle during the prosecutor's initial closing argument, but failed to object during the rebuttal when the prosecutor made the same argument again. The appellant did not object or move for mistrial at the conclusion of closing arguments. Because a party must object whenever an alleged error occurs, as explained in *DeLeon*, the appellant's failure to make a timely objection during the State's rebuttal and at the conclusion of closing arguments was similar to what happened in *Warren*. In that case, this Court held that the defendant failed to preserve the issue for appeal. *Warren*, 205 Md. App. at 133. Accordingly, we hold that the appellant, too, waived his right to appeal this issue.

Even assuming, *arguendo*, that the appellant preserved his claim for appeal and that the comments made by the prosecutor were improper, such error was harmless given the

fact that the appellant was acquitted of all charges related to the bottle. Reversal of an appellant's convictions based on improper closing argument is only warranted if: (1) the statements were improper; and, (2) the cumulative effect of the statements was to prejudice the petitioner beyond a reasonable doubt. *Donaldson v. State*, 416 Md. 467, 473 (201). *See Dorsey v. State*, 276 Md. at 659. In determining whether these two elements are satisfied, the reviewing court considers "various factors, including 'the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused.'" *Lee v. State*, 405 Md. 148, 165 (2008) (quoting *Lawson v. State*, 389 Md. 570, 592 (2005)). Also, the Court considers if "improper remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the defendant." *Donaldson*, 416 Md. at 496-97. Not every improper remark requires reversal; it depends on the facts of each case. *Lee*, 405 Md. at 164.

In *Spain v. State*, 386 Md. 145 (2005), the Court of Appeals reviewed whether the failure to sustain an objection to a prosecutor comments about a witness's lack of motive to lie was a reversible error of the trial court." The Court affirmed the trial court's ruling, holding that the defendant was not unduly prejudiced by the prosecutor's improper comments. With respect to the severity of the remarks, the Court explained that the prosecutor's comment was "an isolated event that did not pervade the entire trial." *Id.* at 159. After the prosecutor made the remarks, the trial judge reminded the jury that they were only "an attorney's argument, not evidence." *Id.* In addition, the trial judge explained the nature of closing arguments in the jury instructions. Such efforts of the trial judge were considered as a factor that ameliorated any prejudice to the accused. Finally, with respect

to the weight of the evidence, there was physical evidence of the crime to support the convictions of the defendant, and the prosecutor's comments did not play a significant role in supporting the convictions. *Id.* at 161.

Here, the prosecutor first mentioned the appellant's use of the bottle to assault the victim in her initial closing argument. In response, defense counsel addressed the State's argument, stating that "the bottle has absolutely no evidence whatsoever." Defense counsel also pointed out that there was no evidence that the bottle was cleaned or that the bottle was used to sexually assault the victim. He further argued that the victim's allegation that the bottle was used as a weapon should instead be used against the victim's credibility, inferring that she was making a false allegation. Thus, the way defense counsel addressed the prosecutor's comments in his closing argument was enough to cure any potential prejudice against the appellant. In addition, the trial judge instructed the jury that "opening statements and closing arguments of lawyers are not evidence," which is what the trial judge in *Spain* did to cure potential prejudice against the defendant. Ultimately, the jury was persuaded by defense counsel and found the appellant not guilty of both first and second degree sexual offense in connection with the bottle. The jury also found the appellant not guilty of use of a bottle as a deadly weapon with an intent to injure.

Therefore, we hold that the prosecutor's alleged improper remarks during the closing argument did not mislead the jury or influence the jury to the prejudice of the appellant.

For the reasons above, we hold that the trial court did not abuse its discretion in permitting the prosecutor to make a comment regarding the bottle during closing argument.

## III. MOTION FOR ADMISSION OF THE CAD REPORT UNDER THE HEARSAY EXCEPTION

### A. The Contentions of the Parties

The appellant also argues that he is entitled to a new trial because the trial court erred in admitting allegedly inadmissible hearsay evidence. During the victim's testimony, the State tried to introduce the police department's CAD report from the time the victim had called 911.[2] Defense counsel objected to its admission, arguing that defense counsel just received the certification of the report even though it was supposed to be provided to the defense at least ten days prior to trial under Maryland Rule 5-902(b). Defense counsel also argued that he was not aware of the State's intention to use the CAD report at trial.

The appellant also contends that not only must a writing or other document be authenticated as a pre-requisite to its admission under Maryland Rule 5-901(a), but that Maryland Rule 5-902 must also be complied with in order to admit business records under the Rule 5-803(b)(6) exception to hearsay. Maryland Rule 5-902 requires a proponent party to notify the adverse party of its intention to authenticate the record "ten days prior to the commencement of the proceeding." The appellant contends that providing a CAD report in discovery is not enough to satisfy Rule 5-902's ten-day requirement. Without a proper and timely certification under Maryland Rule 5-902(b), the record should be treated as inadmissible hearsay.

[2] CAD report refers to the Computer-Aided Dispatch report. *State v. Cates*, 417 Md. 678, 685 (2011).

In response, the State argues that the trial court properly used its discretion in finding that the CAD report was properly authenticated as a business record and, therefore, did not err. The State asserts that the appellant did not contest the fact that the CAD report fell within the business records exception to the rule against hearsay at trial. The State contends that "the only dispute at trial was whether the State complied with the notice requirements under Rule 5-902(b)." Nevertheless, the State asserts that the notice requirement was satisfied by providing the report to the defense in discovery. In support of the argument, the State argues that both the Court of Appeals and this Court have found that a trial court erred in admitting business records under Maryland Rule 5-902(b) only when the "State either produced a certification that did not comply with Rule 5-803(b)(6) or failed to produce a certification entirely." The State also argues that, even if the trial court erred in admitting the CAD report, it is harmless error because there is no possibility that the error contributed to the guilty verdict. Therefore, reversal is not required.

**B. Standard of Review**

The standard of review of a trial court's ruling regarding the admission of evidence is as follows:

> [d]eterminations regarding the admissibility of evidence are generally left to the sound discretion of the trial court. *Hajireen v. State*, 203 Md. App. 537, 552 [39 A.3d 105], *cert. denied*, 429 Md. 306 [55 A.3d 908] (2012). This Court reviews a trial court's evidentiary rulings for abuse of discretion. *State v. Simms*, 420 Md. 705, 724–25 [25 A.3d 144] (2011). A trial court abuses its discretion only when "'no reasonable person would take the view adopted by the [trial] court,'" or "when the court acts 'without reference to any guiding rules or principles.'" *King v. State*, 407 Md. 682, 697 [967 A.2d 790]

> (2009) (quoting *North v. North*, 102 Md. App. 1, 13 [648 A.2d 1025] (1994)).

*Baker v. State*, 223 Md. App. 750, 759 (2015) (all alterations except the first in original). An appellate court conducts *de novo* review of the legal question of whether particular evidence constitutes hearsay. *Baker*, 223 Md. App. at 760.

In *Baker*, this Court further explained that:

> [w]hether hearsay evidence is admissible under an exception to the hearsay rule, on the other hand, may involve both legal and factual findings. *Id.* at 536, 66 A.3d 647. In that situation, we review the court's legal conclusion de novo, but we scrutinize its factual conclusion only for clear error. *Id.* at 538, 66 A.3d 647.

223 Md. App. at 760.

Once a defendant establishes an error in a criminal case, "the State bears the burden of proving, beyond a reasonable doubt, that the error did not contribute to the guilty verdict in any way." *State v. Bryant*, 361 Md. 420, 431 (2000) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)).

**C. Analysis**

We are asked to review whether the trial court erred in concluding that the State, in providing the CAD report to the defense in discovery instead of providing its certification at least ten days prior to trial failed to satisfy the notice requirements under Maryland Rule 5-902(b). Both parties agree that the CAD report constitutes a business record under the Maryland Rule 5-803(b)(6) hearsay exception.

Maryland Rule 5-803(b)(6) delineates the substantive requirements of the business records exception to the hearsay rule. A business record that has been authenticated still needs to be supported by an evidentiary foundation, which can be established in one of two ways: "by extrinsic evidence (usually live witness testimony) regarding the four requirements of Rule 5-803(b)(6) or by self-authentication pursuant to Rule 5-902." *State v. Bryant*, 361 Md. 420, 426 (2000) (original quotation marks omitted).

Pertinent to this appeal, we focus on Maryland Rule 5-902(b). Maryland Rule 5-902(b) provides that:

> (b) Certified Records of Regularly Conducted Business Activity. (1) Procedure. Testimony of authenticity as a condition precedent to admissibility is not required as to the original or a duplicate of a record of regularly conducted business activity, within the scope of Rule 5-803(b)(6) that has been certified pursuant to subsection (b)(2) of this Rule, *provided that at least ten days prior to the commencement of the proceeding in which the record will be offered into evidence*, (A) the proponent (i) *notifies the adverse party of the proponent's intention to authenticate the record under this subsection* and (ii) makes a copy of the certificate and record available to the adverse party and (B) the adverse party has not filed within five days after service of the proponent's notice written objection on the ground that the sources of information or the method or circumstances of preparation indicate lack of trustworthiness.

(Emphasis added). There is no precedent, either from this Court or the Court of Appeals, regarding the Rule 5-902(b) notice requirement at issue in the case at bar. Therefore, we must look to the language of the rule for guidance.

Maryland case law has established that "the principles applied to statutory interpretation are also used to interpret the Maryland Rules." *Duckett v. Riley*, 428 Md. 471, 476 (2012). The cardinal rule of statutory interpretation is "to ascertain and effectuate the intent of the legislature." *Stoddard v. State*, 395 Md. 653, 661 (2006) (quoting *Mayor of Oakland v. Mayor of Mt. Lake Park,* 392 Md. 301, 306 (2006)). The reviewing court must look at "the language of the statute, giving it its natural and ordinary meaning" to determine its purpose or policy. *Stoddard*, 395 Md. at 661 (quoting *State Dept. of Assessments and Taxation v. Maryland Nat'l Capital Park & Planning Comm'n*, 348 Md. 2, 13 (1997)). The Court of Appeals has also explained that "when the statutory language is clear, we need not look beyond the statutory language to determine the Legislature's intent." *Stoddard*, 395 Md. at 662 (quoting *Marriott Employees Fed. Credit Union v. MVA*, 346 Md. 437, 445 (1997)).

With this guidance, we look at the language of Maryland Rule 5-902(b). It clearly manifests that a business record to be offered into evidence must be provided "at least ten days prior to the commencement of the proceeding." The purpose of this, ten-day notification requirement is to put the adverse party on notice so that they can decide whether to file a written objection "on the ground that the sources of information or the method or circumstances of preparation indicate lack of trustworthiness." Without clear language in the statute that the ten-day notification requirement can be substituted with any other method, such as discovery, we should not give alternate meaning to the statute. See *Holbrook v. State*, 364 Md. 354, 364 (2001).

Here, the State argues that the notification requirements of Rule 5-902(b) were satisfied because the CAD report was provided to the defendant in discovery. This cannot be sufficient to satisfy the Rule, given, its clear language and purpose. In *Simmons*, the government clearly put defense counsel on notice in advance as to their intention to use a specific form for a specific purpose. The government in *Simmons* did this so that defense counsel would have time to review and make a decision whether to object to the form. In the present case, we cannot see how defense counsel was put on notice of the State's intent to use the CAD report as evidence when defense counsel only received its certification at trial. The mere fact that the State served the CAD report along with many other documents in discovery cannot be sufficient to serve the purpose of the statute. A holding to the contrary would "ignore the plain language of the statute." *Gorge v. State*, 386 Md. 600, 618 (2005). In this case, the trial judge erred in admitting the CAD report without satisfying the ten-day notification requirement of Maryland Rule 5-902(b). The fact that the State provided the CAD report in discovery does not serve to rectify the court's error. Nevertheless, for the reasons that follow, we shall hold that the trial court's error in admitting the CAD report was harmless.

The State contends that even if the admission of the CAD report was error, the application of the harmless error doctrine renders reversal unnecessary. The State argues that the 911 recording, which was a more comprehensive and detailed version of the CAD report, was admitted and played for the jury without objection. The only part of the CAD report that was different from the 911 recording was "the fact that a hang-up call was placed to 911 minutes before [the victim]'s recorded 911 call was placed." In addition, the

contents of the CAD report were neither read during the trial nor mentioned at all during closing arguments. Therefore, we agree with the State that any possible "additional corroboration from this aspect of the CAD report was marginal."

Moreover, there was other evidence at trial, such as medical examinations, forensic evidence, expert testimony, and the victim's own testimony, which tended to show that the appellant assaulted the victim. Therefore, we are confident that the error in admitting the CAD report did not, in any way, contribute to the verdicts. Accordingly, reversal is not mandated.

## IV. MERGER OF THE TWO CONVICTIONS FOR ASSSAULT IN THE SECOND DEGREE

### A. The Contentions of the Parties

Finally, the appellant argues that the trial court erred in failing to merge the two counts of second degree assault and, instead, imposed concurrent ten-year sentences. The appellant contends that his two second degree assault convictions should be merged under both the required evidence test and the doctrine of fundamental fairness. The appellant claims that one of his assault sentences must be vacated under the required evidence test because there were not two separate assaults that occurred during this incident; rather, it was "one, continuous event." The appellant also contends that, even if there were two separate assaults, his convictions should merge under the principle of fundamental fairness because the "commission of one crime is 'clearly incidental' to another and each were 'part and parcel' to the other." (Quoting *Monoker v. State*, 321 Md. 214, 223-24 (1990)).

The State maintains that the court properly imposed two concurrent sentences for the two counts of second degree assault. With regard to the appellant's contention concerning the required evidence test, the State responds that there is no ambiguity because the appellant was "convicted of two counts of the exact same offense." The State argues that any arguable ambiguity was cured "when the prosecutor stated in closing argument, without objection, that each intentional harmful or offensive touching constituted a separate second degree assault." Regarding the appellant's fundamental fairness argument, the State responds that the issue of fundamental fairness is not preserved for review because the appellant did not raise it below. (Citing *Pair v. State*, 202 Md. App. 617, 625 (2012) ("[M]erger under the doctrine of fundamental fairness must be preserved in order to be reviewed on appeal.")). The State continues that, even if it is preserved, the appellant's argument is without merit because the appellant committed a number of different batteries by inflicting injury to different parts of the victim's body "by different modes and with different weapons".

**B. Standard of Review**

As we explained in *Bishop v. State*, 218 Md. App. 472, 504 (2014),

> [w]e "address the legal issue of the sentencing … under a *de novo* standard of review." *Blickenstaff v. State*, 393 Md. 680, 683, 904 A.2d 443 (2006). As the Court of Appeals explained in *Chaney v. State*, 397 Md. 460, 918 A.2d 506 (2007), a defendant may attack the sentence by way of direct appeal, or "collaterally and belatedly" through the trial court, and then on appeal from that denial. *Id.* at 466, 918 A.2d 506. That said, the scope of the potential remedy is narrow:
>
> > [T]his category of "illegal sentence" [is] limited to those *situations in which the illegality inheres*

> *in the sentence itself*; *i.e.*, there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed and, for either reason, is intrinsically and substantially unlawful.

*Id.* at 466-67, 918 A.2d 506 (emphasis added).

**C. Analysis**

As the Court of Appeals explained in *Bishop*,

> [t]he broader term "merger" (and its grammatical variants) encompasses three different principles of sentencing. The overarching merger doctrine finds its roots in the double jeopardy clauses of federal and Maryland common law, *Moore v. State*, 198 Md. App. 655, 684–85, 18 A.3d 981 (2011), and "provides the criminally accused with protection from ... multiple punishment stemming from the same offense." *Purnell v. State*, 375 Md. 678, 691, 827 A.2d 68 (2003) (footnote omitted). The Court of Appeals has recently reaffirmed that we recognize "three grounds for merging a defendant's convictions: (1) the required evidence test; (2) the rule of lenity; and (3) 'the principle of fundamental fairness.'" *Carroll*, 428 Md. at 693–94, 53 A.3d 1159 (quoting *Monoker*, 321 Md. at 222–23, 582 A.2d 525).

*Bishop*, 218 Md. App. at 505.

Here, the appellant does not argue that his conviction should be merged under the rule of lenity; instead, he asks us to review his convictions under the required evidence test and the principle of fundamental fairness.

In Maryland, the required evidence test is used to determine if two offenses constitute the same offense by examining the elements of each offense and determining "whether each provision requires proof of a fact which the other does not." *Paige v. State*, 222 Md. App. 190, 206 (2015) (quoting *Blockburger v. United States*, 284 U.S. 299, 304

(1932)). "If all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements, the former merges into the latter." *Paige*, 222 Md. App. at 206 (quoting *State v. Jenkins*, 307 Md. 501, 507 (1986)). But, "*even though each offense may arise from the same act or criminal episode*," multiple punishments are not barred by the prohibition against double jeopardy under the required evidence test "*if each offense requires proof of a fact which the other does not*." *Latrary v. State*, 221 Md. App. 544, 553 (2015) (quoting *Cousins v. State*, 277 Md. 383, 388-89 (1976)) (emphasis added).

Nevertheless, the required evidence test cannot be applied to the case at bar. The appellant in this case was convicted of two counts of the exact same offense. Therefore, this case is distinguishable from ones where there are two distinct offenses but the offenses are based on the same acts. In both of those cases, the defendants were convicted of distinct offenses, all of the elements of one offense were included in the other offense. To the contrary, the appellant in this case was convicted of two counts of the same offense (second degree assault) based on separate and intentional harmful or offensive touchings. Moreover, this case is not one in which the appellant was convicted of two counts of second degree assault for the same touching. Rather, the two second degree assault charges were based on separate harmful touchings that required proof of separate and distinct facts.

Therefore, because the evidence clearly indicates that the appellant assaulted the victim in a different manner and with different weapons, the appellant's two second degree assault convictions do not merge under the required evidence test.

Next, the appellant claims that his sentences should merge under the principle of fundamental fairness because each battery was "part and parcel" and "clearly identical" to the other. The State responds that this claim is not preserved for appellate review and, even if it is preserved, merger is not required under the principle of fundamental fairness.

Before we agree with the State that the principle of fundamental fairness did not compel merger in this case, we turn to the principle of fundamental fairness, and address the State's concern that the appellant's claim is not preserved for our review. In *Latray v. State*, 221 Md. App. 544 (2015), this Court held that the normal preservation requirements do not apply when the issue is about the failure to merge a sentence because failure to merge results in an "inherently illegal sentence as a matter of law." *Id.* at 555. This Court reviewed Mr. Latray's arguments based on fundamental fairness despite his failure to raise the issue during trial. *Id.*

Merger pursuant to the doctrine of fundamental fairness is "heavily and intensively fact-driven," making it very different from merger pursuant to the required evidence test and the rule of lenity, "which can both be decided as a matter of law." *Pair v. State*, 202 Md. App. 617, 645 (2011). The doctrine of fundamental fairness does not only look into the elements of the crimes, but also depends heavily on the "circumstances surrounding the convictions." *Latray*, 221 Md. App. at 558. "The principal justification for rejecting a claim that fundamental fairness begs merger in a given case is that the offenses punish separate wrongdoing." *Id.* This principal justification has held consistent since *State v. Boozer*, 304 Md. 98 (1985), in which the Court of Appeals held that "*separate acts resulting in separate insults to the person of the victim may be separately charged and*

*punished even though they occur in very close proximity to each other and even though they are part of a single criminal episode or transaction*." *Id.* at 105 (emphasis added).

In *Carroll v. State*, 428 Md. 679 (2012), the Court of Appeals did not merge conspiracy to commit armed robbery and attempted armed robbery under the principle of fundamental fairness because the defendant's convictions "targeted two crimes." *Id.* at 697-99. In *Latray v. State*, this Court declined to merge two crimes under fundamental fairness because the appellant committed "separate and distinct acts" to complete the aggravated robbery and making false bomb threat charges. *Id.* at 561. We categorized those two charges as "*two separate acts arising from a single criminal episode*." *Id.* at 562 (emphasis added). Likewise, in *Bishop v. State*, this Court declined to merge conspiracy to commit murder with first-degree murder under fundamental fairness "because the defendant committed 'separate and distinct' crimes and should not be rewarded with a reduced sentence merely because he was successful in carrying out his 'plan' to murder the victim." 218 Md. App. 472, 508 (2014).

Similarly, in our cases, the appellant committed "separate and distinct" assaults while inflicting injury on the victim. The appellant slapped the victim on her face and choked her with a phone charger cord. Later, he fetched different objects, such as knives and a plastic hanger, to strike the victim. The appellant also left the room and assaulted the victim again with knives when he returned and saw that she was calling 911. The victim described the incident as "batteries by different modes and with different weapons to different parts of her body." We are not persuaded by the appellant's contention that the commission of one second degree assault is "part and parcel" of the other in this case. As

explained in *Latray*, two crimes are separate and distinct when they can be prosecuted independently of each other, and when allowing merger would reward the defendant for completing two separate criminal acts. The appellant's acts of assaulting the victim with different instrumentalities over the course of at least four hours can be considered as separate and distinct acts for which the appellant could be convicted independently. Thus, the principles of fundamental fairness does not compel merger of the appellant's two counts of second degree assault.

In sum, the offenses do not merge under either the required evidence test or the doctrine of fundamental fairness. Accordingly, we hold that the trial court did not err in imposing separate, concurrent sentences, and affirm the two second degree assault convictions against the appellant.

**JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.**