

Circuit Court for Baltimore City
Case No. 120261019

UNREPORTED
IN THE APPELLATE COURT
OF MARYLAND*

No. 978

September Term, 2022

KENNETH SOMMERS

v.

STATE OF MARYLAND

Nazarian,
Ripken,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.

Filed: October 20, 2023

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

A jury in the Circuit Court for Baltimore City found the appellant, Kenneth Somers¹ (“Appellant”), guilty of first-degree assault and reckless endangerment. The court granted Appellant’s motion for judgment of acquittal as to first-degree attempted murder and second-degree attempted murder. The jury acquitted Appellant of wearing/carrying a dangerous weapon with the intent to injure. The court sentenced Appellant to seven years of incarceration for first-degree assault and five years of concurrent incarceration for reckless endangerment.

For the following reasons, we shall vacate the sentence for reckless endangerment but otherwise affirm the judgments of the circuit court.

ISSUES PRESENTED FOR REVIEW

Appellant presents the following issues for our review: ²

- I. Whether the circuit court erred in admitting two photographs of the victim in the hospital.
- II. Whether the circuit court erred in allowing the State to refresh a witnesses’ recollection with a transcript when the recording, but not the transcript, was provided to defense counsel in discovery.

¹ The case caption and circuit court transcripts spell Somers last name as “Sommers.” However, Somers’ brief filed in this Court indicates that the proper spelling of his name is “Somers.”

² Rephrased from:

1. Did the lower court err in admitting photographs of an assault victim where: (1) the photographs were not authenticated as accurate representations of the victim’s condition; (2) the photographs were not relevant and had the potential to unfairly prejudice Mr. Somers and confuse the jury; and (3) the court deprived Mr. Somers the ability to examine the supporting witness to diminish the weight the jury would afford the photographs?

- III. Whether the circuit court erred in determining that body-worn camera footage was sufficiently authenticated.
- IV. Whether the sentence for reckless endangerment should merge into the sentence for first-degree assault.

FACTUAL AND PROCEDURAL BACKGROUND

The convictions in this case stem from a physical altercation that occurred in August of 2020 involving Appellant and the victim, Wayne Brown (“Brown”). Appellant accused Brown of stealing a Lincoln Town Car (“the vehicle”) from Appellant’s business, Crazy Kenny’s Junk Cars. Appellant placed a “tracker” on that vehicle and attempted to reclaim the vehicle a few days later. On the day of the incident, Appellant tracked the vehicle to a residence in Baltimore City, confronted Brown and assaulted him. When police arrived on scene, Brown was lying on the sidewalk and barely responsive. Then, in the presence of responding officers as shown on the body-worn camera footage, Appellant kicked Brown while Brown was lying prone on the ground.

At trial, the State called two witnesses: Detective Moody and Lieutenant Nicolas of the Baltimore City Police Department. On August 12, 2020, Detective Moody responded to the crime scene for a report of an aggravated assault. When Detective Moody arrived on scene, she located the vehicle that Appellant had attempted to reclaim. Detective Moody

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- 2. Did the court err in allowing the State to use a tangible item at trial, as it intended, where that item had not been disclosed to the defense in discovery?
 - 3. Did the lower court err in finding that body-worn camera footage was authentic under the “silent witness” theory of authentication?
 - 4. Did the lower court err in failing to merge the sentences and/or convictions for first-degree assault and reckless endangerment?

testified about her observations on scene, stating “[t]here was blood throughout the vehicle. There was a bloody can inside the vehicle, some teeth inside the vehicle, [and] a bloody rag that was outside the vehicle.”

The next day, Detective Moody visited Brown at Johns Hopkins Hospital. Over defense counsel’s objection, the court admitted into evidence photographs of Brown that were taken at the hospital after the assault.

While Appellant was in custody, Detective Moody interviewed him in the presence of Detective Banker. A video recording of the interview was admitted into evidence. During the interview, Appellant described the sequence of events that led to the assault. According to Appellant, after he returned from vacation, he noticed that Brown was driving one of his vehicles. Appellant explained to the detectives that he “ha[d] a tracker” and “he put it on the car.” A few days later, Appellant checked the tracker and noticed that Brown was at “a spot he goes to regularly[.]” Appellant told the detectives that when he arrived at Brown’s location he had “the snatch truck, like a repo, that pick up with the lift on the back.”

Appellant confronted Brown and told Brown to “get the [] out of [his] car.” Appellant then “tr[ied] to remove” Brown from the vehicle and they “started fighting.” During his interview with police, Appellant explained his actions and the injuries he inflicted on Brown, by saying “until that person ain’t moving, you’re fighting for your life ‘cause as long as he got enough energy to be combative, he’s a problem, he’s a threat. . . .

I’m fighting for my property.”³

The body-worn camera footage of Officer Nguyen was admitted into evidence via the testimony of Lieutenant Nicolas, who responded to the scene. That video shows the aftermath of the altercation, including Appellant’s interaction with the police on scene, Brown’s condition, and Appellant’s final kick to Brown’s body.

Additional facts will be included as they become relevant to the issues.

DISCUSSION

I. THE COURT DID NOT ERR IN ADMITTING TWO PHOTOGRAPHS OF BROWN TAKEN AT THE HOSPITAL.

Appellant claims that the court erred in admitting photographs of Brown that were taken at the hospital. According to Appellant, the photographs were not sufficiently authenticated. Appellant also contends that the photographs “lacked probative value[.]” In the alternative, Appellant argues that even if the photographs had probative value, they “possessed unfair prejudice and had the potential to confuse jurors which far exceeded their

³ In his statement to police, Appellant said that he used an air freshener can and a rearview mirror as weapons during his altercation with Brown:

I’m no stranger to fighting, okay? If I catch you the right spot right across here, you’re going to say man, who cut that guy with a razor. Nobody did. . . . I’m telling you that mirror, in my hand, bap, bap, bap, that’s what put all that across there and made me like -- once I lost control of that because we’re fighting, once I lost control of that, the air freshener can came into play.

At trial, the State argued that Appellant’s use of these items violated Md. Code, Criminal Law (“CR”) § 4-101(c)(2), which prohibits “wear[ing] or carry[ing] a dangerous weapon . . . openly with the intent or purpose of injuring an individual in an unlawful manner.” The jury acquitted Appellant of that offense.

minimal probity” under Maryland Rule 5-403.⁴ In addition, Appellant takes issue with the court’s limitations on his trial counsel’s cross-examination of Detective Moody as to the photographs. More specifically, Appellant states that the court erred by imposing limitations on the questions establishing:

(1) that the photographs did not document Mr. Brown’s condition at the scene of the fight (and, thus, injuries directly connected to [Appellant’s] actions); and (2) whether the supporting witness knew whether the injuries depicted in the photographs “were already things that were features of Mr. Brown’s appearance prior to the incident[.]”

The State submits that Detective Moody’s testimony laid a proper foundation for the photographs, and thus the photographs were properly authenticated. The State asserts that the photographs were relevant and contained probative value. The State further maintains that the circuit court properly exercised its discretion by limiting “additional or repetitive questioning” during cross-examination by Appellant’s counsel.

A. Authentication

“When an appellant claims evidence was erroneously admitted based on lack of authenticity, we review the trial court’s decision for abuse of discretion.” *Sykes v. State*, 253 Md. App. 78, 90 (2021). “Pursuant to Maryland Rule 5-901(a), authentication of evidence . . . is a condition precedent to its admissibility, and the condition is satisfied where there is sufficient evidence ‘to support a finding that the matter in question is what its proponent claims.’” *Id.* at 91 (quoting Md. Rule 5-901(a)). “The standard for

⁴ Maryland Rule 5-403 provides, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Md. Rule 5-403.

admissibility is low: the court ‘need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the *jury* ultimately might do so.’” *Reyes v. State*, 257 Md. App. 596, 630 (2023) (quoting *Jackson v. State*, 460 Md. 107, 115-16 (2018)). “[T]here must be sufficient evidence for a reasonable juror to find that the [evidence] is authentic by a preponderance of the evidence.” *State v. Sample*, 468 Md. 560, 598 (2020).

Photographs “may be authenticated under several theories, including the ‘pictorial testimony’ theory and the ‘silent witness’ theory.” *Reyes*, 257 Md. App. at 630 (quoting *Washington v. State*, 406 Md. 642, 652 (2008)). “[T]he pictorial testimony theory of authentication allows photographic evidence to be authenticated through the testimony of a witness with personal knowledge[.]” *Washington*, 406 Md. at 652. “[T]he silent witness method of authentication allows for authentication by the presentation of evidence describing a process or system that produces an accurate result.” *Id.*

Detective Moody testified that she saw Brown at the hospital the day after the assault. Detective Moody further testified that Brown was unable to speak because he “was fully sedated and had tubes all in his mouth, intubated.” In addition, she described Brown’s physical condition as follows: “his head was severely swollen, [his] eyes [were] completely shut, he was intubated, . . . [he] had tubes all over his face, several lacerations, dried blood all over his head, [and] abrasions on his head.”

During Detective Moody’s testimony, the State sought to admit photographs of Brown. When the State asked the court for permission to approach Detective Moody with

the photographs of Brown at the hospital (marked as State’s Exhibit 3 through 9 for identification purposes), Appellant’s counsel objected, and a bench conference occurred:

THE COURT: Okay. What’s your objection to [exhibit] 3?

[DEFENSE COUNSEL]: Two, it’s the same for all of them, but for 3 specifically --

* * *

For 3 specifically, it is that there’s been no testimony other than that there was a fight. There’s been no testimony about the nature, the severity of the fight that happened in the car where all of these injuries are. Also they’re not going to have Mr. Brown. These photos were taken the day after, after there had been intervention by doctors who do things like shave and stitch. And so we don’t know what they look like before he was operated on. But the testimony was these were taken 24 hours later after this man had been in the hospital the whole time under doctor’s care. There’s no way to determine what the doctors did and Mr. [Somers] is accused of doing. And they are inflammatory beyond any probative value.

The court responded to defense counsel’s objection, noting “[t]hat may be good argument for arguments[.]” The court, however, granted defense counsel’s objection in part by excluding some of the photographs—marked for identification purposes as State’s Exhibits 5 through 9—“on the grounds that they’re repetitious and inflammatory.”

When the State asked Detective Moody questions to lay a foundation for the photographs in State’s Exhibits 3 and 4, the following colloquy transpired:

[THE STATE]: Detective Moody, I am showing you what's been marked as State's Exhibit 3 for identification. Do you recognize this?

[DET. MOODY]: Yes.

[THE STATE]: What do you recognize it as?

[DET. MOODY]: It's a photo of Mr. Wayne Brown in the hospital.

[THE STATE]: And do you recall about when that was taken?

[DET. MOODY]: This was taken on the day of the incident.

[THE STATE]: And I'm showing you what's been marked as State's Exhibit 4 for identification. Do you recognize it?

[DET. MOODY]: Yes.

[THE STATE]: What do you recognize it as?

[DET. MOODY]: This is another image of Mr. Brown in the hospital.

[THE STATE]: And what -- do you recall when that was taken?

[DET. MOODY]: The day of the incident.

[THE STATE]: And were you at the hospital to observe him in this condition?

[DET. MOODY]: No, not this condition, not like these images depict.

The court then asked the parties to approach the bench and defense counsel objected to the lack of foundation for the photographs. The following then occurred:

THE COURT: You told me that she saw the -- him in that condition, that she went to the hospital and saw him in that condition. What -- and she said she

didn't see him in that condition. When she went to the hospital, was he in that condition?

[THE STATE]: That was our understanding, but can I ask her another question?

THE COURT: Yeah. Well, why don't you clarify.

(Counsel returned to the trial tables, and the following occurred in open court:)

[THE STATE]: Detective Moody, are the State's Exhibits 3 and 4 consistent with the condition that you observed the victim in when you saw him at the hospital?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[DET. MOODY]: Yes.

The court then admitted State's Exhibits 3 and 4.⁵

Detective Moody had first-hand knowledge of the photographs' authenticity because she visited Brown in the hospital the day after the assault. Although Detective Moody testified that the pictures were taken the same day as the assault, she provided detailed testimony about how Brown appeared the next day. Because Brown's appearance in the exhibits was consistent with that detailed testimony, the court did not abuse its discretion in determining that the State properly authenticated the photographs.

⁵ This Court has reviewed the two photographs at issue. Both photographs depict Brown's appearance at the hospital. State's Exhibit 3 shows Brown's upper body and head. State's Exhibit 4 is a close-up photograph of Brown's head. Detective Moody's description of Brown's appearance is consistent with the photographs—Brown's eyes are "completely shut," and he has "several lacerations," with "abrasions on his head."

Even if the photographs were erroneously admitted, the error would be harmless. To prevail under a harmless error analysis, the State must convince the appellate court “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). In reviewing the record, we weigh “the importance of the tainted evidence; whether the evidence was cumulative or unique; the presence or absence of corroborating evidence; the extent of the error; and the overall strength of the State’s case.” *Rosenberg v. State*, 129 Md. App. 221, 254 (1999) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). *See also Gross v. State*, 481 Md. 233, 237 (2022) (reaffirming that an appellate court may consider “the cumulative nature of an erroneously admitted piece of evidence when conducting harmless error analysis.”).

Other evidence demonstrated the severity of Brown’s injuries, as depicted in the photographs. Indeed, the court admitted approximately 1700 pages of Brown’s medical records from Johns Hopkins Hospital stemming from the assault. The medical records state that Brown had “extensive facial lacerations.” The Surgical Intensive Care Unit’s Admission Note described Brown’s facial injuries and summarized the stab wounds on Brown’s face as follows: L infraorbital stab wound; L supraorbital stab wound; Midline forehead stab wound; and R occipital stab wound.

The jury also heard Appellant’s recorded interview with police. In the interview, Appellant admitted that he used a rearview mirror and an air freshener can as weapons during the altercation with Brown. Appellant implied that the rearview mirror caused

lacerations that appeared to be stab wounds on Brown’s face. Lastly, Officer Nguyen’s body-worn camera footage shows that Brown was lying on the ground and his head appeared to be bloody when Officer Nguyen arrived on scene.

Given the overwhelming evidence of Brown’s injuries and his condition at the hospital, there is no reasonable possibility that the two photographs of Brown in the hospital affected the verdict.

B. The Probative Value of the Photographs and the Balancing Test in Maryland Rule 5-403

Evidence is relevant if it makes “the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Md. Rule 5-401. Relevant evidence is generally admissible and irrelevant evidence is inadmissible. Md. Rule 5-402. We review the court’s determination of relevance under a *de novo* standard of review. *State v. Simms*, 420 Md. 705, 725 (2011).

Even if legally relevant, “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]” Md. Rule 5-403. “We determine whether a particular piece of evidence is unfairly prejudicial by balancing the inflammatory character of the evidence against the utility the evidence will provide to the jurors’ evaluation of the issues in the case.” *Smith v. State*, 218 Md. App. 689, 705 (2014). The court’s “ruling on the admissibility of evidence under Rule 5-403 is reviewed for abuse of discretion.” *Montague v. State*, 471 Md. 657, 673-74 (2020).

Appellant concedes that *Roberts v. State*, 4 Md. App. 209, 213 (1968), supports the proposition that, in an assault case, “evidence as to the extent or effect of the injuries

received by the assaulted party is admissible as being relevant or material to an issue of the case, or as relating to ‘a part of res gestae[.]’” While Appellant correctly notes the age of the *Roberts* opinion there is more recent caselaw establishing the potential probative value of photographs of a victim’s injuries. *See, e.g., Johnson v. State*, 303 Md. 487, 502 (1985) (noting that photographs may be “admitted to allow the jury to visualize the atrociousness of the crime”); *Ayala v. State*, 174 Md. App. 647, 681 (2007) (upholding the admission of ten autopsy photos of the victim’s body because “intent was a crucial issue in the case” and “[t]he photographs illustrated the nature and severity of the victim’s injuries”); *Roebuck v. State*, 148 Md. App. 563, 595-600 (2002) (upholding the admission of “color photographs that graphically depicted some of [the victim’s] wounds.”).

Appellant contends that the photographs were irrelevant because the pictures showed Brown’s condition “after he was shaved, stitched, and operated upon[.]” To be sure, the photographs appear to show Brown after he received medical attention. Nevertheless, the photographs depict the injuries that necessitated that medical attention. We agree with the trial court that the intervening medical procedures did not nullify the probative value of the photographs.

Turning to the balancing of probative value versus unfair prejudice, Maryland Rule 5-403 provides “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” “In balancing probative value against unfair

prejudice, . . . prejudicial evidence is not excluded under Rule 5-403 only because it hurts one party’s case.” *Montague*, 471 Md. at 674. Indeed, “[w]e do not exclude relevant evidence merely because it is prejudicial, as ‘[a]ll evidence, by its nature, is prejudicial.’” *Woodlin v. State*, 484 Md. 253, 265 (2023) (quoting *Williams v. State*, 457 Md. 551, 572 (2018)). Rather, “probative value is substantially outweighed by unfair prejudice when the evidence ‘tends to have some adverse effect . . . beyond tending to prove the fact or issue that justified its admission.’” *Montague*, 471 Md. at 674 (2020) (quoting *State v. Heath*, 464 Md. 445, 464 (2019)).

Here, the photographs were taken the same day as the assault, and they depicted Brown’s condition at that time. Moreover, Appellant was convicted of first-degree assault, which is a specific intent crime.⁶ *E.g.*, *Dixon v. State*, 364 Md. 209, 239 (2001). “Specific intent, unlike general criminal intent, is ‘not simply the intent to do an immediate act, but the additional deliberate and conscious purpose or design of accomplishing a very specific and more remote result.’” *Genies v. State*, 426 Md. 148, 159 (2012) (quoting *Chow v. State*, 393 Md. 431, 464 (2006)). At the time of the criminal conduct in this case (August 12, 2020), CR section 3-202(a)(1) provided that “[a] person may not intentionally cause or

⁶ Appellant was charged with other specific intent crimes, including first-degree attempted murder, second-degree attempted murder, and wearing/carrying a dangerous weapon with the intent to injure. *See Chisum v. State*, 227 Md. App. 118, 134-35 (2016) (attempted first-degree murder and attempted second-degree murder “require proof of a specific intent to kill”); *Somers v. State*, 156 Md. App. 279, 316 (2004) (carrying a dangerous weapon openly with the intent to injure is a specific intent crime). Although Appellant was acquitted of those offenses, the photographs were relevant and probative proof of Appellant’s specific intent.

attempt to cause serious physical injury to another.”⁷ The photographs were relevant and probative as to whether Appellant had the specific intent to cause “serious physical injury to” Brown. CR § 3-202(a)(1).

In essence, Appellant argues that the photographs were unfairly prejudicial and confusing because they depicted Brown’s injuries while he was intubated and recovering in the hospital after medical intervention. However, the medical records, body-worn camera footage, and Detective Moody’s testimony established that Brown was injured, hospitalized and intubated following the assault. The jury was able to decide what weight, if any, to place upon the photographs in light of all of the evidence. *See State v. Smith*, 374 Md. 527, 534 (2003) (holding that circumstantial evidence was sufficient to support petitioner’s conviction beyond a reasonable doubt.) The court did not abuse its discretion in admitting the two photographs.⁸

C. The Cross-Examination of Detective Moody

During cross-examination, Appellant’s counsel asked questions aimed at assessing Detective Moody’s knowledge about Brown’s appearance before and after the medical

⁷ Effective as of October 1, 2020, CR section 3-202 expressly prohibits strangulation as a modality of first-degree assault. Indeed, CR section 3-202(b)(3) now states that “[a] person may not commit an assault by intentionally strangling another[,]” and CR section 3-202(a) provides that “[i]n this section, ‘strangling’ means impeding the normal breathing or blood circulation of another person by applying pressure to the other person’s throat or neck.” Those new provisions have no effect on our legal analysis in this opinion. For clarity and uniformity, the remainder of this opinion refers to the pre-October 2020 version of CR section 3-202.

⁸ Even if the court abused its discretion by admitting the photographs, the error would be harmless for the reasons stated in Discussion Section I.A., *supra*, of this opinion.

intervention. Ultimately, Appellant’s counsel’s questions were repetitive. On appeal, Appellant challenges the court’s limitations during the following portion of his attorney’s cross-examination of Detective Moody:

[DEFENSE COUNSEL]: [T]hose photos were taken after medical intervention on Mr. Brown, correct?

[THE STATE]: Objection.

THE COURT: Overruled.
Do you need to see the photos to answer that question?

[DET. MOODY]: You can show me the photos, yes.

THE COURT: So if you would show State’s 3 and 4 to the witness please?

[DEFENSE COUNSEL]: I’m showing you . . . State’s 4. Do you recognize that?

[DET. MOODY]: Yes.

[DEFENSE COUNSEL]: Okay. And that’s a photo of what?

[DET. MOODY]: It’s Mr. Brown in the hospital.

[DEFENSE COUNSEL]: Okay. And you see stitches on Mr. Brown, correct?

[DET. MOODY]: Yes.

[DEFENSE COUNSEL]: All right. And so it’s safe to say that that photo was taken after there had been medical work done on Mr. Brown, correct?

[DET. MOODY]: Yes.

[DEFENSE COUNSEL]: So then that's not really a fair and accurate representation of what Mr. Brown looked like at the scene because he hadn't been given --

[THE STATE]: Objection.

[DEFENSE COUNSEL]: -- he hadn't received medical treatment at the scene; is that correct?

THE COURT: Sustained. Sustained.
You don't have to answer that question.

[DET. MOODY]: Okay.

[DEFENSE COUNSEL]: But you see stitches in that photo, correct?

[DET. MOODY]: I do.

[DEFENSE COUNSEL]: And you said that when you went and eventually interviewed Mr. Brown, do you recall testifying about that?

[DET. MOODY]: I do.

[DEFENSE COUNSEL]: You said that when you went to see Mr. Brown, you said you saw a scar under his eye, correct?

[DET. MOODY]: Yes.

[DEFENSE COUNSEL]: And you said you saw a missing patch of hair, correct?

[DET. MOODY]: Correct.

[DEFENSE COUNSEL]: [P]rior to the incident -- but that was in October, correct?

[DET. MOODY]: Correct.

[DEFENSE COUNSEL]: Prior to the incident in August, had you had contact with Mr. Brown?

- [DET. MOODY]: Yes.
- [DEFENSE COUNSEL]: So you knew what Mr. Brown looked like before that?
- [DET. MOODY]: I s[aw] Mr. Brown when he was in the hospital.
- [DEFENSE COUNSEL]: No, but prior to the incident --
- [DET. MOODY]: No. I don't know what he looked like, no.
- [DEFENSE COUNSEL]: So you --
- [DET. MOODY]: I'd never met him.
- [DEFENSE COUNSEL]: You'd never met him?
- [DET. MOODY]: Correct.
- [DEFENSE COUNSEL]: And so you don't know if Mr. Brown already had [a] scar under his eye before the incident in August, correct?
- [DET. MOODY]: Correct.
- [DEFENSE COUNSEL]: And you don't know if Mr. Brown had some sort of condition that caused his hair to be patchy, like a lot of people have, before that -- before the incident in August, correct?
- [DET. MOODY]: Correct.
- [DEFENSE COUNSEL]: And so for all you know, those were already things that were features of Mr. Brown's appearance prior to the incident in August, correct?
- [THE STATE]: Objection.
- THE COURT: Sustained.

“The Confrontation Clause of the Sixth Amendment of the United States

Constitution and Article 21 of the Maryland Declaration of Rights guarantee criminal defendants the ability to confront the witnesses against them.” *E.g.*, *Stanley v. State*, 248 Md. App. 539, 550-51 (2020). The right of confrontation includes the opportunity to cross-examine witnesses about matters relating to, among other things, their biases. *Martinez v. State*, 416 Md. 418, 428 (2010). “The ability to cross-examine witnesses, however, is not unrestricted.” *Id.* “Compliance with our federal and state constitutions requires the trial judge to allow the defense a ‘threshold level of inquiry’ that puts before the jury ‘facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.’” *Manchame-Guerra v. State*, 457 Md. 300, 309 (2018) (quoting *Martinez*, 416 Md. at 428). “Once that threshold is met, the trial court has considerable discretion to limit the scope of cross-examination to prevent, among other things, ‘prejudice, confusion of the issues, and inquiry that is repetitive or only marginally relevant.’” *State v. Galicia*, 479 Md. 341, 360 (2022) (quoting *Manchame-Guerra*, 457 Md. at 309).

Here, defense counsel reached the required threshold level of inquiry. To be sure, the court overruled the State’s objection and granted defense counsel latitude to establish that the photographs depicted Brown after medical intervention. Defense counsel was subsequently permitted to cross-examine Detective Moody about her unfamiliarity with Brown’s appearance before the assault, i.e., whether he had a scar under his eye, or patchy hair, before the physical encounter with Appellant. The court then properly limited defense counsel’s repetitive line of questioning because those questions had been asked and

answered. *See* Md. Rule 5-611(a) (stating in relevant part that “[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, [and] (2) avoid needless consumption of time[.]”); *see also* PROF. LYNN MCLAIN, MARYLAND EVIDENCE STATE AND FEDERAL § 611:9 at 724-25 (3d ed. 2013) (“In the court’s discretion, it may preclude a party from repeating a question to which that party has already received a responsive answer from the same witness.”) (footnotes omitted).

For these reasons, the court did not abuse its discretion by exercising reasonable control over the breadth and repetitive nature of Appellant’s counsel’s cross-examination.

II. THE COURT DID NOT ERR IN PERMITTING THE STATE TO USE AN UNDISCLOSED TRANSCRIPT OF A DISCLOSED RECORDED STATEMENT TO REFRESH A WITNESS’ RECOLLECTION AT TRIAL.

Appellant claims that the court erred in determining that no discovery violation occurred when the State used a transcript of Appellant’s recorded statement to refresh Detective Moody’s recollection at trial. The State argues that the court correctly determined that there was no requirement to disclose the transcript before trial. At trial, Detective Moody testified that she interviewed Appellant and that interview was recorded, published to the jury, and admitted into evidence. While the recording was playing in open court, the trial judge noted having difficulty hearing what was said.⁹ Following the playing of the

⁹ This Court has reviewed the recorded interview. We note that Detective Moody, Detective Banker and Appellant are wearing face masks. The interview occurred in August of 2020, during the COVID-19 pandemic.

interview, the following transpired:

THE COURT: Detective Moody, it was very hard to hear the tape. At any time, did Mr. [Somers] tell you how long the car had been missing?

[DET. MOODY]: I can't recall.

THE COURT: [Prosecutor]?

[THE STATE]: Would it refresh your recollection to view a transcript of the interview?

[DET. MOODY]: Yes.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

* * *

THE COURT: Just hand [the transcript] to the witness. You can review that, Detective Moody. Don't say anything.

[DET. MOODY]: Okay.

(Pause).

[DEFENSE COUNSEL]: Your Honor, may we approach?

THE COURT: No.
[Prosecutor], you can direct her to a page if that would help her. So take the -- take it from her or tell her what page you want her to look at.

[THE STATE]: Detective Moody, I'm directing you to page 6 of the transcript.

THE COURT: Just look at page 6 and see if that helps your memory of how long the car had been taken for or how long had the car been taken.

[THE STATE]: Oh, I'm sorry.

[DEFENSE COUNSEL]: Your Honor, defense objects. May we approach?

THE COURT: Overruled. No.
Does that help your memory?

[DET. MOODY]: Yeah. Approximately two weeks.

Defense counsel later clarified the subject of his objection:

THE COURT: I had a very difficult time hearing the video, and there's a transcript of the video. Do you have any objection to me reading it?

[DEFENSE COUNSEL]: I do. That was the nature of my objection earlier. It was never disclosed though. We never --

THE COURT: What objection? Well, just -- a transcript doesn't need to be disclosed.

[DEFENSE COUNSEL]: But -- well, it does I think in this case because it's so fuzzy. We haven't had any opportunity to determine if it's even accurate, it may not be. It's hard for anyone to hear this tape.

THE COURT: All right. Well, just give a copy to -- I'm not giving it to the jury. I'm just reading it so I understand better what the facts are.

Can you --

[THE STATE]: Would I be able to provide it to you later?

THE COURT: Sure. Sure.

[THE STATE]: Okay.

THE COURT: Whenever -- but maybe today.

[THE STATE]: Oh, sure.

THE COURT: How’s that?

[DEFENSE COUNSEL]: I’d like a copy as well.

THE COURT: Yeah.

[THE STATE]: Yeah, that’s fine.

THE COURT: You definitely should have a copy too.

The transcript was provided to defense counsel and to the court before Detective Moody’s cross-examination. After a recess and a bench conference, defense counsel confirmed that he was ready for the jury to return to the courtroom and his cross-examination of Detective Moody began.

On appeal, Appellant claims that the State committed a discovery violation under Maryland Rule 4-263(d)(9) because the transcript was “a tangible item it intended to use at trial[.]” This Court conducts a *de novo* review of whether a discovery violation occurred. *See Thomas v. State*, 213 Md. App. 388, 402 (2013) (holding that “[f]actual findings of the trial court will not be reversed unless clearly erroneous, but the question whether a discovery violation occurred under the Maryland Rules is reviewed *de novo*.”).

Maryland Rule 4-263 governs discovery in criminal cases in the circuit courts. Rule 4-263(d)(9) requires the State’s Attorney, “[w]ithout the necessity of a request,” to provide the defense with the following:

Evidence for Use at Trial. The opportunity to inspect, copy, and photograph all documents, computer-generated evidence as defined in Rule 2-504.3(a), recordings, photographs, or other tangible things that the State’s Attorney intends to use at a hearing or at trial[.]

This evidence must be provided to the defense “within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213(c)[.]” Md. Rule 4-263(h)(1).

The recording of Appellant’s statement fell under Rule 4-263(d)(9) because the State intended to use the recording at trial.¹⁰ The transcript of that recording, however, was not “[e]vidence for use at trial” within the meaning of Rule 4-263(d)(9). Indeed, the transcript was merely used to refresh a witness’ memory. Thus, the transcript was not entered into evidence. *See Farewell v. State*, 150 Md. App. 540, 576 (2003) (holding that “[t]he reason for giving an attorney a large amount of freedom to refresh a witness’ recollection is because the witness’ testimony is the evidence, not the actual stimulus.”).

Maryland Rule 5-612 governs when a party uses a writing or other item to refresh a witness’ memory:

If, while testifying, a witness uses a writing or other item to refresh memory, any party is entitled to inspect it, to examine the witness about it, and to introduce in evidence those portions which relate to the testimony of the witness for the limited purpose of impeaching the witness as to whether the item in fact refreshes the witness’s recollection.

Here, the court ensured that defense counsel was able to inspect the transcript and use the transcript to cross-examine Detective Moody. As a result, the court complied with Rule 5-612, and no discovery violation occurred.

¹⁰ Appellant does not dispute that the State timely provided the recording. The State was also required to provide the recording as discovery under Maryland Rule 4-263(d)(1), which directs the State to provide “all oral statements of the defendant . . . that relate to the offense charged and all material and information, including documents and recordings, that relate to the acquisition of such statements[.]”

Notably, the trial transcript reveals that Appellant’s counsel did not ask for more time to review the transcript of Appellant’s recorded statement. We agree with the State, however, that “additional time would not seem to have been necessary for this purpose, as the transcript was used to refresh the witness’s recollection only as to a very particular point on a particular page of the transcript.”

The State argues that even if error occurred in this regard, the error would be harmless. The Supreme Court of Maryland has set forth the following standard for determining whether a discovery violation amounts to harmless error:

An appellate court does not reverse a conviction based on a [circuit] court’s error or abuse of discretion where the appellate court is satisfied beyond a reasonable doubt that the [circuit] court’s error or abuse of discretion did not influence the verdict to the defendant’s detriment. A discovery violation that unfairly surprises a defendant and prejudices the ability of a defendant to mount an adequate defense generally cannot be construed as harmless error.

Alarcon-Ozoria, 477 Md. at 108.

The court has discretion to sanction a party for a discovery violation. *Thomas*, 397 Md. at 570. Maryland Rule 4-263(n) addresses the sanctions that a circuit court may impose when a discovery violation has occurred:

If at any time during the proceedings the court finds that a party has failed to comply with this Rule or an order issued pursuant to this Rule, the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances. The failure of a party to comply with a discovery obligation in this Rule does not automatically disqualify a witness from testifying. If a motion is filed to disqualify the witness’s testimony, disqualification is within the discretion of the court.

The Supreme Court of Maryland has clarified that pursuant to this rule, “a defendant is prejudiced only when he is unduly surprised and lacks adequate opportunity to prepare a defense, *or when the violation substantially influences the jury*. The prejudice that is contemplated is the harm resulting from the nondisclosure.” *Thomas*, 397 Md. at 574 (emphasis added).

Even if the failure to disclose the transcript amounted to a discovery violation, which we find it did not, the error would be harmless beyond a reasonable doubt because the State’s usage of the transcript was narrow in scope. Indeed, the State used the transcript to refresh Detective Moody’s recollection as to how long Appellant said that the vehicle had been missing. In addition, the State could have used the actual recording of Appellant’s statement—which was provided as discovery, entered in evidence, and played for the jury at trial—to refresh Detective Moody’s recollection on this detail of the testimony. The transcript was simply a more efficient option to accomplish that task. Any error stemming from the alleged discovery violation was harmless.

Appellant also contends that the error could not be harmless because the judge used the transcript to aid her understanding of the recording. That argument is unavailing because this was a jury trial. Based on our independent review of the record, we are persuaded that the judge’s understanding of the transcript in no way affected the jury’s verdict.

III. THE COURT DID NOT ERR IN ADMITTING THE BODY-WORN CAMERA FOOTAGE.

Appellant asserts that the court erred in admitting Officer Nguyen’s body-worn camera footage. According to Appellant, “the State, as proponent, failed to demonstrate that the video was the accurate product of a reliable process.” The State counters that Appellant’s claim is, in part, unpreserved, and that the claim is otherwise without merit because the State sufficiently authenticated the footage.

At trial, the State called Lieutenant Nicolas as a witness to authenticate the body-worn camera footage of Officer Nguyen, who responded to the scene during the aftermath of the assault and did not testify at trial.¹¹ Lieutenant Nicolas testified that he was “the body-worn camera lieutenant coordinator for the agency.” He explained that he “was part of the [body-worn camera] program when it was initiated,” and he “helped develop it.” Lieutenant Nicolas’ unit was responsible for “reviewing all evidence, video evidence, on arrest and . . . citations, . . . creating an electronic case folder, and then forwarding it to the State’s Attorney’s Office.”

Lieutenant Nicolas attended a yearly training convention held by Axon, which is the company that the Baltimore City Police Department “used for body-worn cameras[.]” As to the unit’s structure, Lieutenant Nicolas explained that he had three supervisors, five

¹¹ Before trial, the State moved “in limine to exclude any questioning or any testimony regarding . . . Officer Nguyen’s pending charges.” The parties proffered that Officer Nguyen had pending charges stemming from his failure “to help the victim” in this case, Wayne Brown.

detectives, contract specialists and civilian employees. As the coordinator, Lieutenant Nicolas also reviewed body-worn camera footage.

Lieutenant Nicolas explained the functionality of the body-worn cameras, the data storage process for the recordings, and the mechanisms in place to prevent and track misconduct related to electronic evidence tampering:

[THE STATE]: [C]an you explain how the device itself operate[s], the body-worn camera device?

[LT. NICOLAS]: Yes. It's a device that works on a charged battery. Every officer keeps it, wear[s] on his chest area. And once they respond to a scene prior to having interaction with the individuals involved, they press it twice to activate the camera. The camera has a -- it used to have a 30-second buffer where it films 30 seconds prior to the officer filming, activating [the] camera, but now it's moved up to a one-minute buffer. So from 30 seconds to 1 minute, you won't have any audio, but you'll still have visual of what the officer encountered.

[THE STATE]: [W]hen a video is recorded, how is it later then extracted from the device?

[LT. NICOLAS]: Once the officer's tour of duty is over, officers are required to dock their camera in a mounting station, and these videos are transferred from the cam device onto our website, evidence.com, where they can be viewed.

[THE STATE]: And is there any way to change a video between when it's been recorded and when it's been uploaded to evidence.com?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[LT. NICOLAS]: No, there is not. We can do redactions and things of that nature, but the original video will always be intact and the same. There's a[n] audit trail where it's foolproof where if an individual tried to delete the video, it will show that a video was deleted. We have a process where that doesn't happen. If somebody were to make a clip of a video, the clip would be created, but the original video will always stay intact.

As to the preservation of the body-worn camera footage in this case, Lieutenant Nicolas explained:

[THE STATE]: After your review of the body-worn camera video in this case, what, if any, determinations were you able to make regarding the preservation of the video?

[LT. NICOLAS]: The videos were preserved intact and then forwarded to the State's Attorney's portal.

THE COURT: I don't think she's asking you about videos generally. She's asking you specifically about this video.

[LT. NICOLAS]: This video was preserved and all evidence related to this case was shared to the State's Attorney's portal.

Defense counsel objected to the admission of the body-worn camera footage, arguing that there was a lack of authentication. More specifically, defense counsel contended that Lieutenant Nicolas was not qualified to authenticate the footage because he was not an expert. Defense counsel also claimed that the video was not authenticated because Lieutenant Nicolas was not present when Officer Nguyen docked the video. Last, defense counsel asserted that the admission of the video without Officer Nguyen's

testimony violated the Confrontation Clause of the Sixth Amendment of the United States Constitution.

The court admitted the video over defense counsel’s objection, ruling as follows:

I’m satisfied [Lieutenant Nicolas] doesn’t need to be an expert of technological things. [H]e’s indicated that the program, the body-worn camera police officers started in 2016, he was the head of it from the very beginning. He’s the supervisor of the entire unit. He described the unit. Additionally, it is exactly like a photo. [The Prosecutor] can introduce a photo as long as she provides a sufficient foundation that it’s reliable, and -- then it’s admissible as probative evidence. And I think [the prosecutor] has established that it’s authentic and that a sufficient foundation has been laid, so I will allow its introduction.

On appeal, Appellant claims that the State failed to establish that there was no tampering before the footage was docked by Officer Nguyen. The State argues that this portion of Appellant’s claim is unpreserved because Appellant’s counsel did not make this specific argument at trial. Although Appellant did not specifically argue this contention below, “[p]reservation for appellate review relates to the issue advanced by a party, not to every legal argument supporting a party’s position on such issue.” *Smith v. State*, 176 Md. App. 64, 70 n.3 (2007). At trial, Appellant’s counsel’s argument for exclusion of the footage included the following contention:

[Lieutenant Nicolas] can talk all he wants about him seeing the video and he said that . . . the officers are required to dock the video. But he doesn’t know whether or not Officer Nguyen did that because he wasn’t there. He doesn’t know whether the video w[as] transferred to evidence.com because he doesn’t do that. He doesn’t know if they were -- if what happened from between Nguyen being on the scene and the video getting into the dock[.]

That argument is sufficient to preserve Appellant’s claim as to the alleged foundational insufficiency of the body-worn camera footage. *See also* Md. Rule 4-323(c) (“For purposes

of review by the trial court or on appeal of any other ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court.”).

Turning to the merits of Appellant’s argument more broadly, photographic evidence that “is recorded on equipment that operates automatically, . . . may be authenticated under the ‘silent witness’ theory[.]” *Reyes*, 257 Md. App. at 630. “Videos admitted under the silent witness theory must have probative evidence in themselves, meaning they must be edifying regardless of the witness’ testimony.” *Covel v. State*, 258 Md. App. 308, 323 (2023). “The foundational basis may be established through testimony relative to ‘the type of equipment or camera used, its general reliability, the quality of the recorded product, the process by which it was focused, or the general reliability of the entire system.’” *Jackson*, 460 Md. at 117 (quoting *Washington*, 406 Md. at 653). *See also* Discussion Section I.A., *supra* (setting forth the standard of review for authentication).

Here, the body-worn camera footage contained probative evidence, as it depicted the aftermath of the initial assault, Brown’s condition, and Appellant’s final kick to Brown’s body. At trial, the State appropriately indicated that it would not ask Lieutenant Nicolas “about what’s on the video or anything of that nature” because Lieutenant Nicolas’ testimony was strictly foundational. Appellant claims that Lieutenant Nicolas’ testimony failed to establish that Officer Nguyen properly docked and uploaded the video. Lieutenant Nicolas, however, testified that there was no way to change the body-worn camera footage before it was uploaded because the system contained a “foolproof” “audit trail” to track

and thwart any attempts to tamper with the footage. As to the specific body-worn camera footage in this case, Lieutenant Nicolas asserted that the video was “preserved intact[.]”

Two Supreme Court of Maryland decisions, *Washington v. State*, 406 Md. 642, and *Jackson v. State*, 460 Md. 107, guide our analysis on this issue. In *Washington*, the court admitted into evidence the State’s surveillance video and still photographs of a shooting that occurred outside of a bar. 406 Md. at 646–47. The State moved to admit and the court did admit that evidence during the State’s direct examination of the bar owner, who “did not know how to transfer the data from the surveillance system to portable discs.” *Id.* at 655. The bar owner “hired a technician to transfer the footage from the eight cameras onto one disc in a single viewable format.” *Id.* At trial, the State relied on the “silent witness” theory of authentication, and the court admitted the evidence over defense counsel’s objection. *Id.* at 646-47. The Supreme Court of Maryland held that the State failed to lay an adequate foundation because “[t]he videotape recording, made from eight surveillance cameras, was created by some unknown person, who through some unknown process, compiled images from the various cameras to a CD, and then to a videotape.” *Id.* at 655.

In *Jackson*, the court admitted into evidence the State’s surveillance footage that showed the defendant making withdrawals from a bank ATM. 460 Md. at 117–20. The State authenticated that evidence through the testimony of a bank employee who “described the process he used to access the ATM video footage,” which involved accessing a computer program and finding the camera footage for the relevant date and time. *Id.* at 117. The employee “testified that he then ‘exported the images into a digital

file and emailed them to [the detective].” *Id.* Then, after receiving confirmation from the detective, the employee was “required to submit a specific request with date, time, location and camera specifications to [the bank’s] team . . . , who would ‘download the requested video and mail it directly to the detective.’” *Id.* At trial, the employee testified that the video was the same as the one that he had initially observed on the computer program. *Id.* at 118-19. The court recognized that “the State had sufficiently established the foundation for the video footage’s authenticity, even if the video’s relevance remained conditional on the rest of the State’s case.” *Id.* at 120. The Supreme Court of Maryland affirmed, holding that there was a sufficient foundation to admit the video because the employee testified about “the process of reproduction, the reliability of that process, and whether the reproduction was a fair and accurate representation of what the witness had viewed when he submitted a request for the video footage[.]” *Id.* at 119.

We liken the instant case to *Jackson* and find it distinguishable from *Washington*. Here, the State established that Lieutenant Nicolas was the “the body-worn camera lieutenant coordinator for the agency.” He testified that he “was part of the program when it was initiated,” and he “helped develop it.” Lieutenant Nicolas also testified that he attended training conventions held by Axon, which was the company “used for body-worn cameras[.]” Moreover, Lieutenant Nicolas “taught at the convention two or three” times. Unlike the bar owner’s unfamiliarity with the surveillance system in *Washington*, Lieutenant Nicolas provided detailed testimony about the data storage process for the body-worn camera footage. Because Lieutenant Nicolas’ testimony established a sufficient

foundational basis, the court properly exercised its discretion by admitting the body-worn camera footage.

IV. THE SENTENCE FOR RECKLESS ENDANGERMENT MERGES INTO THE SENTENCE FOR FIRST-DEGREE ASSAULT.

Last, Appellant argues that the court erred by imposing separate sentences for his first-degree assault and reckless endangerment convictions. More specifically, Appellant contends that the sentence for reckless endangerment should merge into the sentence for first-degree assault. On appeal, the State agrees that the reckless endangerment sentence should merge into the sentence for first-degree assault. We agree with both parties.

“Maryland recognizes 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 v. State*, 428 Md. 679, 693–94 (2012) (quoting *Monoker v. State*, 321 Md. 214, 222–23 (1990)). The required evidence test, which “applies to both statutory and common law offenses,” “focuses upon the elements of each offense; if all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements, the former merges into the latter.” *Marlin v. State*, 192 Md. App. 134, 159 (2010) (internal citations omitted).

In *Marlin v. State*, this Court concluded that “under principles of fundamental fairness or the rule of lenity,” reckless endangerment merges into first-degree assault by firearm when the defendant’s “conduct as to the reckless endangerment involved the same conduct that formed the basis for the first-degree assault[.]” *Id.* at 171. In *Marlin*, because “the evidence at trial pertained solely to a single act of shooting a single victim” and “no

other conduct was involved in proving either offense,” only one sentence was warranted.

Id. Moreover, this Court explained when reckless endangerment, as a lesser included offense, may merge into first-degree assault:

[R]eckless endangerment under [CR] § 3-204 may merge with first degree assault under [CR] § 3-202(a)(1), involving the conduct of causing or attempting to cause serious physical injury to another, when the mens rea and the actus reus of reckless endangerment ripen into the specific intent to cause or attempt to cause serious physical injury. In that circumstance, reckless endangerment might be a lesser included offense under [CR] § 3-204(a)(1).

Id. at 165.

When the charges are based on different acts, however, the sentences for each offense do not merge. *See Morris v. State*, 192 Md. App. 1, 39 (2010). “The ‘same act or transaction’ inquiry often turns on whether the defendant’s conduct was ‘one single and continuous course of conduct,’ without a ‘break in conduct’ or ‘time between the acts.’” *Id.* (quoting *Purnell v. State*, 375 Md. 678, 698 (2003) *superseded by statute on other grounds as recognized in Rich v. State*, 205 Md. App. 227, 239 n. 3 (2012)). “[A]ny ambiguity in the indictment or as to how the jury understood the charges must be resolved” in the defendant’s favor. *Gerald v. State*, 137 Md. App. 295, 312 (2001).

Here, the indictment charged Appellant with first-degree assault and reckless endangerment, but it did not identify the specific acts related to each charge. Nor did the court’s instructions inform the jury that the charges were based on separate acts. The State’s closing argument also did not allege separate conduct for each charge. Hence, this ambiguity must be resolved in Appellant’s favor, and we must vacate his sentence for reckless endangerment.

**SENTENCE FOR RECKLESS
ENDANGERMENT VACATED.**

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE CITY OTHERWISE
AFFIRMED. CASE REMANDED TO THE
CIRCUIT COURT FOR BALTIMORE
CITY TO REVISE THE COMMITMENT
RECORD. COSTS TO BE PAID ONE-
QUARTER BY THE MAYOR AND CITY
COUNCIL OF BALTIMORE AND THREE-
QUARTERS BY APPELLANT.**