Circuit Court for Anne Arundel County
Case No.: C-02-CR-21-001504

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1109

September Term, 2022

PAUL D. HARELL

v.

STATE OF MARYLAND

Wells, C.J.
Nazarian,
Storm, Harry C.
(Specially Assigned),
JJ.

Opinion by Wells, C.J.

Filed: November 7, 2023

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

Appellant, Paul D. Harell, was charged by criminal indictment in the Circuit Court for Anne Arundel County with multiple offenses related to an attempted first-degree rape during a home invasion. Prior to trial, the court granted, in part, the State's motion to admit evidence of Harell's prior rape convictions under Maryland Rule 5-404(b). Following a five-day trial, a jury convicted Harell of attempted first- and second-degree rape, first- and second-degree assault, home invasion, reckless endangerment, and wearing, carrying, and transporting a weapon. After merging lesser included offenses, the circuit court sentenced appellant to life imprisonment for attempted first-degree rape. Harell presents the following questions for our review, which we have rephrased:

1. Did the circuit court err in admitting evidence of his two prior rape convictions?

2. Did the circuit court err in accepting Special Agent Garrett Swick as an expert?

3. Was the evidence sufficient to support his convictions?

For the reasons set forth below, we affirm.

BACKGROUND

On the evening of August 12, 2021, A.F.[1] was attacked in her home in Mayo, near Edgewater, Maryland, where she lived alone. A.F., who was seventy-five years old at the time of trial, testified that she awakened in the middle of the night to someone choking her, laying on top of her, and telling her to be quiet. A.F. used her hands and feet to push her attacker off of her, and a struggle ensued. The attacker hit her on top of her head multiple

[1] We refer to the victim and other individuals by their initials to protect their privacy.

times before gaining control and placing her in a chokehold with his arm across her throat and a shiny knife in his hand. The attacker pushed her down on the bed and struck her in the side of the head with the butt of the knife while yelling, "Shut up or I'll kill you. Shut up or I'll kill you. Turn over on your stomach." At that point, she felt him push up her pajama top and try to push down her pajama bottom. A.F. was facing down on her bed with one of her attacker's arms around her throat and his other arm holding the knife, when she felt the medical alert device she was wearing pushing into her chest. She pressed the alert button and a high screeching noise sounded like a smoke alarm.

At the sound of the alarm, the attacker stood up and walked out the door. He exited her house using the back door of the basement. Through the light on her stairs, she observed that the attacker was wearing shorts, a hoodie, and construction-type boots. A.F. was unable to see any of the attacker's facial features, and she was unsure if the attacker had been wearing a mask. She noted that the attacker was at least 5'8" and felt strong and muscular to her. She did not recognize his voice. The attacker did not take his clothes off or expose his genitalia and he did not try to spread A.F.'s legs or touch any of her "private areas."

After the attack, police arrived at A.F.'s home and she was transported by ambulance to the hospital. She noticed that her leg and chest were bleeding and she "hurt all over." She also noticed that "a big chunk" of her thumbnail was missing. Sometime after the attack, A.F. noticed that a paring knife was missing from her kitchen.

Lucia Tucker, the president of Cleaning Made Easy, testified that Harell is a former employee who had cleaned A.F.'s house on August 10, 2021. She testified that Harell left

work on August 13, 2021 for a COVID-19 test.

Anne Arundel County Police Corporal Marc Musgrove responded to A.F.'s 911 call on August 13, 2021. On arrival at A.F.'s home, Corporal Musgrove found her very upset, disheveled, and bleeding from an injury to her upper chest. She told him that she had awoken to someone holding her down, and that her assailant had hit her several times on the right side of the head and held a knife to her throat during a struggle. Corporal Musgrove observed blood on the sheets and blankets, and a blood trail that extended from the bed to the bathroom and out to the living room.

Joshua Long, a neighbor who lived not far from A.F., testified that he and some friends were on his front porch in the early hours of August 13, 2021, when he saw "a gray SUV looking car" with "Masks 4 Sale" written in fluorescent paint on the rear windows. According to Long, the vehicle circled the block several times. Less than five minutes after Long last saw the car drive by, the area was "flooded" with police. Long identified the vehicle Harell was driving at the time he was arrested as the car he observed in his neighborhood on August 13, 2021.

Anne Arundel County Police Corporal Brian Slattery was on duty in the afternoon of August 13, 2021, when he received a BOLO (Be On the Look Out) for a gray vehicle with the words, "Masks 4 Sale" painted on the rear windows. Shortly after 3:30 p.m., Corporal Slattery encountered a vehicle with a Washington license plate matching the BOLO description parked at a Royal Farms convenience store in Churchton. The corporal activated his body-worn camera, took photos of the vehicle, and approached the driver, who upon request, provided his driver's license, identifying him as Harell. Harell's DNA

was later collected pursuant to a search warrant.

Detective Bryn Cunningham and Detective Nicholas Klapska of the Anne Arundel County Police Department interviewed Harell at the police station after his arrest. Harell told the detectives that on the evening of August 12, 2021, he went to the Golden Corral and the movies in Largo, and spent the night and morning of August 13, 2021 sleeping in his car in a Lothian Park and Ride. He denied knowing where Edgewater was. Harell admitted that he owned the SUV with "Masks 4 Sale" painted on the rear windshield and stated that he is the only person who drives his car and that it has never been stolen.

Detective Cunningham asked Harell about scratch marks on Harell's arms. Harell explained that he was scratched by a spring mop he used while cleaning. Detective Cunningham also asked Harell if there was any reason why his DNA would be under A.F.'s fingernails, and Harell responded that that there was no reason for his DNA to be there because he wore gloves to clean her house.

Over defense objection, Supervisory Special Agent Garrett Swick of the FBI was accepted as an expert in historic cell phone data retrieval and analysis. He testified that he analyzed the call detail records associated with Harell's cell phone number and used that data to create a map of the locations of the cell phone on August 10, 2021 between 1:00 and 3:00 p.m. and between 11:30 p.m. on August 12 and 12:26 a.m. on August 13, 2021. Special Agent Swick's cell tower analysis showed Harell's phone in the area of A.F.'s home during these periods. Special Agent Swick's analysis did not show Harell's cell phone at any of the Park and Ride locations in Lothian overnight between August 12 and 13, 2021.

Anne Arundel County Forensic Biologist Rebecca Schlisserman, an expert in forensic serology and DNA analysis, examined samples from the fingernail and fingertip swabbings taken from A.F., and compared the extracted DNA from those samples to the known DNA samples taken from both A.F. and Harell. She found that the samples contained a mixture of DNA consistent with the combined DNA profiles of A.F. and Harell. Analyst Schlisserman calculated the probability that someone other than Harell was the male contributor to the DNA mixture was one in 260 sextillion. The analyst agreed that it was possible that the DNA found in A.F.'s fingertip swabbings could have resulted from contact with DNA that Harell had left at her house while cleaning.

Over defense objection, K.R. and A.M., both rape victims of Harell, testified regarding the details of the rapes.[2] K.R. testified that on June 24, 1993 at approximately 1:30 a.m., while her husband was at work, she was asleep in her bed in Oak Harbor, Washington, with her daughter asleep next to her, when she was awakened by someone climbing on top of her. Initially, she felt someone's hands sliding over her body and assumed it was her husband, and she said, "Hey, not now." When the individual responded, she realized he was not her husband and she felt a blade against her throat. He then took off her underwear and slid her shirt over her head. While holding the blade to her throat, he inserted his penis into her vagina before ejaculating on her stomach.

After he finished, the man stood up, threw her blanket over her, and told her to stay where she was because there was someone else in the apartment who would hurt her young

[2] The trial court granted the defense request for a continuing objection to this entire line of questioning.

child in the other room if she did not comply. The rapist left the apartment after K.R. told him that she had no money. K.R. believed that the rapist had entered her apartment through an open window based on her discovery of a footprint on the back of the couch in front of the window. K.R. identified her rapist as Harell.

A.M. testified that on December 27, 1992, she was sleeping on the couch in the living room of the apartment she rented with two roommates when she was awakened by someone straddling her waist. She asked him who he was and he told her to "be quiet" and asked if anyone else was in the apartment. She felt a sharp object at her throat and a hand covering her mouth. A.M. struggled as he placed his fingers in her mouth and pushed her tongue to the roof of her mouth to keep her from screaming. She stated that it felt like her attacker was wearing leather gloves. She recounted that he removed her pajama bottoms, put his fingers in her vagina, inserted his penis in her vagina and ejaculated. When he was finished, he forced her at knifepoint to accompany him to each room and confirm that no one else was in the home. He then instructed her to undress and sit on the couch, and she was afraid that he was going to rape her again. But then they saw the headlights of her roommate's car arriving and the attacker told her that she was "lucky this time," and left through the sliding glass door. A.M. identified her rapist as Harell.

Thomas Donald Howe, Deputy Prosecuting Attorney for Pierce County, Washington, testified that in October 2016, in his role as an Assistant Attorney General in Washington, he encountered Harell. Howe recognized one true test copy of a judgment and sentence from Washington, showing that Harell had been convicted of second-degree rape of K.R., and a second true test copy of a judgment and sentence from Washington, showing

that Harell had been convicted of second-degree rape of A.M. Over objection, the State introduced a portion of a transcript from a proceeding in Washington in October 2016, in which Howe questioned Harell under oath as to the commonality of his offenses against women who were either asleep or lying down at the time of the attacks.

Harell testified that he lived in Maryland between the ages of nine and nineteen. In 1991, he joined the United States Navy and was stationed in Washington state. In 1994, at the age of twenty-two, Harell was sentenced for the rapes of K.R. and A.M. He returned to Maryland in November of 2020 and, in June of 2021, he began cleaning commercial and residential buildings for Cleaning Maid Easy. In August 2021, Harell lived in Lothian, Maryland. He testified that he was unfamiliar with Edgewater. Harell recalled that he "had a few conversations" with A.F. when he cleaned her house on August 10, 2021.

Harell testified that on August 13, 2021, he owned a 2012 Ford Escape that had "Masks 4 Sale" written on the window. He stated that he removed the "Masks 4 Sale" lettering from the car on August 15, 2021. Harell had his cell phone in his sole possession between August 12 and 17, 2021. According to Harell, the "spec sheet" that he used for cleaning A.F.'s home indicated that her home was unlocked. Though Harell had been to Edgewater to clean A.F.'s home, he told Detective Klapska that he had never been to Edgewater.

Harell recognized the photos taken by police on August 17, 2021, showing him with a colostomy bag. He has had a colostomy bag for seven years and was wearing it on August 12 and 13, 2021. On August 14, 2021, Harell received treatment at Patient First for a scratch on his eye. When Harell met with police on August 17, 2021, he had a scratch on his arm.

He stated that he had marks on his hands on August 17, 2021, but those marks were the result of a skin condition, and not scratches.

Harell testified that in the course of therapy, he had admitted raping K.R. and A.M. He acknowledged that when he decided to rape K.R. and A.M., he knew that they were asleep, and, in both cases, he obtained a knife and held it to their throats. He recalled threatening K.R. and A.M., and stated that the knife was helpful in controlling both women. Harell denied that he was motivated, in part, by the thrill of waking up K.R. and A.M. with a knife and scaring them.

As indicated, the jury found Harell guilty of all charges. He noted a timely appeal.

DISCUSSION

I.

A.

Evidence of Prior Convictions

Harell contends that the circuit court erred in admitting evidence relating to his two prior rape convictions. He argues that the trial court erroneously disregarded the age of the prior convictions, and the convictions were not similar enough to the crime for which he was tried to render them probative of his intent or provide any other special relevance to the crimes charged. He further asserts that the trial court failed to consider the prosecution's need for the prior rape convictions in evaluating the probative value of that evidence against the danger of unfair prejudice to him. Harell also contends that the circuit court abused its discretion in denying his motion for a new trial on the grounds that the testimony regarding the prior rape convictions exceeded the scope of the trial court's ruling.

The State responds that the circuit court properly found that the evidence of the prior rapes had special relevance to show Harell's intent, an element of several of the crimes charged, and a contested issue at trial. The State argues that the evidence was also admissible to establish Harell's identity and *modus operandi*. The State points out that the motions court considered the age of Harell's prior convictions as a factor in performing the balancing test, and the circuit court's determination that the probative value of the evidence outweighed the risk of unfair prejudice was not an abuse of discretion. The State further contends that the evidence was necessary to rebut Harell's defense that he did not intend to rape A.F., and the probative value of the evidence was not outweighed by the danger of unfair prejudice.

Maryland Rule 5-404(b) prohibits the admission of evidence of "other crimes, wrongs, or acts" for the purpose of proving a defendant's "action in the conformity, therewith." As such, "'evidence of a defendant's prior criminal acts may not be introduced to prove that he is guilty of the offense for which he is on trial.'" *State v. Faulkner*, 314 Md. 630, 633 (1989) (quoting *Straughn v. State*, 297 Md. 329, 333 (1983)). The rule "is designed to protect the person who committed the other crimes . . . from an unfair inference that he or she is guilty not because of the evidence in the case, but because of a propensity for wrongful conduct." *Winston v. State*, 235 Md. App. 540, 563 (2018) (quotation marks and citation omitted). Other crimes may be admissible, however, where "the evidence is 'specially relevant' to a contested issue" other than propensity, "such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident." *Burris v. State*, 435 Md. 370, 386 (2013) (quoting Rule 5-404(b)).

See also Odum v. State, 412 Md. 593, 609 (2010); *Hurst v. State*, 400 Md. 397, 407–08 (2007).

Other crimes evidence is subject to a three-part analysis before it is admitted. "First, the Court must determine whether the evidence fits into one or more of the exceptions." *Vaise v. State*, 246 Md. App. 188, 207–08 (2020) (quoting *Darling v. State*, 232 Md. App. 430, 463 (2017) (further citations omitted). This is a legal determination. *Id*. at 208 (quotation marks and citation omitted). Second, it must be established by clear and convincing evidence that the prior act occurred. *Id*. We review this finding to determine whether sufficient evidence exists to support the court's decision. *Id*. Third, the court must find that the probative value of the evidence outweighs the danger of unfair prejudice. *Id*. We review this finding for abuse of discretion. *Id*.

In this case, the State moved in limine for permission to introduce Harell's prior rape convictions as evidence of his motive, intent, common scheme or plan, and absence of mistake. At the pre-trial motions hearings, the State called K.R. and A.M., who testified regarding the details of their rapes. The State also called Thomas Howe, the prosecutor who tried the two prior rape cases, and the State introduced copies of Harell's prior rape convictions from Washington.

In deciding the motion, the court undertook the requisite three-step analysis and determined that the two prior rape convictions had special relevance as to Harell's intent and *modus operandi*.[3] The court noted that the State was required to prove Harell's intent

[3] At trial, the court granted Harell's request for a continuing objection to the entire line of questioning regarding the prior rapes.

"when he broke in, when he went into the house, . . . when he ended up [in] the bedroom," and "whether he had a weapon in his hand." Further evidence of intent was required to show his "intent when he was on top of the victim and . . . as he attempted to pull down her clothes." The court found that this case was "similar enough to the other cases" that the evidence of prior crimes was admissible to show Harell's intent.

We have recognized that evidence of a prior rape, and an assault with intent to rape, are admissible to prove the defendant's intent to rape the victim. *See, e.g.*, *Simms v. State*, 39 Md. App. 658, 671 (1978). In *Simms*, this Court held that evidence of a prior rape and a prior assault with intent to rape bore a "striking similarity" to each other and to the murder of the victim in the case. *Id.* at 670. We noted that all three crimes were committed within the same neighborhood, against young women waiting for buses in the early morning hours, by an assailant armed with a gun. *Id.* at 670. As to the two prior cases, both victims identified the defendant as their assailant and testified that his method of attack was the same: he forced both women to walk with him by placing his arm around their waist while pressing a gun into their sides. *Id.* at 670. The victim of the attempted rape was able to escape the defendant before he raped her. *Id*. at 670–71. We explained that "[b]ecause one's intent is subjective in nature, proof is seldom direct but is usually inferred from proven circumstances." *Id.* at 671 (citing *Weaver v. State*, 226 Md. 431, 434 (1961)). We concluded that, based on the similarities of the prior crimes, a reasonable inference could be drawn that the defendant assaulted the victim with the intent to rape her. *Id.*

In this case, intent was an element of the charges of attempted rape and home invasion, and the circuit court properly instructed the jury that the State was required to

prove that Harell had the intent to commit those crimes. Based on the similarities between the attacks on K.R. and A.M., the jury could reasonably infer that Harell intended to rape A.F.; the only difference was that A.F. managed to escape him by sounding her medical alert alarm.

The court also determined that evidence of the two prior rapes was admissible based on their special relevance as to *modus operandi*. With respect to *modus operandi*, the court pointed out the similarities of the manner in which the attacks occurred: at nighttime, with knives, and while the victims were asleep. There were also similarities in the manner in which Harell entered the homes, the vulnerability of the victims while sleeping, and the way they woke up with him on top of them. Indeed, evidence that is "so nearly identical in method as to earmark them as the handiwork of the accused," is the type of "'signature crime' evidence" that "is useful in identifying a defendant who claims that he was not the person who committed the crime." *Hurst*, 400 Md. at 414 (quoting *Faulkner*, 314 Md. at 638).

As to the second step, the court found that Harell's involvement in the prior rapes was not in dispute based on the true test copies of the prior convictions and the testimony of the prior victims. Contrary to Harell's argument that the motions court failed to consider the age of the prior convictions, the record shows that the court addressed this argument in its analysis. The motions court stated that it was "not persuaded by the argument that the age of the cases means that the [c]ourt should not consider . . . these crimes as potential other crimes evidence under the statute or the case law." In considering the age of the prior offenses, the court subtracted from the analysis the sixteen years that Harell was

incarcerated, and calculated the offenses as occurring in 2009, or thirteen years prior. The court determined that there was no basis for excluding the prior convictions based on the amount of time that had elapsed between the prior convictions and the current charges. The court explicitly stated that the age of the offenses would factor into the court's analysis of whether the prior convictions were admissible as exceptions under Rule 5-404(b).

Regarding the third step of the analysis, the circuit court balanced the probative value against the risk of unfair prejudice in admitting the evidence, analyzing the facts of each of the three prior rapes separately.[4] With respect to K.R. and A.M., the court noted that Harell had a familiarity with each of the victim's locations; he was alleged to have peeped in both houses before breaking in. He had previously been inside K.R.'s house. He accessed both women's homes through a back door or window and attacked them at night, using a knife, while they were asleep and vulnerable. Like K.R. and A.M., when A.F. awoke, Harell was on top of her and there was little she could do to fight back. Evidence of Harell's prior rapes was highly probative in establishing that he had utilized a similar method in attacking A.F. while she was asleep and vulnerable, and that he perpetrated his attack with the intent to rape her. The court did not err in determining that the two prior rapes were specially relevant to show Harell's intent to break into A.F.'s house and rape her using substantially the same *modus operandi* that he had used in his prior offenses.

[4] The court excluded evidence of the third prior rape against M.V., finding that there were differences between the *modus operandi* in that case and the attack on A.F., specifically the lack of evidence that Harell was familiar with M.V.'S house and or that he had formed the intent to rape her before entering the house.

We also conclude that the evidence of the prior rapes was not unfairly prejudicial. Though the evidence of the two rapes was, of course, prejudicial, the probative value of the evidence outweighed the risk of unfair prejudice. *See Odum*, 412 Md. at 615 ("The more probative the evidence is of the crime charged, the less likely it is that the evidence will be unfairly prejudicial."). We are unpersuaded by Harell's argument that the trial court failed to consider that the State did not need the "inflammatory" evidence of the prior rapes to show intent. As we have explained, "[p]robative value does not depend on necessity. . . . [T]here is no downside to making a strong case even stronger." *Cousar v. State*, 198 Md. App. 486, 517 (2011) (quoting *Oesby v. State*, 142 Md. App. 144, 166–67 (2002)).

To address the possibility that the jury could consider the evidence for propensity purposes, the court emphasized the limited purpose of the evidence:

> Other crimes or acts to prove motive, intent, or identity: You have heard that the Defendant committed the other crimes of—other crimes of a sexual nature, which is not a charge in this case. You must consider this evidence only on the question of identity, motive, or intent. However, you may not consider this evidence for any other purpose. Specifically, you may not consider it as evidence that the Defendant is of bad character, or has a tendency to commit crime.

In light of the court's instruction, we presume the jury appropriately viewed the other crimes evidence for the limited purpose of showing Harell's intent and his *modus operandi*. "Maryland courts long have subscribed to the presumption that juries are able to follow the instructions given to them by the trial judge, particularly where the record reveals no overt act on the jury's part to the contrary." *Spain v. State*, 386 Md. 145, 160 (2005). Here, the trial court did not abuse its discretion in finding that the probative value

of the two prior rapes was not substantially outweighed by the potential for unfair prejudice.

B.

Motion for a New Trial

Harell argues that he was entitled to a new trial because the trial court erred in admitting testimony of A.M. and K.R. regarding his conduct after he had raped them. Specifically, he argues that the trial court's ruling limited the admission of other crimes evidence to facts pertaining to Harell's conduct leading up to the rapes of A.M. and K.R. He asserts that A.M.'s testimony that she believed he intended to rape her a second time before her roommates arrived home, and K.R.'s testimony that he threatened that a second person was in her home who would harm her child if she did not "stay where she was" after the rape, exceeded the scope of the trial court's ruling on the admissibility of that evidence.

The State counters that Harell did not request a limitation regarding the testimony of A.M. and K.R., either at the motions hearing or at trial, and his continuing objection to the other crimes evidence at trial was not sufficient to preserve this issue for appeal. The State further argues that the court was well within its discretion in denying Harell's motion for a new trial.

Maryland Rule 4-331(a) provides: "[o]n motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial." We ordinarily review a court's decision to deny a motion for a mistrial for abuse of discretion. *Williams v. State*, 462 Md. 335, 344 (2019). Where, however, "an alleged error is committed during the trial, when the losing party or that party's counsel, without fault,

does not discover the alleged error during the trial, and when the issue is then raised by a motion for a new trial, we have reviewed the denial of the new trial motion under a standard of whether the denial was erroneous." *Merritt v. State*, 367 Md. 17, 31 (2001). Here, Harell's argument is based on facts known to him or his counsel during trial, and therefore, we review the trial court's decision for abuse of discretion.

In denying Harell's motion for a new trial, the court stated:

> Now, I do not believe at the time that I made the ruling that I made any particular limitations on the testimony that was going to be offered. I believe what I discussed was, any differences between the cases that occurred after the – it was the similarities of the cases leading up to the rape that compelled the [c]ourt, or the [c]ourt found compelling to admit the evidence. I don't believe I said it had to stop at the very instance of a rape.

We find no support in the record for Harell's assertion that the motions court limited the admissibility of other crimes evidence to the events that preceded the rapes of A.M. and K.R. At the motions hearing, A.M. testified that she believed that Harell intended to rape her a second time, and K.R. testified that Harell told her that if she did not cooperate with him, there was a second person in the house who would hurt her child in the other room. The motions court denied Harell's objection as to the admission of evidence regarding A.M. and K.R., finding that "they fit squarely under an exception and the probative value outweighs any prejudice." Harell did not request a limitation on the other crimes evidence, and no limitation was given. His argument that the testimony of A.M. and K.R exceeded the scope of the trial court's ruling is therefore without merit. Accordingly, the circuit court did not abuse its discretion in determining that a new trial was not in the interests of justice.

II.

Expert Designation of Special Agent Swick

Harell contends that the trial court erred in accepting Special Agent Swick as an expert in historic cellular record analysis, specifically with respect to the use of GAR testing to determine cell tower coverage. He asserts that Special Agent Swick lacked the training, experience and knowledge required to testify as an expert regarding the cellular data evidence in this case.

Generally, evidence relating to cell phone location mapping requires expert testimony. *See State v. Payne*, 440 Md. 680, 701–02 (2014) (holding that trial court erred in failing to qualify police detective as an expert before admitting his testimony regarding defendants' location based upon the information from call detail records and cell tower locations); *Coleman-Fuller v. State*, 192 Md. App. 577, 619 (2010) (holding that it was "clearly error" for trial court to allow police detective's lay testimony that defendant's cell phone records showed his location near murder scene); *Wilder v. State*, 191 Md. App. 319, 356, 364–65 (2010) (reversing defendant's convictions because the court failed to qualify police detective as an expert where he testified he tracked the defendant's locations using GPS or "cell tower hits").

"'[T]he admissibility of expert testimony is a matter largely within the discretion of the trial court, and its action in admitting or excluding such testimony will seldom constitute a ground for reversal.'" *Santiago v. State*, 458 Md. 140, 153–54 (2018) (quoting *Roy v. Dackman*, 445 Md. 23, 38–39 (2015) (further citations omitted). A trial court's decision to admit or exclude expert testimony will not be reversed "absent an error of law

or fact, a serious mistake, or clear abuse of discretion." *Gross v. State*, 229 Md. App. 24, 32 (2016) (quotation marks and citations omitted).

Maryland Rule 5-702 governs the admissibility of expert testimony and provides:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

In this case, Harell's challenge focuses on the first factor of the analysis—whether Special Agent Swick was qualified to testify as an expert. In assessing a potential expert's qualifications, "[t]he trial court is free to consider any aspect of a witness's background in determining whether the witness is sufficiently familiar with the subject to render an expert opinion, including the witness's formal education, professional training, personal observations, and actual experience." *Stevenson v. State*, 222 Md. App. 118, 136 (2015) (quoting *Massie v. State*, 349 Md. 834, 851 (1998)). In order to qualify as an expert, "one need only possess such skill, knowledge, or experience in that field or calling as to make it appear that [the] opinion or inference will probably aid the trier [of fact] in his search for the truth." *Donati v. State*, 215 Md. App. 686, 742 (2014) (quotation marks and citations omitted). "It is sufficient if the court is satisfied that the expert has in some way gained such experience in the matter as would entitled his evidence to credit." *Blackwell v. Wyeth*, 408 Md. 575, 619 (2009) (quotation marks and citations omitted).

With respect to Special Agent Swick's qualifications, he testified that he is a twelve-year veteran of the FBI. In 2018, he began his training for the Cellular Analysis Survey Team ("CAST") by completing a basic training course covering "the basics of looking at the call detail records, an[d] utilizing those records to plot out the device activity on a map." Next, he completed an advanced course, which was "a deeper dive into the records from the providers," which included "learning the nuances of each provider's records," and the "issues . . . that come up with them." He also learned how to "properly present those records on a map so it's . . . understandable." He was also selected to attend the critical incident readiness assessment to assist with finding missing persons in conjunction with the Child Abduction Rapid Deployment team. That training consisted of a three-day course designed to assess a trainee's ability to analyze and request records in high pressure situations.

Special Agent Swick testified that he was selected to attend the certification course, which he described as follows:

> From there I was chosen to go on to the certification course, which is two, two week courses that begins with a week of learning about RF, Radio Frequency technology from professors from the Florida Institute of Technology. The second week we meet with all the major phone providers, we meet with their engineers, as well as their custodians of record so that we can learn about how their systems work, and how their networks work, the data or records [they will] provide us to do our job.
>
> *The second two-week course, . . . the first week is using our [G]ladiator [A]utonomous [R]eceiver, which is the same equipment the phone companies use to go out and assess the coverage of their towers. So we essentially place receivers on the tops of our vehicles or you can carry it, it's a mobile piece of equipment. And you just cover the whole area around a tower and it will give you a print out of the, or of, I should say a display of the coverage area of that tower.*

> Then the second week we take a case and we work it from beginning to end, ultimately ending in a moot court scenario. If you perform well during these courses[,] you are then certified as a CAST agent from there. Most of our agents maintain their jobs in the field, . . . and they do it as a collateral duty. That wasn't the path I took, I do work in the CAST Unit, so that is my, this is my full time job that I do right now.

(Emphasis added.) The GAR technology portion of the training consisted of sixteen hours of classroom training and between sixteen and twenty-four hours of practical training using the equipment Special Agent Swick received his certification in September of 2021. Since his certification, he has analyzed approximately 140 telephones or devices. Prior to certification, he analyzed as many as 300 devices in approximately sixty cases, many of which involved multiple devices. Following his certification, he has used GAR in his field work on three occasions, one of those occasions was his work in this case. He explained that "[w]e only use [GAR] when it is warranted, which is not frequent."

Special Agent Swick taught the CAST basic training course five times. CAST training requires recertification every year on call detail records, and he was recently recertified in March 2022. A representative from Gladiator Forensics, the owner of GAR technology, was present at the recertification to provide any necessary updates to the technology. Special Agent Swick works in the unit that maintains all of the GAR machines. The GAR equipment is routinely used by other CAST agents in the field, and Special Agent Swick has assisted other agents with the use of GAR.

Special Agent Swick had testified as an expert in historical cellular record analysis five times: in Baltimore City, Baltimore County and the United States District Court for the District of Maryland in Baltimore. He had not previously been accepted in court

proceedings as an expert in GAR technology or the use of GAR technology, nor had he written any articles or presented at any scientific or engineer conferences on the use of GAR.

During voir dire, defense counsel asked Special Agent Swick if he knew the error rate for the GAR technology. He responded that he did not understand the reference to "error rate," because the technology works just like the antennas in cell phones by reading the signals it finds. He further stated, "I don't believe there is an error rate associated with that. If there is, I do not have knowledge of what that error rate is."

In accepting Special Agent Swick as an expert in the field of historical cellular record analysis, the court stated that "it certainly sounds like he was qualified, he's taken coursework, he's used it in the past[,]" and "if he is properly trained and qualified, I think it goes to weight as opposed to admissibility."

The record establishes that Special Agent Swick had gained sufficient knowledge, skill, and experience through this twelve-year career as an FBI agent and his specialized training in the CAST program to provide expert testimony regarding historical cellular record analysis and the use of GAR technology in this case. *See, e.g.*, *Stevenson v. State*, 222 Md. App. 118, 135–36 (2015) (holding that the trial court did not abuse its discretion in qualifying a detective as an expert in "call detail record analysis, call detail interpretation and cell site mapping," where he had "extensive first-hand training and experience in analyzing cell phone call detail data"); *see also Blackwell*, 408 Md. at 618–19 (" . . . a witness may be competent to express an expert opinion if he is reasonably familiar with the subject under investigation, regardless of whether this special knowledge is based upon

professional training, observation, actual experience, or any combination of these factors[.]"(quotations and citation omitted)).

The fact that Special Agent Swick had not previously been qualified as an expert in historical cellular record analysis was not a basis for disqualification. *See, e.g.*, *Donati*, 215 Md. App. at 742–43 (affirming the trial court's acceptance of the qualifications of an expert witness in digital cell phone forensics, even though the witness lacked post-graduate degrees in computer science and had not testified previously). Given Special Agent Swick's FBI qualifications, and his specialized experience in the CAST program using GAR, we conclude that the circuit court did not abuse its discretion in determining that Harell's challenges to accuracy of the GAR testing, and Special Agent Swick's proficiency in the use of that technology, went to the weight, rather than the admissibility, of his testimony. *See Ditto v. Stoneberger*, 145 Md. App. 469, 495 (2002) ("Objections attacking an expert's training, expertise, or basis of knowledge go to the weight of the evidence and not its admissibility." (quotation marks and citation omitted)).

III.

Sufficiency of the Evidence

Harell contends that the evidence was insufficient to sustain his convictions.[5] Specifically, he argues that the evidence failed to place him at the scene of the crime and

[5] Harell states that the evidence was insufficient to support his conviction for wearing, carrying and transporting a weapon, but because he fails to provide any argument in support of his contention, we decline to address it. *See Honeycutt v. Honeycutt*, 150 Md. App. 604, 618 (2003) (when a party fails to adequately brief an argument, this Court may decline to address it on appeal).

failed to establish that he broke into A.F.'s house and assaulted her with the intent to rape her.

The State responds that Harell's challenge to the sufficiency of the evidence is preserved only as to the home invasion conviction. The State argues that he failed to preserve his sufficiency challenge as to the assault and reckless endangerment charges because he submitted at trial that the evidence was sufficient as to those charges. With respect to the convictions for attempted first and second-degree rape, the State contends that Harell failed to challenge the identity evidence in connection with the attempted rape charges. The State asserts that he argued lack of identity only with regard to the home invasion charge. Alternatively, the State contends that the evidence presented at trial was sufficient to support his convictions.

Maryland Rule 4-324(a) provides, in pertinent part: "A defendant may move for judgment of acquittal on one or more counts . . . at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. The defendant shall state with particularity all reasons why the motion should be granted." In moving for judgment of acquittal, "alleged deficiencies in the evidence must be pointed out 'with particularity' at the time of trial in order to preserve for appellate review a challenge to the sufficiency of the evidence." *Mulley v. State*, 228 Md. App. 364, 387 (2016). Arguments made for the first time on appeal are not entitled to appellate review. *Redkovsky v. State*, 240 Md. App. 252, 261 (2019). In some cases, however, "a motion for judgment of acquittal may be sufficient to preserve an issue where the acquittal argument generally includes the issue raised on appeal." *Id.*

We agree with the State that because Harell submitted that the evidence was sufficient to support the charges of first- and second-degree assault and reckless endangerment, he failed to preserve his challenge as to those charges. With respect to the attempted first- and second-degree rape charges, however, he argued in support of acquittal that A.F. could not identify her attacker, and he argued generally that the DNA evidence was insufficient to establish his identity as the assailant. We deem those arguments sufficient to preserve his challenge to the sufficiency of the DNA evidence as it relates to the attempted first- and second-degree rape charges as well as the home invasion charge.

In reviewing a challenge to the sufficiency of the evidence, we "examine the record solely to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" and view the evidence and reasonable inferences therefrom "in the light most favorable to the State." *State v. Wilson*, 471 Md. 136, 159 (2020) (quoting *Fuentes v. State*, 454 Md. 296, 307 (2017)). "Because the fact-finder possesses the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence." *Redkovsky*, 240 Md. App. at 262–63 (quoting *Tracy v. State*, 423 Md. 1, 12 (2011)). Rather, we defer to any reasonable inferences a jury could have drawn in reaching its verdict and decide whether the evidence supported those inferences. *Id.* at 263 (citation omitted). We do not consider any exculpatory inferences that may be drawn from the evidence because those inferences are not part of the version of the evidence most favorable to the State. *Cerrato-Molina v. State*, 223 Md. App. 329, 351 (2015).

Viewing the evidence in the light most favorable to the State, the jury could reasonably find that Harell was the person who broke into A.F.'s home and attacked her with the intent to rape her. As for the evidence identifying Harell as A.F.'s assailant, the DNA evidence before the jury established that the likelihood that the DNA found on A.F.'s fingernails and fingertips belonged to her and someone other than Harell was one in 260 sextillion. According to Long, in the early morning hours of August 13, 2021 "a gray SUV looking car" with a sign on the window advertising "Masks 4 Sale" drove back and forth in the vicinity of A.F.'s house several times over the course of ten minutes. In the afternoon of August 13, 2021, Detective Slattery approached a gray vehicle with writing on the rear window stating, "Masks 4 Sale" at a Royal Farms in Churchton and determined that the driver was Harell. When interviewed by police, Harell confirmed that he had written the words "Masks 4 Sale" on the rear window of his vehicle. Special Agent Swick's expert analysis of Harell's cell phone records established that, between the hours of 11:56:09 p.m. on August 12, 2021 and 12:26:09 a.m. on August 13, 2021, Harell's cell phone was located on the peninsula where A.F.'s home was located.

With respect to intent, the evidence showed that A.F. awoke in the middle of the night to someone choking her and laying on top of her. The assailant struck her in the head and held a knife to her while restraining her in a chokehold, forcing her on her stomach, and attempting to push her top up and her bottoms down. The jury could have found that A.F.'s assailant broke into her home and overtook her while she was sleeping, similar to the *modus operandi* Harell admitting to using to gain control of K.R. and A.M. before he raped them. The jury could also have found that the evidence established that Harell was

A.F.'s assailant and that he was preparing to rape her in the same manner he had raped K.R. and A.M.

Harell's explanations for the presence of his DNA on A.F.'s fingertips and fingernails, the scratches on his arms, and his activities in Largo and Lothian on the night A.F. was attacked were issues for the jury to consider and weigh against the State's evidence. Those are not issues for us to consider in assessing the sufficiency of the evidence. In this case, the evidence considered by the jury was sufficient to sustain Harell's convictions.

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