Circuit Court for Garrett County
Case No. C-11-CR-18-000135

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2573

September Term, 2019

JAMES PTOMEY

v.

STATE OF MARYLAND

Leahy,
Reed,
Beachley,

JJ.

Opinion by Beachley, J.

Filed: May 28, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Following a two-day trial in the Circuit Court for Garrett County, a jury convicted appellant James Ptomey of attempted first-degree murder and violation of a protective order. The court sentenced appellant to twenty-five years' imprisonment for attempted first-degree murder, and thirty days concurrent for violation of the protective order. Appellant timely noted an appeal to this Court and presents the following issues for our review, which we have slightly rephrased and consolidated as follows:

I. Did the trial court err by allowing evidence of Ms. Ptomey's in-court identification of the mask allegedly worn by her assailant, where it had granted appellant's pre-trial motion to suppress the identification, and the State made no pre-trial motion for reconsideration?

II. Did the trial court err by denying appellant's motion for judgment of acquittal?

Although we hold that the trial court committed error by allowing evidence of Ms. Ptomey's in-court identification of the mask, we conclude that the error was harmless beyond a reasonable doubt. Additionally, we hold that the court did not err in denying appellant's motion for judgment of acquittal. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Nancy Ptomey, the victim in this case, had been married to appellant for approximately twenty-four years prior to the events that brought about the charges in this case.[1] On August 28, 2018, both Ms. Ptomey and appellant appeared in court wherein Ms. Ptomey obtained a temporary protective order against appellant. After her work shift on

[1] Ms. Ptomey testified that, following appellant's arrest, she filed for "an automatic divorce."

September 7, 2018, Ms. Ptomey decided to stay in a motel for the night, rather than her home, "because [she] had a bad feeling." At the time, Ms. Ptomey and appellant were living separately. The following day, she returned home at approximately 11:00 a.m. As soon as she entered her house, she checked her landline phone to see if it was working because, according to Ms. Ptomey, appellant previously "had it shut off." After unsuccessfully attempting to contact the phone company, Ms. Ptomey began preparing for work when she heard a knock at her front door. Ms. Ptomey opened the door and saw a man wearing a gold and black mask holding a wooden object.[2] He immediately said, "bitch, I'm going to kill you." Ms. Ptomey recognized the man's voice as appellant's. The man then began striking Ms. Ptomey with the object. The assault continued in the dining room of Ms. Ptomey's home, where the man struck Ms. Ptomey with the object, kicked her in the ribs, punched her in the face, and repeatedly slammed her up against a bookshelf. According to Ms. Ptomey, the attacker then went to the kitchen to retrieve a knife, allowing her an opportunity to escape by running out the front door.

Once Ms. Ptomey made it to the road outside her home, she collapsed. After two cars passed her, a third car finally stopped. Ms. Ptomey told the occupants that her husband was trying to kill her, and they called 9-1-1. Police arrived, and Ms. Ptomey was taken to Garrett Memorial Hospital for medical treatment.

[2] Ms. Ptomey was not able to identify the object, but referred to it as both a "bat" and a "club" at trial.

Later that day, appellant was arrested. On November 7, 2018, the State charged appellant by way of criminal information with attempted first-degree murder, first-degree assault, second-degree assault, and violation of a protective order. As noted above, the jury convicted appellant of attempted first-degree murder and violation of a protective order. We shall provide additional facts as necessary to inform our analysis.

DISCUSSION

Appellant argues that the circuit court erred in allowing Ms. Ptomey's in-court identification of the mask he allegedly wore during the attack despite the fact that the suppression court granted his pre-trial motion to suppress that identification. We agree, but conclude that the court's error was harmless beyond a reasonable doubt. We also conclude that the evidence was sufficient to sustain appellant's conviction for attempted first-degree murder.

I. THE COURT ERRED BY VIOLATING ITS SUPPRESSION RULING, BUT THAT ERROR WAS HARMLESS

Prior to trial, appellant filed a motion to suppress, among other things, "an out-of-court identification made by [Ms. Ptomey] on September 8, 2018 of a picture of a mask sent by D/Sgt. Sigmund to Ms. Ptomey's relative, Jennifer [Ptomey[3]]." On February 27, 2019, the circuit court held a suppression hearing on that motion. At the hearing, Detective

[3] The motion refers to this person as "Jennifer Larue." Elsewhere in the record, including in appellant's own brief to this Court, she is referred to as "Jennifer Ptomey." It is clear from context that the parties have construed Jennifer Larue and Jennifer Ptomey to be the same person—appellant and Ms. Ptomey's daughter, Jennifer. For clarity, we shall refer to her as Jennifer Ptomey.

Sergeant Michael Sigmund of the Maryland State Police, Criminal Enforcement Division in the Western Region, testified that he received a call at approximately 2:00 p.m. regarding the attack on Ms. Ptomey, and that he responded to the hospital in order to interview her. During this interview, Ms. Ptomey told Sgt. Sigmund the details of her attack, including the fact that her attacker was wearing "a black and gold color mask." Notably, the only description Ms. Ptomey provided at that time was that the mask was a black and gold colored face mask.

After transporting Ms. Ptomey to her residence, Sgt. Sigmund went to the Dollar General store in McHenry because, according to Lisa Larue, one of Ms. Ptomey and appellant's daughters, appellant had been in that store that morning. While at the Dollar General, Sgt. Sigmund was able to review video surveillance footage which showed appellant, Ms. Larue, and Ms. Larue's child enter the store at approximately 10:56 a.m. The video showed that, at approximately 11:02 a.m., appellant approached one of the cash registers while holding a gold-colored mask in his hand. One of the Dollar General employees then took Sgt. Sigmund to the mask section of the store and showed Sgt. Sigmund what he believed was the same mask that appellant was holding in the surveillance footage.

Sgt. Sigmund took photographs of the mask with his phone, and after leaving the store, he texted the picture of the mask to Ms. Ptomey's daughter, Jennifer Ptomey, whom Sgt. Sigmund knew was with Ms. Ptomey at the time. Sgt. Sigmund told Jennifer Ptomey that he believed the photograph depicted the same type of mask appellant purchased at the

store, and asked Jennifer to show the picture to Ms. Ptomey to see if it matched the description of the mask her attacker wore. Sgt. Sigmund then called Ms. Ptomey, and she "identified it as being positively -- that it was the mask the suspect was wearing at the time of the crime."

Continuing his investigation, Sgt. Sigmund later returned to the Dollar General to obtain the video surveillance footage. During that visit, he was also able to obtain the receipt for appellant's September 8, 2018 transaction. The receipt indicated that appellant purchased a "skull mask," and the SKU[4] number of the mask appellant purchased matched the SKU number of the mask Sgt. Sigmund photographed and forwarded to Ms. Ptomey.

Appellant argued that Ms. Ptomey's out-of-court identification of the mask should be suppressed because the photograph was unnecessarily suggestive, and because her initial description of it being "black and gold" was inaccurate in that she failed to articulate that it was actually a skeleton or skull-like mask. Appellant also argued that Ms. Ptomey's identification was tainted by Sgt. Sigmund's indication to her that he was sending her a picture of "*the* mask." Accordingly, appellant argued that Ms. Ptomey should not be allowed at trial to identify the photograph of the mask in question as identical to the one her attacker wore.

In ruling on appellant's motion to suppress Ms. Ptomey's identification of the mask, the court stated:

[4] Although not explained at the suppression hearing, it seems apparent that an "SKU number" is a number used to identify a specific store item.

> There is another issue related to [Ms. Ptomey's] identification of the mask that was shown to her in a photograph and which she then identified. The identification prior to seeing a photograph of that alleged mask was that it was black and gold, and that was nothing more. There was . . . no indication as to the composition of it, whether it was a ski-type mask, it's made out of knit material, or a plastic Halloween-type mask. There's no indication. It's, simply, black and gold is the only description that Ms. Ptomey gives.
>
> The typical way in the case -- in the case law on this matter would indicate that normally the law enforcement would present a photo array to the alleged victim. And, certainly, while it may not have been available to have black and gold items in a photo array, there were, certainly, other masks available. At that time, the product SKU had not been identified as to which mask it was. You could -- the officer testified he could somewhat see which mask he purchased, but, other than that, there was no other identification. I think most telling is that after [showing] the single photograph of a black and gold skull mask to [Ms. Ptomey], she then uses the word *skull* in referring to this mask. I think that that shows that it was suggestive to her. In showing her a single photograph of a single black and gold mask in this case, I think that the reliability of her testimony is somewhat suspect because after seeing the single photograph, her description of the mask becomes much more specific and much more precise.
>
> So, with respect to [Ms. Ptomey's] identification of the mask in this case, I am going [to] grant the suppression motion in this matter. I think that the showing of a single photograph of a mask that was purchased by [appellant], contemporaneously, was overly suggestive to the alleged victim in this case as evidence[d] by her reference to it then being a skull mask, which seems to be something that she, certainly, could have easily used to describe[] that mask prior to seeing a photograph . . . sent to her from Trooper Sigmund.

In other words, the court excluded Ms. Ptomey's out-of-court identification of the photograph of the mask, and precluded her from making any subsequent in-court identification of the mask because "the showing of a single photograph of a mask" was "overly suggestive" to her, rendering "the reliability of her testimony [to be] somewhat suspect."

Appellant argues that "the court permitted the State to solicit Ms. Ptomey's identification of the mask at trial, directly violating its pre-trial ruling." Indeed, at trial—before the same judge who presided over the suppression hearing—the following colloquy took place during the State's direct examination of Ms. Ptomey:

> [THE STATE]: Now, you told the ladies and gentlemen of the jury that when you opened this door, obviously, there was someone there. Do you recall how he was dressed?
>
> [MS. PTOMEY]: Yes. He had on a gold and black mask, a blue, like a bluish-gray long sleeve shirt and jeans.
>
> [THE STATE]: And what did you recall about the mask when you were talking to the police.
>
> [MS. PTOMEY]: That it was gold.

Appellant's counsel then asked to approach the bench to object, arguing that Ms. Ptomey's testimony was inadmissible because the court had granted appellant's motion to suppress her identification of the mask:

> [DEFENSE COUNSEL]: At this point, I would like to note my objection based on the prior motions that I've made to limit the State from using the identification of the mask. We established pretrial and Your Honor upheld our motion pretrial that the detective showed [Ms. Ptomey] a mask, a picture of the mask, *and that tainted her identification of that mask*, and I'm objecting again, and I want it noted that we are objecting to any in-court identification of the mask because it has already been tainted by the pretrial identification of that mask.
>
> THE COURT: Any -- anything from the State?

[THE STATE]: I'll lay a foundation. If she recognizes that mask here in the courtroom today because it's the one that was worn as opposed to any other reason, I mean, that's the process for her to identify the mask.

THE COURT: Okay. Objection's overruled.

[DEFENSE COUNSEL]: Thank you, Your Honor.

THE COURT: All right.

(Emphasis added).

The State then proceeded to show Ms. Ptomey State's Exhibit 23, a mask Sgt. Sigmund purchased from the Dollar General which matched the SKU number of the mask appellant purchased.

[THE STATE]: Ms. Ptomey, I'm handing you a package marked for identification as State's Exhibit No. 23, and I'm going to ask you if you can remove the item from that package, please. Can you look -- can you just look at that item and tell me if that item is familiar to you?

[MS. PTOMEY]: Yes.

[THE STATE]: *And how is that item familiar to you?*

[MS. PTOMEY]: *He wore a mask similar to that.*

[THE STATE]: *And how do you recognize that mask here today?*

[MS. PTOMEY]: *Because I have seen him wear it, and, like, I can't get that out of my head.*

(Emphasis added).

At the outset, we note that defense counsel's objection was arguably premature. Ms. Ptomey's initial testimony that the mask her attacker wore was "gold and black" was consistent with the description she provided to law enforcement before she received the suggestive photograph from Sgt. Sigmund, and therefore did not contravene the court's pre-trial ruling. Shortly after the court overruled defense counsel's objection, however, the State went on to show Ms. Ptomey the mask Sgt. Sigmund purchased from the Dollar General, but defense counsel lodged no subsequent objection.

Although we ultimately conclude that appellant sufficiently preserved this objection for appellate review, our preservation analysis requires us to examine the pre-trial motions hearing. The State seeks to characterize appellant's motion to suppress Ms. Ptomey's identification of the mask as a "motion *in limine*." Appellant insists that the motion was a "motion to suppress." Although our review of the record leads us to believe that the motion was one "to suppress" rather than *in limine*, under either lens the issue is properly preserved. We explain.

We first look through the lens of a "motion to suppress."[5] It is well-settled that a pretrial ruling *denying* a motion to suppress is "preserved for appellate review, even if no

[5] In our view, the record suggests that the parties believed the motion was a "motion to suppress." At the hearing, the parties debated who bore the burden on appellant's motion. Appellant's counsel insisted that appellant bore the burden, likely relying on the fact that when an accused challenges whether identification procedures were unduly suggestive in violation of due process, the accused "bears the initial burden of showing that the procedure employed to obtain the identification was unduly suggestive." *In re Matthew S.*, 199 Md. App. 436, 447 (2011) (internal quotation marks omitted) (quoting *James v. State*, 191 Md. App. 233, 251-52 (2010)). The State's Attorney disagreed, citing her thirty

contemporary objection is made at trial." *Jackson v. State*, 52 Md. App. 327, 331, *cert. denied*, 294 Md. 652 (1982). That principle does not neatly apply here, however, because the court *granted* the motion at the suppression hearing. Nevertheless, by allowing Ms. Ptomey to identify the mask at trial in contravention of its earlier suppression ruling, the court violated Maryland Rule 4-252(h)(2)(A). That Rule provides that, where a court grants a motion to suppress, the State generally may not offer the evidence at trial unless the State, prior to trial, moves for reconsideration. The Rule also provides that, if the court reverses or modifies its earlier suppression ruling, it must "prepare and file or dictate into the record a statement of the reasons for the action taken." The record here reveals that the State never moved for the suppression court to reconsider its ruling as required by Rule 4-252(h)(2)(A), nor did the court ever file or dictate into the record a statement of the reasons for its apparent reversal. Accordingly, if the motion constituted a suppression motion, then the court erred by contradicting its previous ruling. Indeed, at the suppression hearing, the court made the specific finding that "the showing of a single photograph of a mask" was "overly suggestive" to Ms. Ptomey, and rendered "the reliability of her testimony [to be] somewhat suspect." Thus, if the motion is viewed as a motion to suppress evidence on

years of experience in handling suppression issues. While the burden of suppression can depend on the issue to be decided (for example, the State bears the burden where a search is executed without a warrant, *see McCain v. State*, 194 Md. App. 252, 278 (2010)), the movant will obviously always bear the burden in a motion *in limine* to exclude evidence. Accordingly, though not necessary to resolve the preservation issue, the record strongly suggests that the parties and the court treated the motion as if it were a "motion to suppress."

constitutional grounds, the court violated Rule 4-252(h)(2)(A) by reversing its pre-trial ruling absent a request from the State and an explanation filed or dictated into the record.

On the other hand, if the motion at issue was a motion *in limine*, the issue is still preserved. Unlike a suppression ruling, when a motion *in limine* to exclude evidence is *denied*, a party must timely object at trial to preserve the issue for appeal. *State Farm Fire & Cas. Co. v. Carter*, 154 Md. App. 400, 408 (2003) (citing *Brown v. State*, 373 Md. 234, 242 (2003)). When a motion *in limine* to exclude evidence is *granted*, "normally no further objection is required to preserve the issue for appellate review." *Reed v. State*, 353 Md. 628, 638 (1999). Unfortunately, neither of these principles neatly align with the instant case, as appellant prevailed on the motion—the evidence was to be excluded—yet was nevertheless forced to object at trial when the court contradicted its pre-trial ruling. The record shows that appellant did indeed object.

To be sure, appellant's objection was arguably premature in that counsel noted the objection before the State asked Ms. Ptomey to make an in-court identification of the mask. We recognize that Maryland Rule 4-323(a) generally requires a party to object to the admission of evidence when it is offered or as soon "as the grounds for objection become apparent." Although defense counsel did not object precisely when the State showed Ms. Ptomey the mask, the above colloquy shows that counsel promptly objected once the State began to ask Ms. Ptomey about the mask. In defense counsel's objection, she specifically objected to any in-court identification of the mask based on the suppression court's finding that the showing to Ms. Ptomey of Sgt. Sigmund's photograph of the mask had "tainted"

any subsequent identification. Despite being reminded of its earlier ruling, the court inexplicably overruled appellant's objection and allowed Ms. Ptomey to identify the Dollar General mask in court as one similar to that worn by her assailant. To hold that appellant failed to preserve this issue would be to exalt form over substance. *See Clemons v. State*, 392 Md. 339, 362-63 (2006) (declining to place form over substance where counsel's objection was in close proximity to the court's prior ruling).

Having established that appellant preserved this issue for our review, we conclude that the court committed error. In granting appellant's motion, the court specifically found that Sgt. Sigmund's act of sending the photograph to Ms. Ptomey was "suggestive to her" and that "the reliability of [Ms. Ptomey's] testimony is somewhat suspect because after seeing the single photograph, her description of the mask becomes much more specific and much more precise." Yet despite finding that Ms. Ptomey's ability to identify the mask was tainted by the suggestive photograph, the court nevertheless allowed the State to show her the very mask that Sgt. Sigmund purchased from the Dollar General. In doing so, the court violated its own pre-trial ruling without any request from the State to do so, and without any record evidence explaining its decision to reverse the pre-trial ruling.

Because we conclude that the circuit court violated its own suppression ruling by allowing Ms. Ptomey to identify the mask at trial, we must determine whether that error requires vacation of appellant's convictions. We apply the harmless error standard where a trial court erroneously admits evidence in a criminal trial:

> [W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a

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

Dionas v. State, 436 Md. 97, 108 (2013) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)). We conclude beyond a reasonable doubt that the court's error here did not influence the verdict.

At the outset, we recognize that Ms. Ptomey's credibility was central to this case—without her testimony, the State could not prove that appellant assaulted her (or that an assault even occurred). Recognizing the importance of Ms. Ptomey's credibility, the defense sought to portray Ms. Ptomey as a liar. To do so, the defense showed that Ms. Ptomey lied to investigators about where she was staying the night before the attack. The defense also impeached her credibility by establishing that she had previously been convicted of obtaining property or services by passing a bad check. The defense pointed to the fact that there was little evidence, aside from Ms. Ptomey's injuries, to show that an attack took place, let alone in her home. For example, the defense pointed out that a responding officer did not observe any blood inside the home, and that the bookshelf appellant allegedly pushed Ms. Ptomey into during the attack appeared untouched.

By portraying Ms. Ptomey as lacking credibility, the defense invited the jury to disbelieve the State's entire narrative, including the significance of the mask and any in-court identification of the mask. To support its theory that Ms. Ptomey concocted her story, the defense suggested that Ms. Ptomey knew appellant purchased a mask at the Dollar

General the morning of the attack. During cross-examination, defense counsel elicited from Ms. Ptomey that she knew many Dollar General employees, that one of those employees often messaged her using Facebook, and that "one of those employees at Dollar General messaged [Ms. Ptomey] that they saw [her] daughter buying a mask at Dollar General[.]" In closing argument, defense counsel told the jury, "[Ms. Ptomey] could have gotten a message from someone saying, oh, your husband was just in. He bought a mask. He bought a black and gold mask. He bought a Halloween mask." The defense therefore suggested that Ms. Ptomey used that information to bolster the false narrative that appellant attacked her.

Because of the nature of the defense's theory of the case, Ms. Ptomey's in-court identification of the mask, though court error, did not influence the verdict. Whether the assailant wore a "black and gold" mask or the specific mask identified in court was essentially irrelevant to the defense's theory that Ms. Ptomey constructed her false accusations using her knowledge that appellant purchased *a* mask at the Dollar General. Indeed, if the defense theory that Ms. Ptomey fabricated the entire incident were correct, it would hardly be surprising for her to identify whatever mask appellant purchased at the Dollar General to be the one her attacker wore. Thus, the defense's theory that Ms. Ptomey fabricated the incident was not undermined by Ms. Ptomey identifying a specific mask in court as opposed to her general testimony that her attacker wore a mask. It was for the jury to decide whether Ms. Ptomey invented the entire story. Based on the convictions, the jury apparently found her credible.

Although the trial court erred when it allowed Ms. Ptomey to testify that the mask her attacker wore was "similar" to the mask shown at trial, we hold that the admission of that testimony did not undermine the defense's theory that Ms. Ptomey lied about appellant assaulting her. Accordingly, we conclude beyond a reasonable doubt that the court's error in no way contributed to the guilty verdict. *Dionas*, 436 Md. at 108.

II. THE EVIDENCE WAS LEGALLY SUFFICIENT

We next address appellant's argument that the evidence was insufficient to support his conviction for attempted first-degree murder. Specifically, appellant argues that Ms. Ptomey's injuries were not sufficiently serious to demonstrate a specific intent to kill. We disagree.

Regarding the appropriate standard of review, our Court has explained:

> In reviewing the sufficiency of the evidence, an appellate court determines "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *see also Derr v. State*, 434 Md. 88, 129, 73 A.3d 254 (2013); *Painter v. State*, 157 Md. App. 1, 11, 848 A.2d 692 (2004) ("[t]he test is 'not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder'") (citations omitted) (emphasis in original).
>
> The appellate court thus must defer to the factfinder's "opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence[.]" *Pinkney v. State*, 151 Md. App. 311, 329, 827 A.2d 124 (2003); *see also State v. Mayers*, 417 Md. 449, 466, 10 A.3d. 782 (2010) ("[w]e defer to any possible reasonable inference the jury could have drawn from the admitted evidence and need not decide whether the jury could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence") (citations omitted). Circumstantial evidence, moreover, is entirely sufficient to support

> a conviction, provided that the circumstances support rational inferences from which the trier of fact could be convinced beyond a reasonable doubt of the guilt of the accused. *See, e.g.*, *State v. Manion*, 442 Md. 419, 431-32, 112 A.3d 506 (2015); *Painter*, 157 Md. App. at 11, 848 A.2d 692.

Anderson v. State, 227 Md. App. 329, 345-47 (2016) (quoting *Benton v. State*, 224 Md. App. 612, 629-30 (2015)).

Appellant moved for judgment of acquittal at the close of the State's case, and argued that the evidence was insufficient to support a conviction for attempted first-degree murder because: "There was nothing established by the State's Attorney that there was premeditated malice aforethought. There was nothing established that the injuries were severe to, uh, rise to the level of an attempted first-degree murder." The court rejected this argument, noting that the presence of the weapon and mask demonstrated premeditation. The court also noted that Ms. Ptomey suffered injuries—though not life threatening—to "vital areas," including her head and stomach, and denied appellant's motion for judgment of acquittal. Appellant's counsel properly renewed the motion for judgment of acquittal at the close of all the evidence, incorporating the arguments made in the first motion. The court also denied that motion.

It is well-settled in Maryland that "[a] person is guilty of an attempt when, with intent to commit a crime, he engages in conduct which constitutes a substantial step toward the commission of that crime whether or not his intention is accomplished." *Townes v. State*, 314 Md. 71, 75 (1988) (citing *Cox v. State*, 311 Md. 326, 329-31 (1988)). Regarding the elements of attempted first-degree murder, the Maryland Criminal Pattern Jury Instructions provide:

> Attempted first degree murder is a substantial step, beyond mere preparation, toward the commission of murder in the first degree. In order to convict the defendant of attempted murder in the first degree, the State must prove:
>
> (1) that the defendant took a substantial step, beyond mere preparation, toward the commission of murder in the first degree;
>
> (2) that the defendant had the apparent ability, at that time, to commit the crime of murder in the first degree; and
>
> (3) that the defendant willfully, and with premeditation and deliberation, intended to kill [the victim].
>
> Willful means that the defendant actually intended to kill [the victim]. Deliberate means that the defendant was conscious of the intent to kill. Premeditated means that the defendant thought about the killing and that there was enough time, though it may only have been brief, for the defendant to consider the decision whether or not to kill and enough time to weigh the reasons for and against the choice.

MPJI-Cr 4:17.13.

On appeal, appellant once again argues that the evidence was insufficient to support his conviction for attempted first-degree murder because of the lack of severity of Ms. Ptomey's injuries. In his brief, he states, "Where the assailant had the ability to cause much more significant harm, the minimal severity of Ms. Ptomey's injuries demonstrated that he had no intention of causing her death. This is different from cases where injuries have been significant enough to establish intent to kill." Appellant also argues that, "the assailant chose to leave Ms. Ptomey unattended when he went to the kitchen[,]" demonstrating that the assailant did not intend to kill her.

We reject appellant's argument that Ms. Ptomey's injuries were not sufficiently serious enough to support the finding that appellant intended to murder her. As the pattern

jury instructions show, attempted murder does not require a physical injury to the victim. *See* MPJI-Cr 4:17.13. Instead, the State must simply show that appellant possessed the intent to murder Ms. Ptomey. We explain.

In *State v. Earp*, 319 Md. 156, 159 (1990), the Court of Appeals held that "an indispensable element of the crime of attempted murder is a specific intent to murder." There, during a Halloween party with more than 100 people, Earp stabbed the victim near the victim's shoulder, and then removed the knife to lunge at the victim a second time. *Id.* at 159-60. According to a doctor who treated the victim, the victim's shoulder blade prevented the knife from penetrating further, and that, had the knife gone deeper, "it would have created a potential for hemorrhaging which, if not stanched, could have been fatal." *Id*. at 160-61. Fortunately, "[t]he wounds actually incurred were not life threatening." *Id.*

The State charged Earp with attempted first and second-degree murder; assault with intent to murder; assault with intent to maim, disfigure, or disable; and battery. *Id*. at 161. Following a jury mistrial, the case proceeded to a bench trial, but only on the charges of attempted murder and assault with intent to maim, disfigure, or disable. *Id*. Relevant here, the trial court found Earp guilty of attempted second-degree murder, but this Court reversed that conviction. *Id*.

In affirming this Court's reversal of Earp's conviction, the Court of Appeals explained that the problem with the trial court's conviction for attempted murder was that it only found that Earp intended to inflict grievous bodily harm. *Id*. at 161, 167. The Court expressly held that a finding of an intent to inflict grievous bodily harm is insufficient to

satisfy the *mens rea* for attempted murder, stating, "The specific intent required to prove an attempt is the intent to commit a particular crime, in this case murder. Accordingly, the required specific intent in the crime of attempted murder is a specific intent to murder." *Id*. at 163. To be sure, the Court recognized that "An intent to kill may, under proper circumstances, be inferred from the use of a deadly weapon directed at a vital part of the human body." *Id*. at 167 (citing *State v. Jenkins*, 307 Md. 501, 514 (1986)). The problem in *Earp* was that the trial judge only found an intent to inflict grievous bodily harm, not the intent to murder. *Id*. Despite reversing Earp's conviction, the Court of Appeals noted that, "From the evidence before him in the instant case, the trial judge could have found that Earp harbored a specific intent to kill [the victim]." *Id*. at 167.

Applying *Earp*, we have no difficulty concluding that the evidence in this case supported a rational finding that appellant harbored the specific intent to kill Ms. Ptomey. In his book *Criminal Homicide Law*, Judge Charles E. Moylan, Jr., wrote:

> Because the specific intent to kill lies hidden in the killer's brain, however, its proof is sometimes problematic. It may be proved directly, if the killer proclaims his purpose even as he kills or if he acknowledges his purpose afterward. It may be proved indirectly, by evidence of bad blood between the killer and the victim, by an earlier expression of an intent to kill, by a strong motive, by profiting from the victim's death, by an elaborate murderous scheme or plan, or by infinite varieties and combinations of circumstantial evidence. First and foremost in the ranks of proof, however, is the permitted inference of an intent to kill from the directing of a deadly weapon at a vital part of the victim's anatomy.

Judge Charles E. Moylan, Jr., *Criminal Homicide Law* § 3.2 (2002). Additionally, in *Anderson*, we noted that, "Because few defendants announce to witnesses their intent to

kill, we most often have to look to other factors to discern whether the defendant had a specific intent to kill." 227 Md. App. at 347 (citing *Pinkney*, 151 Md. App. at 332).

Appellant possessed the requisite intent to kill. First, unlike the typical circumstances described in *Anderson*, the evidence showed that appellant *did* announce to a witness his intent to kill. Ms. Ptomey testified, without objection, that when she opened the door, appellant stated, "bitch, I'm going to kill you." According to Ms. Ptomey, after verbally expressing his intent to kill her, appellant began to repeatedly strike her in the head with a wooden object that he had brought with him. Ms. Ptomey testified that she could not count how many times appellant struck her in the head with the object, but that the blows caused her to fall down, and that while she was on the floor, appellant continued to strike her on the head with the wooden object until he "broke it over [her] head." With his weapon broken, appellant proceeded to kick Ms. Ptomey several times. He also slammed her against a bookshelf, held her by the throat, and "[beat her] with his fist." Appellant then went to the kitchen and began "rummaging" in the knife drawer—ostensibly to find a knife—finally giving Ms. Ptomey an opportunity to escape.

In sum, the evidence showed that appellant told Ms. Ptomey that he was going to kill her, struck her in the head with a wooden object until it broke, proceeded to kick and punch her, and then rummaged through the knife drawer in Ms. Ptomey's kitchen.

Regardless of the extent of Ms. Ptomey's injuries, that evidence was sufficient to permit a rational trier of fact to conclude that appellant possessed the requisite intent to kill.[6]

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

[6] Because we hold that the evidence was sufficient to support appellant's conviction for attempted first-degree murder, we need not reach appellant's argument that the evidence was insufficient to support a conviction for first-degree assault. Appellant raised this conditional argument operating under the assumption that we would reverse his conviction for attempted first-degree murder.