Circuit Court for Anne Arundel County
Case No. C-02-CR-18-001818

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 251

September Term, 2019

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JEFFREY T. RANDALL

v.

STATE OF MARYLAND

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Fader, C.J.,
Shaw Geter,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Fader, C.J.

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Filed: September 2, 2020

A jury sitting in the Circuit Court for Anne Arundel County convicted the appellant, Jeffrey T. Randall, of second-degree assault and reckless endangerment. Mr. Randall asks us to reverse his convictions on the grounds that the trial court abused its discretion in (1) allowing the prosecutor to argue, during rebuttal closing argument, that strangulation is a physical beating, and (2) subsequently refusing to instruct the jury that assault by physical beating does not include strangulation. Because Mr. Randall did not preserve these issues for review, we will affirm.

## BACKGROUND

### *The State's Evidence*[1]

On the evening of July 28, 2018, Anne Arundel County Police Officer Christian Bailey responded to reports of a domestic dispute at a residence on Leymar Road in Glen Burnie. When he arrived, Officer Bailey encountered a woman, identified as Cynthia Johnson, standing outside the home. Officer Bailey observed that Ms. Johnson "was visibly upset and crying and hysterical," and he "could initially very quickly see a large injury on the top of her forehead." Ms. Johnson "wasn't able to communicate efficiently or effectively when [he] was trying to talk to her. She just kept complaining of pain . . . everywhere." Officer Bailey called for emergency medical services personnel, who transported Ms. Johnson to the Baltimore-Washington Medical Center. Michelle Wright,

[1] Our recitation of the facts is based on the evidence presented at trial, "including all reasonable inferences to be drawn therefrom, in the light most favorable to the State." *See Fuentes v. State*, 454 Md. 296, 307 (2017).

a paramedic attending to Ms. Johnson, testified that she "stat[ed] over and over that he's going to find me and he's going to kill me."

At the hospital, Ms. Johnson "continuously complained of pain" and "continuously stated that she was in fear" of Mr. Randall, her live-in boyfriend.[2] Registered nurse Kimberly Steiner and nurse practitioner Mary Beth Winkeljohn treated Ms. Johnson, who told the nurses that she had been assaulted by her boyfriend after an argument. The nurses noted that Ms. Johnson exhibited disheveled hair; multiple stages of bruising on her head, face, arms, fingers, hands, and legs; and a large hematoma on her forehead. That night, in explanation of her injuries, Ms. Johnson told medical personnel that her boyfriend had kicked and punched her multiple times, bent back her fingers, and dragged her around by her hair, pulling out chunks of hair and causing her face to hit different items, such as door frames. She also said that he had attempted to strangle her by putting his arm against her neck. In response to a questionnaire, Ms. Johnson indicated that she did not feel safe in her environment and believed she was in immediate danger.

Ms. Johnson was diagnosed with a nasal fracture; two rib fractures; contusions, abrasions, and cuts on her hands and fingers; contusions on her head, face, abdomen, chest, and lower extremities; hematomas on her head and scalp; and "nonfatal strangulation," all resulting from a recent assault. Two days later, Ms. Johnson told Detective Theresa

[2] Mr. Randall was not at the home when officers arrived at the scene. A short time later, officers present to "canvass for a suspect" located Mr. Randall approximately 200 feet from the home.

Panowicz during an interview "[t]hat she was still in a lot of pain and her eyes were partially swollen shut."

***Ms. Johnson's Testimony***

Ms. Johnson told a different story at trial. She testified that on the morning of July 28, 2018, she "was coloring with [her] daughter," one of her four children who lived with her, Mr. Randall, and Mr. Randall's brother. At some point, Ms. Johnson argued with Mr. Randall about flirtatious text messages and phone calls between him and other women. After confronting Mr. Randall, Ms. Johnson went into the bedroom, pulled the covers over her head, and started crying. When Mr. Randall and her son came to see what was wrong, Ms. Johnson "went to go yank the covers off [her] head" and sit up "to say something and [she] literally banged [her] head into [Mr. Randall's]," leaving a swollen "red knot." Ms. Johnson testified that the collision was accidental. Around the same time, Mr. Randall also argued with his brother, who wanted Ms. Johnson and her children to move out of the house. Ms. Johnson said that it was the brother who called the police, to prevent a fight between the brothers.

Ms. Johnson denied any physical fight between herself and Mr. Randall. Instead, she said that Mr. Randall left at some point because of his frustration with his brother, and when Officer Bailey arrived at the house, she was upset. She also said that she told the officer that she was in pain only because her head hurt from the accidental bump with Mr. Randall. In explanation of her injuries when she presented to the hospital, she said,

among other things, that her black eyes were caused by the headbutt;[3] the bruises and cuts on her hands had been there for days; she had carpal tunnel syndrome and preexisting injuries to her shoulder, arm, and hand; the bruises on her legs were from a fall, running into things, and interactions with her son and another child; and her "ribs ha[d] been messed up for several months," and she recently reinjured them in a different incident.

Ms. Johnson also denied or claimed not to remember having told the paramedics and hospital staff that Mr. Randall had tried to choke and kill her, put his forearm against her neck, and break her fingers. She further denied that Mr. Randall had hit, punched, strangled, and dragged her by her hair. She did admit, however, that she had stated that Mr. Randall had "pulled her hair." When the prosecutor asked Ms. Johnson if she "want[ed] to see [Mr. Randall] in trouble at this point," she said that she did not, "because he really didn't do anything wrong."

***The Defense Case***

Mr. Randall's brother, Mitchell, testified that on July 28, 2018, the two of them had been drinking Bacardi and playing video games when they got into an argument. Although he heard Mr. Randall and Ms. Johnson also arguing loudly that evening, and observed injuries on Ms. Johnson, the brother did not witness any physical altercation between the pair and did not know how Ms. Johnson sustained her injuries. Mr. Randall's brother said he had called the police because he knew that he and Mr. Randall were about to fight. On

[3] Ms. Winkeljohn, who the court accepted as an expert in emergency medicine, testified that the numerous injuries to Ms. Johnson's head and face were inconsistent with a single accidental headbutt.

cross-examination, he agreed that the call also was based on his observation that the "boyfriend and girlfriend are fighting and he pretty much d[id]n't want her to leave."

Mr. Randall testified that on the day in question, he had drunk "over a fifth" of alcohol and did not remember some of what happened. He stated that he and Ms. Johnson had argued because he had been caught talking to other women. He denied kicking, punching, or strangling her. Mr. Randall corroborated Ms. Johnson's testimony that he had inadvertently headbutted her, and he admitted to pulling her hair and grabbing her hands, but only "because [he] thought she was going to swing on [him]." Any bruises she had on her body, he said, were from something that her son had done to her.

Mr. Randall admitted to fighting with his brother that day. He said that he had left the house to cool down at a nearby park before his brother called the police. When Mr. Randall saw the police, he approached them because he believed that they were there to arrest him.

Mr. Randall also sought to explain numerous recorded jailhouse calls between himself and Ms. Johnson in which he had told her what to say in court.[4] Mr. Randall testified that he told her to say they had been drinking and wrestling so that she would not get in trouble for lying to the police about being abused by her boyfriend.

***Procedural Background***

The State charged Mr. Randall in a seven-count indictment. The first three counts were for first-degree assault, second-degree assault, and reckless endangerment "by means

[4] Detective Panowicz estimated the number of pre-trial calls between Mr. Randall and Ms. Johnson to be 1,100.

of a physical beating." The next three counts charged those same offenses, but "by means of strangulation." The final count was for false imprisonment.

At some point during the trial, the court and counsel had an off-the-record discussion in which a concern was raised regarding the two sets of assault/endangerment charges and possible jury confusion. On the third day of trial, in a colloquy that referenced that prior discussion, the court proposed to read the definitions of first-degree assault, second-degree assault, or reckless endangerment only once each "so [the jury] know[s] what the definitions of the various crimes are, and then on the verdict sheet, separate them out according to the indictment." The following ensued:

> [PROSECUTOR]: So, yesterday, obviously, there was an issue that came up about the nature of how it was charged, separating out a strangulation and a physical beating, as far as two separate charges for something that appears to be one incident cohesively. And under case law that I have—and that is *Graham v. State*, and that's 117 Md. App.—it's allowable and possible to separately charge two different touchings or encounters even though they're part of the same criminal episode or transaction. So, legally, I don't think that there are any problems with that, per that case, and there is also supplemental case law in that case that goes with it.
>
> That being said, there was also a discussion about the nature of whether or not it's confusing, whether or not it's duplicative, and the State understands that. So, I would like to make an election at this point, to enter a nolle prosequi to Count 4, Count 5, and Count 6 for strangulation, and proceed solely on the physical beating, because it will be the State's position that strangulation is, in fact, part of a physical beating.
>
> I believe that that makes it more straightforward for everyone and I don't think that it presents any problems in that manner. That way, nobody has to read anything twice.
>
> So, that's my election at this time. Thank you.

[DEFENSE COUNSEL]: I certainly appreciate the State nolle prossing those three counts. I do still believe, however, that a general instruction for assault-second is not appropriate and a general instruction for assault-first is not appropriate, and I rely on a couple of cases that I had found. The cases that I relied upon are *Thompson v. State*, 371 Md. 473, and *Bush v. State*, 289 Md. 669. And, basically, what those cases say is that in determining the character of the offense, we look to the body of the indictment, not to the statutory reference or caption.

I would also note that *Dzikowski v. State*, 436 Md. 430, essentially says that the accused—in this case, Mr. Randall—be informed of the charges against him, including the specific conduct with which he is charged.

So, in talking this over with one of my colleagues last night, she put it very, very succinctly in layman's terms. Essentially, Mr. Randall is not being charged by the statute; he's being charged for the behavior. And I think what these two cases say is for someone specifically charged with behavior, it's the behavior that's listed in the charging document, not necessarily the statute that, you know, overrides.

So, again, when in chambers yesterday, I said that I believe that Mr. Katzeff (ph) may have made a mistake in charging this case. I think that Mr. Katzeff, or the State, made a mistake, because they limited the conduct that Mr. Randall was charged with. They specifically said that he committed an assault b[y] carrying out a physical beating, and by doing that, they had prevented themselves from the ability to have a general instruction because—

THE COURT: Well, I certainly think that would mean that you could only use the battery portion of assault as opposed to the frightened portion. But are you going beyond that?

[DEFENSE COUNSEL]: I am. I am, indeed, because the statutory definition of assault, broad assault, it's not specified in, you know, in the indictment. The statutory definition of assault is any unwarranted or unconsented-to touching that is offensive to the person that is touched.

So, that could be something as simple as me placing my hand on someone's shoulder and offending them by that. That's technically an assault. That could be something as simple as me slapping someone or me touching your knee or something like that. If I've offended them by my touching, however minor, then that's technically an assault-second degree.

THE COURT: And do any of the cases that you've cited say that?

[DEFENSE COUNSEL]: Yes. Yes, I just cited those cases. What those cases say is that—

THE COURT: But you have to prove—so, I mean, the word "beating" is not defined in the jury instructions. I mean, where—how do you properly define the activities that would amount to that word used in the indictment?

Is that the only word in the indictment, "beating"?

[PROSECUTOR]: It's physical beating.

[DEFENSE COUNSEL]: Physical beating.

Well, if the State—

THE COURT: Yeah. So, it has to be physical, I agree.

[DEFENSE COUNSEL]: Right.

THE COURT: It can't be frightened.

[DEFENSE COUNSEL]: Right.

THE COURT: But, I mean, you could beat someone with a pencil eraser.

[DEFENSE COUNSEL]: I—no, I understand that, too, but beating—and again, a beating wasn't even defined in Black's Law Dictionary. I had to go to the regular Webster's dictionary, and I think a beating is defined as striking over and over again.

And, again, I think by this case law, I think that's what the State is married to. The State has given up their right to proceed on a general, simple, offensive-touching type of hearing in terms of charging Mr. Randall. The State led to having to prove—

THE COURT: So, what are you—if that is your argument, what are you suggesting that the instruction should say?

[DEFENSE COUNSEL]: I'm suggesting that the instruction should not include the general language that normally goes. I'm suggesting that the instruction must say that in order to be found guilty of an assault, Mr. Randall—you know, the State must prove beyond a reasonable doubt that Mr. Randall committed a physical beating, rather than an offensive touching.

THE COURT: All right. Counsel, do you have a response to that?

[PROSECUTOR]: Very briefly, Your Honor. I don't disagree that to some degree we're married to the language of the indictment. I don't disagree with that.

But I think that what the State's intent was that it kind of to wit, this is how the assault-second degree happened. So, I don't think that we should change the jury instruction to say he committed a physical beating. I think it should say he committed an unconsented-to physical touching by way of a physical beating.

And then as far as the definition of beating, that should be open for argument for both, the State and Defense counsel. Defense counsel can—because like Your Honor said, you can beat someone or hit someone with an eraser and it doesn't necessarily make any difference. So, at that point, it's open for argument.

Not ideal, and I understand what Defense counsel is saying; however, to say that you change the entirety of the language, no, no, no. The manner . . . of the second-degree assault, which will be, no matter what we do, an unlawful physical touching, will be through a physical beating I think that that—

THE COURT: So, you would propose to put the words "to wit, a beating" in the actual instruction?

[PROSECUTOR]: So, if we were to do—I would prefer that we don't, but I understand what Defense counsel is saying. And that to some degree, because of the nature of the indictment, that it would be "committed an assault in the second degree, an unlawful physical touching through a physical beating."

It's just the manner of how it happened. It doesn't change.

> THE COURT: Okay. All right. So, I'm going to step down and just share these cases with my law clerk and I would like to take—for us to take a break.

Based on this exchange, the trial court later instructed the jury that "[a]ssault is causing offensive physical contact, in this case, through physically beating Cynthia Johnson," and that to convict Mr. Randall of assault, "the State must prove that the Defendant caused offensive physical contact by physically beating Cynthia Johnson . . . ." The court did not define "physically beating."

As pertinent to this appeal, during her initial closing argument, the prosecutor stated:

> I want to talk to you briefly about the law, just so you can understand. The judge read you the instructions. We have assault-one, the highest level of assault, requiring in this case a physical beating, with the Defendant's intent to cause serious physical injury that includes death or dismemberment.
>
> * * *
>
> Assault-second degree is the lesser, the lower, fitting underneath of it. Unconsented touching to by a physical beating in this case.
>
> * * *
>
> When we look at this, these show you the intent. She told you. Cynthia told you. She told the paramedic, "He's going to kill me and he dragged me by the hair." And she had hair, visible hair, ripped out of her head. That's a physical beating.
>
> She told the nurse, "Not only did he drag me, but he hit my head on things as we went through doorways and various different things." That's a physical beating, and dragging someone through a doorway seems like a pretty good way to cause them significant physical injury.

The prosecutor then detailed Ms. Johnson's bodily injuries, as observed by the emergency room nurses: hair ripped out of her head; two black eyes; a broken nose; broken ribs; contusions to the face; bruises all over her body. The prosecutor continued:

> So, I'm going to talk to you about—there's something else I want to say before we move on. Let's talk about the strangulation. She indicated that she was strangled. Gosh, how could I forget that?
>
> The nurse practitioner said that strangulation is incredibly dangerous. That it doesn't take very long to cut off all of this going up to her brain to cause injury.
>
> This man deprived her of her lifeblood, her literal lifeblood to her brain and her ability to breathe. He deprived her of one of the three things that humans require: Oxygen, water, and food.
>
> Now, oxygen is the first one. He deprived her of that, to the point where she told the nurse practitioner that she was near passing out.
>
> Physical beating. It's one of the main things. Each individual thing can be a physical beating, and I'd submit to you that each of them together are also, obviously, a physical beating.
>
> * * *
>
> A man who has had the opportunity to take control of this woman: control her physically, beat her physically, strangle her, punch her in the face, causing a hematoma on her head, crack her ribs, give her bruising all over her body, controlled the money, and, essentially hold her hostage in a kind of way that only happens in domestic violence.
>
> * * *
>
> I would respectfully ask that you find the Defendant guilty of assault in the first degree and the associated charges, because he did intend to seriously physically harm her and because his intent risked her life. Thank you.

Defense counsel made no objections during the prosecutor's argument, including to the position that strangulation can constitute and be part of a physical beating. Rather, in his closing argument, defense counsel responded:

> Was Cynthia Johnson telling the truth back [on July 28, 2018,] or was Cynthia Johnson telling the truth yesterday about whether or not [] Jeffrey Randall physically beat her?

> And that's really what this case is about: whether or not Jeffrey Randall physically beat [Cynthia Johnson]. That's the question that must be decided. And, really, the only person that can tell you that is Cynthia Johnson.
>
> * * *
>
> Cynthia Johnson is the only one who can definitively tell you whether or not she was physically beaten.
>
> Physical beating is not strangulation. Physical beating is not hair-pulling. Physical beating is not grabbing someone's hands when they're swinging at you. Physical beating is striking someone over and over and over again and that's the only question before you here today.

Defense counsel later summarized:

> There was no strangulation here. There were no visible [signs] or visible marks of strangulation. There were no marks around the neck. There was no loss of bowel. There was no loss of urine, which Nurse Winkeljohn generally says happens. But most importantly, because the State went out of their way to try to get Nurse Winkeljohn to say, ["]Hey, if someone is strangled, there may not be visible signs of injury.["] Most importantly, not only were there no[] visible signs of injury, but there were no invisible signs of injury, either. The CAT scan was normal. The CAT scan was normal, because he didn't strangle her. There was no strangulation. That's why the CAT scan was normal.
>
> There were no internal signs of injury on her back, on her abdomen. They did a CAT scan of the head. It's because he didn't physically beat her. The CAT scan of the head was normal. There [were] no signs of internal bleeding because he did not physically beat her and because the incidental and accidental contact did not create a substantial risk of death or serious physical injury; it's as simple as that.
>
> * * *
>
> Again, in order to find Mr. Randall guilty, you have to believe beyond a reasonable doubt that Ms. Johnson was telling the truth back then about everything and that Ms. Johnson was physically beaten by Jeffrey Randall. That she was hit over and over and over and over again—not whether or not

> her hair was pulled, not whether or not they touched hands—that she was physically beaten. That she was physically hit over and over and over again.

In rebuttal, the prosecutor stated, in pertinent part:

> So, if a man walks out of a bar and someone jumps him in the street and they start strangling him off the ground—Nope, sir. Sorry, you weren't physically beaten. They rip out his hair—Nope, sir. Sorry, you weren't physically beaten. Punch him a few times—okay. Now he's physically beaten. That's not accurate.
>
> Strangulation is a physical[] beating. It's one of many ways to physically beat someone. Ripping someone's hair out as he drags her is a physical beating. It's one of the many ways that [Ms. Johnson] was physically beat in this case.
>
> * * *
>
> No physical sign of strangulation. Well, the nurse practitioner said that not everybody has visible signs of strangulation; in fact, a lot of people never develop signs of strangulation. She said that's what can make it so dangerous. I submit to you that [Ms. Johnson] was strangled. She came very close to passing out.
>
> As I stated before, they can try and bury her testimony. He can try and tell her what to say. He can try and say that he didn't physically beat her, that this is a head bump, but nothing buries this. You can't bury this.
>
> It is an assault. It is a physical beating. It is a strangulation. It is a hair-pulling to the point where she had hair ripped out of her head. It is dangerous and it is unacceptable. And I ask you to use your joint wisdom to find that today. Thank you.

After the prosecutor completed her rebuttal closing argument, defense counsel objected. Counsel argued that neither hair pulling nor strangulation was a "physical beating," and, therefore, neither could constitute an "assault" as charged in the indictment. Defense counsel asked the court for a clarifying instruction.

The prosecutor responded:

> I respectfully disagree. I have done everything humanly possible to abide by what the State has put in. I have said physical beating and that we're required to find a physical beating probably about 40 times.
>
> Now, I have made an argument that strangulation can be a physical beating, but there is no, in fact, legal definition that I can find—and I submit that Counsel can find—of what a legal physical beating is.
>
> Furthermore, if Counsel wanted an additional jury instruction for physical beating, he should have asked for it before we read the instructions and did closing argument. I submit that it's too late.
>
> And we had a very specific discussion about the fact that we would be able to make argument about what we believe physical beating is[,] and that's exactly what I did.

Based upon the prosecutor's argument, the trial court declined to issue a clarifying instruction to the jury. The court explained that it was "up to the jury to make a factual determination of whether they believe there was a physical beating."

Although the jury acquitted Mr. Randall of first-degree assault, it convicted him of second-degree assault and reckless endangerment.[5] The trial court sentenced Mr. Randall to ten years in prison, suspending all but five years. Mr. Randall timely appealed.

## DISCUSSION

In his only claim of error, Mr. Randall contends that the circuit court abused its discretion by: (1) "allowing the prosecutor to argue to the jury during rebuttal closing argument that strangulation is a physical beating"; and (2) "refusing to instruct the jury that assault by physical beating does not include strangulation." Mr. Randall offers two grounds for his claim of abuse of discretion. First, he argues that because the State *nol*

[5] The court had previously granted Mr. Randall's motion for judgment of acquittal as to the count of false imprisonment.

*prossed* the charges of assault and reckless endangerment by way of strangulation, permitting the State to continue to argue for conviction on the basis of strangulation "was the functional equivalent of an eleventh-hour amendment" to the indictment without his consent. Second, he contends, as he did at trial, that strangulation is not a physical beating.

In response, the State raises several preservation/waiver arguments, based on defense counsel's alleged failure to properly object and acquiescence. If addressed on the merits, the State argues that the trial court properly exercised its discretion in declining to issue a clarifying jury instruction that a physical beating could not include strangulation.

**MR. RANDALL FAILED TO PRESERVE HIS APPELLATE CLAIMS.**

As reflected in the prosecutor's on-the-record comments on the third day of trial, during an earlier discussion that was held off-the-record, one of the participants had raised the possibility that the two different sets of assault/reckless endangerment counts might be duplicative. To ameliorate that concern, the prosecutor elected to *nol pros* the three counts referencing strangulation and "proceed solely on the physical beating [counts]." In doing so, the prosecutor stated expressly that "it will be the State's position that strangulation is, in fact, part of a physical beating."

The defense raised no objection at that point to the *nol pros* or to the prosecutor's stated intent to argue that strangulation is part of a physical beating. Instead, defense counsel thanked the State for the *nol pros* and then argued at length that instead of using a pattern instruction that defined assault as any unwelcome touching, the court should instruct the jury using a tailored instruction stating that the State had to prove a physical beating. Thus, despite being informed explicitly in that conversation that the State's

position was and would be that strangulation can constitute a physical beating for purposes of the remaining charges, the defense did not object or indicate any contrary position. Nor did the defense move to restrict testimony, evidence, or argument about strangulation, or ask the court for an instruction defining or limiting the term, "physical beating."

In her initial closing argument, the prosecutor—while she was focusing primarily on other aspects of the encounter—argued that strangulation could be a physical beating. Indeed, the prosecutor told the jury that "[e]ach individual thing" Mr. Randall had done to Ms. Johnson, including strangling her, punching her in the face, cracking her ribs, and dragging her by the hair, "can be a physical beating, and I'd submit to you that each of them together are also, obviously, a physical beating." Again, Mr. Randall raised no objection. To the contrary, in his own closing argument, Mr. Randall argued that point on the merits, telling the jury that "[p]hysical beating is not strangulation," and stating repeatedly that a physical beating has to involve being "hit over and over and over again."

In her rebuttal closing, the prosecutor returned to the point, arguing to the jury that a physical beating was not limited to punching but could also include strangulation and ripping out someone's hair: "Strangulation is a physical[] beating. It's one of many ways to physically beat someone. Ripping someone's hair out as he drags her is a physical beating. It's one of the many ways that [Ms. Johnson] was physically beat in this case." The prosecutor returned to the theme at the end of her rebuttal argument: "It is an assault. It is a physical beating. It is a strangulation. It is a hair-pulling to the point where she had hair ripped out of her head. It is dangerous and it is unacceptable. And I ask you to use your joint wisdom to find that today."

Mr. Randall first objected to the prosecutor's contention that strangulation could be a physical beating after rebuttal closing argument had concluded. At that time, Mr. Randall argued that hair-pulling and strangulation did not meet the definition of assault by physical beating and that any statement to the contrary "was an error of [] law." On that basis, he asked the court to instruct the jury that strangulation is not a physical beating.

### A. Mr. Randall Failed to Preserve His Claim that the State's Argument Impermissibly Amended the Indictment.

On appeal, Mr. Randall's lead argument is that by permitting the prosecutor to argue that strangulation can be a physical beating and failing to issue a clarifying instruction, the court effectively—and impermissibly—permitted the State to amend the indictment through its rebuttal closing argument. We agree with the State that Mr. Randall has not preserved that contention for our review because he never presented it to the trial court.[6] Indeed, when the State *nol prossed* the counts expressly referencing strangulation, Mr. Randall raised no opposition at all to the prosecutor's announcement that "it will be the State's position that strangulation is, in fact, part of a physical beating." Nor did Mr. Randall object when the prosecutor made that point in her initial closing argument. And when Mr. Randall finally did object after rebuttal closing argument, his objection was based on other grounds—namely, that strangulation was not a form of physical beating. Because he did not raise before the trial court any claim that the State had effectively

[6] Although parts of defense counsel's explanation of the grounds for his objection following the prosecutor's rebuttal closing argument were indiscernible to the court reporter, there is no indication that defense counsel raised this argument, nor does Mr. Randall argue to the contrary on appeal.

amended the indictment through its rebuttal closing argument, he has failed to preserve that issue for appellate review. *See* Maryland Rule 8-131(a) ("Ordinarily, the appellate court will not decide any issue unless it plainly appears by the record to have been raised in or decided by the trial court."); *see also Starr v. State*, 405 Md. 293, 304 (2008) (stating that a trial court is not required "to imagine all reasonable offshoots of the argument actually presented").

### B. Mr. Randall Failed to Preserve His Objection to the State's Argument that Strangulation Can Be a Physical Beating.

Mr. Randall also failed to preserve his objection to the circuit court's handling of the State's argument that a physical beating can encompass strangulation. At trial, Mr. Randall objected to that argument only the second time it was made to the jury (and third overall). He similarly limits his appellate claim of error to the court's failure to restrict or counter the prosecutor's statements during rebuttal closing argument. By not taking issue with the prosecutor's statements in her opening argument either at trial or on appeal, Mr. Randall has failed to preserve the issue of whether the trial court abused its discretion in either (1) permitting the prosecutor to make similar statements in rebuttal closing argument, or (2) failing to counter those similar statements with a supplemental jury instruction. *See Purohit v. State*, 99 Md. App. 566, 586 (1994) (defendant failed to preserve for appeal his claim on the first two of the prosecutor's allegedly improper statements during closing argument because he "failed to object to [that] portion of the State's closing argument"); *cf. DeLeon v. State*, 407 Md. 16, 31 (2008) ("Objections are waived if, at another point during the trial, evidence on the same point is admitted without

objection."); *Brown v. State*, 90 Md. App. 220, 225 (1992) (because the defendant did not object each and every time to the admission of the handgun or alternatively request a continuing objection, the defendant waived his objection; thus, he did not preserve the issue for appellate review).

Furthermore, even if he had preserved his contention for appellate review, we would discern no abuse of discretion in the trial court's handling of rebuttal closing argument or its subsequent refusal to instruct the jury that a strangulation cannot be a physical beating. Rule 4-325(a) requires the court to instruct the jury at the close of the evidence, and it permits the court to supplement those instructions at a later time, "when appropriate." The decision whether to supplement the instructions is within the trial court's discretion and will not be disturbed except on a clear showing of an abuse of discretion. *Appraicio v. State*, 431 Md. 42, 51 (2013).

As noted, at the time she *nol prossed* Counts 4 through 6, the prosecutor stated explicitly that she would argue that "strangulation is, in fact, part of a physical beating." In her initial closing argument, the prosecutor explained that the State was required to prove that Mr. Randall physically beat Ms. Johnson and listed several ways in which the State contended the evidence proved such a beating, one of which was strangulation. Instead of objecting to the prosecutor's argument and asking for a clarifying instruction at that point, defense counsel, in his own closing argument, attempted to rebut both (1) the claim that physical beating can include strangulation, and (2) that the evidence showed that Mr. Randall had strangled Ms. Johnson:

> Physical beating is not strangulation. Physical beating is not hair-pulling. Physical beating is not grabbing someone's hands when they're swinging at you. Physical beating is striking someone over and over and over again and that's the only question before you here today.
>
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>
> There was no strangulation here. There were no visible [signs] or visible marks of strangulation. There were no marks around the neck. There was no loss of bowel. There was no loss of urine, which Nurse Winkeljohn generally says happens. But most importantly, because the State went out of their way to try to get Nurse Winkeljohn to say, Hey, if someone is strangled, there may not be visible signs of injury. Most importantly, not only were there not visible signs of injury, but there were no invisible signs of injury, either. The CAT scan was normal. The CAT scan was normal, because he didn't strangle her. There was no strangulation. That's why the CAT scan was normal.

Counsel objected and asked for a clarifying instruction that strangulation is not a physical beating only after the prosecutor responded to his own argument by making the point once again, now in rebuttal, that "[s]trangulation is . . . one of many ways to physically beat someone" and one of "the many ways that [Ms. Johnson] was physically beat in this case." In other words, with fair advance warning of what the State's argument would be, and after engaging on the merits of the debate in his own argument, defense counsel waited until the State had argued the point to the jury multiple times—and no longer had the opportunity to make another argument—before asking the court to instruct the jury that the State was wrong.

Moreover, neither during the trial nor on appeal has Mr. Randall identified any legal authority for the proposition that strangulation cannot fall within the scope of a physical beating, either generally or specifically in this case, in which the evidence of strangulation was that Mr. Randall pushed his forearm into Ms. Johnson's throat while lifting her during

the course of a broader physical altercation.[7] After hearing from both parties, the trial court determined that the facts of the case did not warrant an additional instruction, and that it would leave it "up to the jury to make a factual determination of whether they believe there was a physical beating." We discern no abuse of discretion in that decision.

**JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED; COSTS ASSESSED TO APPELLANT.**

[7] The absence of legal authorities defining the scope of a "physical beating" is unsurprising because that is not a necessary element of an assault charge. To the contrary, an assault is "any attempt to apply the least force to the person of another." *State v. Stewart*, 464 Md. 296, 320 (2019) (Greene, J., concurring and dissenting) (quoting *Dixon v. State*, 302 Md. 447, 458-59 (1985)). It was only as a result of the inclusion of "by means of a physical beating" in the indictment that the State was required to prove a physical beating.