Circuit Court for Baltimore City
Case No. 117086012

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 262

September Term, 2018

JOSEPH QUICK

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: January 10, 2019

Joseph Quick, appellant, was convicted by a jury sitting in the Circuit Court for Baltimore City of robbery and second-degree assault.[1] He raises the following three questions on appeal, which we have reordered and rephrased for clarity:

I. Did the trial court err when it interjected itself into the State's case?

II. Did the trial court err when it allowed in evidence a police photograph of appellant because that evidence was irrelevant, unduly prejudicial, and inadmissible "other crimes" evidence?

III. Did the trial court err in not merging for sentencing purposes appellant's second-degree assault conviction into his robbery conviction?

For the reasons that follow, we shall vacate his sentence on second-degree assault conviction but otherwise affirm the judgments.

BACKGROUND

The State's theory of prosecution was that on the evening of February 19, 2017, appellant assaulted Robert Sparks outside the apartment building from which appellant had been recently evicted. Mr. Sparks and the lead detective on the case testified for the State. The theory of defense was that the physical altercation between appellant and Mr. Sparks ensued only after Mr. Sparks withheld money and property belonging to

[1] The jury acquitted appellant of first-degree assault. The court sentenced appellant to concurrent sentences of ten years for robbery and four years for second-degree assault. We note that the jury also found appellant guilty of theft, as evidenced from the verdict sheet, but because the jury was never hearkened or polled to that charge, it is a nullity. *See State v. Santiago*, 412 Md. 28 (2009) (a charge on which a jury renders a guilty verdict but on which the jury is neither polled nor hearkened is not properly recorded and is therefore a nullity).

appellant. Appellant testified in his defense. Viewing the evidence in the light most favorable to the State, the following was established.

In 2016, Mr. Sparks managed a restaurant at the corner of Preston and Calvert Street in Baltimore City and the apartment above the restaurant. Both the restaurant and apartment were owned by a friend of Mr. Sparks. Sometime in late August or early September of that year, Mr. Sparks hired appellant to help in the kitchen of the restaurant, and then rented to him the third-floor apartment above the restaurant for $100 a week. There was no written lease agreement.

Mr. Sparks testified that over the months appellant worked at the restaurant and lived above it the situation devolved. Mr. Sparks explained that at first appellant was "very happy to have a job again . . . steadily making money, [but] there came more and more and more times that he didn't feel good, didn't feel like coming to work, needed to sleep all day, and then he couldn't sleep at night, couldn't pay his rent[.]" In February 2017, Mr. Sparks fired appellant and asked him to leave the apartment.

Appellant moved out on February 19, and the next evening, around 11:00 p.m., Mr. Sparks met appellant at the building because appellant had said he needed to retrieve some documents he had left inside the apartment. When they met, appellant told Mr. Sparks he wanted to get his things later, and Mr. Sparks left to run an errand. Mr. Sparks returned within an hour and found appellant sitting inside the building on the bottom stair. When Mr. Sparks approached, appellant stood up. Appellant said, "I'm sorry to do this to you, Mr. Rob. Give me all your money[,]" and aimed what appeared to be a handgun at him. Mad and frustrated, Mr. Sparks took a swing at appellant and missed.

Appellant then began beating Mr. Sparks with his fists and broke the gun, which turned out to be a toy, over Mr. Sparks' head. Appellant shoved Mr. Sparks to the back of the foyer. Mr. Sparks fell to the ground, and appellant started kicking him. Appellant took money from Mr. Sparks' pockets and repeatedly kicked him in the face. Mr. Sparks "played dead," and appellant ran out of the building.

The police arrived shortly thereafter. Mr. Sparks was taken to the police station where he gave a statement and identified appellant as his assailant. The next day, Mr. Sparks was taken to the hospital where he underwent surgery for a broken jaw. Photographs of his injuries and his hospital records were admitted into evidence.

Video from a camera located inside the building's stairwell recorded some of the assault. The video was downloaded into a DVD, admitted into evidence, and played for the jury. The minute and a half video shows Mr. Sparks walk up the front stairs of the building, enter through the front door, and stand in the stairwell. He greets appellant who is sitting on the stairs. Appellant stands, shoves Mr. Sparks away from the front door, and looks out the front window of the door. Appellant then turns toward Mr. Sparks, who swings at him and misses. Appellant begins to hit Mr. Sparks repeatedly, while Mr. Sparks attempts to fend off the blows. Appellant backs Mr. Sparks to the back of the stairwell, and for the next minute neither man appears on the video. Appellant is next seen on the video leaving the building through the front door.

Appellant testified in his defense. He testified that shortly after he began working at the restaurant, Mr. Sparks began withholding $100 from his weekly pay. Appellant complained to Mr. Sparks, but Mr. Sparks continued to do so. In the middle of February,

Mr. Sparks fired appellant and told him to remove his personal property from the apartment by the end of the month. Two days later, appellant was told to leave immediately or the police would be called. Over the next several days, appellant repeatedly attempted to retrieve his property from the apartment and the money owed him by Mr. Sparks, but each time Mr. Sparks told him to come back later.

On the evening of February 20, the two met at the building. When Mr. Sparks said he did not feel like walking up the stairs to the apartment, appellant admitted that he tried to force Mr. Sparks to go up the stairs with a toy gun, but the two ended up fighting. Mr. Sparks eventually gave appellant some money, and appellant decided to take the money and leave. Appellant testified that he only hit Mr. Sparks three times, and he denied kicking him. Appellant admitted to a prior conviction for extortion.

DISCUSSION

I.

Citing *Diggs v. State*, 409 Md. 260 (2009), appellant argues that the trial court committed reversible error when it engaged in repeated questioning of Mr. Sparks that assisted the State in laying a proper foundation for admission of the assault video (the DVD). Appellant argues that the "protracted and inquisitorial nature of the [trial] court's questioning undoubtedly reflected partiality towards the State and more directly, it enabled the State to present critical evidence to the jury." Appellant acknowledges that he did not object at any time to the trial court's questioning, but asks us to nonetheless exercise plain error review because the trial court's intrusion "affect[ed] the entire trial process" and any objection by his defense counsel "would likely have been futile and

created an even more hostile environment for appellant." The State argues that appellant has not preserved his argument for our review because he did not object to the trial court's behavior at any time, and even if preserved, appellant's argument lacks merit.

After Mr. Sparks testified about the assault, the State attempted to admit the assault video into evidence. The State elicited from Mr. Sparks that there were cameras in the building where the assault occurred, that he provided the video footage from the cameras to the police, and that he had reviewed the video footage. When the State sought to admit the video, defense counsel objected and a bench conference ensued. When asked to state her objection on the record, defense counsel said: "I think it's been properly authenticated, but the witness has said 'we,' 'we.' I don't know if he means himself or who?" The trial judge responded that the State had not laid a proper foundation and sustained the objection, informing the State, "I don't know how many cameras there are. I don't know how they're kept. I don't know . . .who is in charge of the cameras. I don't know where they're positioned in the hallway. I don't know anything that I need to know before I can allow this into evidence."

Questioning of Sparks resumed and the following colloquy occurred:

> [THE STATE]: Mr. Sparks, can you tell this Court where the cameras in the apartment are situated?
>
> THE COURT: Well, first, can you – there are cameras. How many cameras?
>
> THE WITNESS: There's eight or ten cameras. The one relevant to this [] one –
>
> THE COURT: Just how many cameras are there totally on this address, 200 East Preston Street?

THE WITNESS: At least three.

THE COURT: And how do you know that?

THE WITNESS: Because I see them everywhere I go in that building in plain sight.

THE COURT: Okay. So, you see the three cameras?

THE WITNESS: Yes.

THE COURT: Can you tell me exactly where they are?

THE WITNESS: The camera for this hallway is mounted above the – okay. The stairs go up, twist up, and there's a landing, and you turn and you go up one more time to be on the second floor. That landing that's between the first and second floor is where . . . this camera is mounted. It's fairly large, very plain sight, in the middle of that wall.

THE COURT: Okay.

THE WITNESS: It's aimed straight at the door. Its purpose is to look for intruders that come in the door.

THE COURT: All right. And you said there were three cameras. Where is the second camera?

THE WITNESS: The second camera is in a window of apartment two facing out to the street.

THE COURT: Where is the third camera?

THE WITNESS: In a different window facing to a different street.

THE COURT: On what floor?

THE WITNESS: The same. The second floor.

THE COURT: All right. Next question.

[THE STATE]: And, Mr. Sparks, do you know how those cameras operate?

[THE WITNESS]: Yes.

THE COURT: Who is responsible for the cameras?

THE WITNESS: The owner of the business more than anyone.

THE COURT: And who is the owner of the business?

THE WITNESS: A man named Randy Kerrigan.

THE COURT: Okay.

The State then asked Mr. Sparks three questions: whether Mr. Sparks helped set up the cameras in the building, whether he knew how the cameras work, and whether the footage on the camera that recorded the assault was downloaded to a disc. The judge then called the parties to the bench and told the prosecutor: "[S]he's not challenging how they work. She's suggesting that they haven't been authenticated. So, you have to establish who keeps the cameras, who is responsible for the cameras, who puts the disc in the camera, those kinds of issues, not how the camera itself works."

The trial court then excused the jury and the parties proceeded to further discuss whether the video had been authenticated:

> [THE STATE]: Your Honor, the video footage was video footage that Mr. Sparks and myself viewed in person and he's able to speak to the fact that it was a fair and accurate depiction of what occurred on the night in question.
>
> THE COURT: But you've got to ask him that question.
>
> [THE STATE]: Your Honor, I apologize if I hadn't asked him that, Your Honor. There was an objection and, Your Honor, I –
>
> THE COURT: There was an objection when you moved it into evidence.
>
> * * *
>
> [THE STATE]: Okay. I'm sorry, Your Honor.
>
> THE COURT: Don't be sorry. That's just –

[THE STATE]: I thought I had asked that question, Your Honor, but I must have –

THE COURT: Okay. Other than authenticity, are you objecting to the video on any other grounds?

[DEFENSE COUNSEL]: Yes.

The parties resolved an unrelated issue, returned to their respective trial tables, and the State resumed questioning of Mr. Sparks. The State elicited from Mr. Sparks that: the video on the CD depicted the assault, the video came from the camera in the building's foyer, he had reviewed the video, and the video was a fair and accurate depiction of the assault, except that it did not reflect how dark it was in the hallway that night. The trial judge then proceeded to ask several questions:

THE COURT: All right. Tell me about that. So, you're telling me that all the cameras go to a single device to maintain the recordings?

THE WITNESS: Yes.

THE COURT: And where is that device located?

THE WITNESS: It is located in the office area of the restaurant.

THE COURT: And who maintains that device?

THE WITNESS: The owner, Randy Kerrigan.

THE COURT: All right. Who retrieved this video from that device?

THE WITNESS: Randy Kerrigan retrieved the video from that device and –

THE COURT: Did he do that in your presence?

THE WITNESS: No. He's 40 miles away, but he remoted in, retrieved it, put it on the office computer, and left it there for me to put on a thumb drive for police, et cetera, or they use their own thumb drive.

THE COURT: And when did you give it to the police?

THE WITNESS: I think the next day.

Mr. Kerrigan downloaded the video into a DVD. The State moved to admit the DVD into evidence. Defense counsel objected, and a bench conference again ensued. Defense counsel argued that the State still had not met its burden of establishing the video's authenticity because Mr. Kerrigan had retrieved the video and downloaded it to a DVD. The trial court stated that it "would ordinarily agree with you" but overruled the objection because Mr. Sparks testified that the DVD accurately depicted the assault. The DVD was then admitted into evidence and played for the jury.

A. Preservation

"Plain error" review applies in the context of unobjected to jury instructions. *See* Md. Rule 4-325(e). For unobjected to errors of the type alleged here, we look to Md. Rule 8-131(a). That Rule provides: "Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court" but that we "may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." We have said:

> The purpose of Maryland Rule 8-131 is to allow the court to correct trial errors, obviating the necessity to retry cases had a potential error been brought to the attention of the trial judge. The Rule is also designed to prevent lawyers from "sandbagging" the judge and, in essence, obtaining a second "bite of the apple" after appellate review.

Sydnor v. State, 133 Md. App. 173, 183 (2000), *aff'd*, 365 Md. 205 (2001), *cert. denied*, 534 U.S. 1090 (2002).

"There is no fixed formula for the determination of when discretion should be exercised, and there are no bright line rules to conclude that discretion has been abused."

Garrett v. State, 394 Md. 217, 224 (2006) (quotation marks and citation omitted). Nonetheless, an appellate court should recognize unobjected to error when "compelling, extraordinary, exceptional or fundamental to assure the defendant of [a] fair trial." *Rubin v. State*, 325 Md. 552, 588 (1992) (quotation marks and citations omitted). The standard is high: "Every error that, if preserved, might have led to a reversal does not thereby become extraordinary." *Perry v. State*, 150 Md. App. 403, 436 (2002), *cert. denied*, 376 Md. 545 (2003). "[A]ppellate invocation of the 'plain error doctrine' 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon." *Morris v. State*, 153 Md. App. 480, 507 (2003).

"In the context of a trial court's interrogation of a witness, trial counsel must, at the very least, object to the court's question or comment in order to preserve appellate review of the interrogation." *Smith v. State*, 182 Md. App. 444, 478 (2008). The leading case in which the Court of Appeals reviewed a claim of judicial bias under plain error review is *Diggs v. State* and its companion case, *Ramsey v. State*. *See* 409 Md. 260 (2009). The Court summarized the trial court's intrusion in *Diggs*, stating:

> [T]he [trial] judge rehabilitated the prosecutor's case by laying the foundation for the distribution charge during questioning of the lead detective[]; rehabilitated [another detective] after he appeared confused; questioned Sherienne Diggs regarding the denominations of bills, where she put her keys, and the timing of her telling the police that the car and drugs belonged to her boyfriend rather than her brother; commented to Ms. Diggs, 'You have a very good memory on everything else,' and questioned her whether she was comfortable with her testimony, all of which bolstered the State's case while implying a disbelief in the defense and created the aura of partiality in front of the jury.

Diggs, 409 Md. at 293. The Court of Appeals similarly summarized the facts in *Ramsey*, stating:

> [T]he judge elicited key elements of the State's case from [an officer] including the timing and in-court identification of the defendant; established key aspects of the officer's testimony regarding the drugs; elicited testimony regarding the elements of intent to distribute after the prosecutor finished questioning the witness; made comments to the jurors to bolster the integrity of the prosecutor that 'most lawyers, good lawyers, talk to their witnesses,' and established the chain of custody of the drugs after the prosecutor failed to do so.

Id.

In each of those cases, defense counsel did not object to each instance of objectionable questioning. In *Diggs*, defense counsel only advised the trial court twice on the record that the court was testifying. Specifically, defense counsel advised the court that its actions were objectionable, stating: "This is inappropriate. You are not supposed to involve yourself in a case this way" and later advised the court, "I am objecting to you questioning her any further. You're badgering her." *Id*. at 270-71. In *Ramsey*, defense counsel likewise did not object to each instance of objectionable questioning, but defense counsel did object to the trial court's comment to the jury that unlike the defense lawyer "most lawyers, good lawyers, talk to their witnesses" when, at an ensuing bench conference, defense counsel told the judge that its comments "essentially buttress[ed] the credibility of the prosecutor[.]" *Id*. at 279, 285. Nevertheless, the Court of Appeals addressed the question of judicial bias because the "judge acted as a co-prosecutor, and his behavior exceeded 'mere impatience' and crossed the line of propriety, creating an atmosphere so fundamentally flawed as to

prevent Diggs and Ramsey from obtaining fair and impartial trials." *Id*. at 293. The Court held, however, that "[o]rdinarily the failure to object will only be countenanced in those instances in which the judge exhibits repeated and egregious behavior of partiality, reflective of bias. Failure to object in less pervasive situations may not have the same result, nor will we necessarily intervene." *Id*. at 294.

We agree with the State that in the instant case, appellant has waived his argument regarding the trial judge's bias and lack of partiality. Contrary to the facts in *Diggs* and *Ramsey*, at no time did defense counsel object to the questions posed, nor did the trial judge act in a manner that reflected "repeated and egregious behavior of partiality, reflective of bias." *Id*. at 294. The trial judge here asked clarifying questions as to the authenticity of the video. There was no insinuation against appellant's truthfulness and no bolstering of the prosecutor over defense counsel. *See Smith v. State*, 182 Md. App. 444, 478-79 (2008) (discussing several cases in which Maryland appellate courts have rejected claims of judicial impartiality in examining witnesses because of defense counsel's failure to object to each instance of objectionable questioning). *Cf. Archer v. State*, 383 Md. 329, 342, 359-61 (2004) (Court of Appeals reversed where the trial court attempted to persuade a reluctant witness to testify at a murder trial through contempt proceedings and a coercive instruction on how to testify even though defense counsel did not engage in repetitive objections at each instance of the judge's conduct where counsel did advise the trial court, "'At this point, Judge, I have to object. . . . Basically, you are trying to coach this defendant to say something that's not true.'") and *Leak v. State*, 84 Md. App. 353, 368-69 (1990) (where we reversed for appearance of partiality because the

clear purpose of the trial court's interrogation was to convey to the jury the judge's opinion of the defense witness's credibility, even though defense counsel did not object after each question asked by the judge but had informed the judge at a bench conference that he "had assumed a prosecutorial role in cross-examining the defense witness" and had moved for a mistrial).[2] & [3]

[2] In a footnote, appellant directs our attention to more instances of the court's interjection at trial, all of which occurred during the direct examination of Mr. Sparks:

1. After Mr. Sparks testified as to how he came to be in the stairwell with appellant, the judge asked Mr. Sparks: "And then what happened?"
2. When Mr. Sparks testified that appellant broke a weapon over his head, the court clarified, "What do you mean 'broke it' over your head?"
3. When the State showed Mr. Sparks a photograph of the floor of the foyer that showed a piece of the toy gun and asked Mr. Sparks whether the photograph was a "fair and accurate depiction of that area," the court asked Mr. Sparks "Is it a fair and accurate depiction of the gun that was used?"
4. When the State asked Mr. Sparks whether a photograph was a fair and accurate description of the stairwell and Mr. Sparks testified to his injuries, defense counsel objected. The court advised Mr. Sparks that the State had not asked him how he had been injured but whether the photograph shown to him was a fair and accurate picture of where the crime allegedly occurred.
5. When the State attempted to play the assault video and asked Mr. Sparks to narrate, the court sustained defense counsel's objection and asked, "How about this, Mr. Sparks. Tell us what is happening while the video is playing. Okay?"
6. While the video played, the court asked Mr. Sparks four times, "Now what is happening?"
7. When the State asked Mr. Sparks what type of car keys appellant removed from his pocket during the assault and Mr. Sparks said the car keys were "crazy expensive" to replace, the court directed Mr. Sparks to state what kind of car he owned.
8. When the State asked what injuries, if any, he sustained, and Mr. Sparks replied that his "mandible" was broken, the court asked him to explain what he meant by mandible and then asked if he had any other injuries.
9. Lastly, when defense counsel objected to the State eliciting hearsay testimony from Mr. Sparks that he told the detective the name of his assailant, the court

(continued)

II.

Appellant argues that the trial court committed reversible error when it permitted the lead detective to testify that he identified appellant by entering information into the "departmental database," procuring a photograph, showing it to Mr. Sparks for purposes of identification, and in admitting into evidence the procured photograph. Appellant argues that because identity was not an issue, the testimony and photograph should not have been admitted because they had no probative value, were highly prejudicial, and comprised impermissible "other crimes" evidence. The State argues that appellant has not preserved his "other crimes" evidence argument because he did not raise this argument below. The State further argues that the evidence was "relevant, and any potential prejudice was minimal and was cured."

During Mr. Sparks' direct examination, the State elicited that following the assault, Mr. Sparks was taken to the police station where he identified appellant from a photograph and wrote a statement under the photograph. The State then sought to

(continued)

> asked Mr. Sparks when he spoke to the detective in relation to the time of the assault and then, "And what happened when you got [to the police station]?"

[3] Appellant argues in a footnote that in addition to the trial court's questioning during admission of the assault video, the court "took over questioning or assisted the State in presenting evidence" several more times during Mr. Sparks' direct examination. We have reviewed each of the instances listed in appellant's footnote and find that the questioning complained of by appellant was an attempt by the trial court to clarify questions posed by the State or answers given by Mr. Sparks. In none of the instances cited by appellant did the trial court in any way impugn the credibility of a witness or suggest any bias in favor of either party. The court's questions were clearly motivated by efficiency. While we recognize that persistent questioning by a trial court, in and of itself, could lead to possible bias, that is not the situation before us.

introduce the document containing Mr. Sparks' statement and a front and profile picture of appellant, into evidence. Defense counsel objected on several grounds, stating "Identification is not an issue in this case. This is the man's mugshots. It has his SID number. Also, there's writing on it. He says he's 'assaulted.' That's a question for the jury[.]" The court overruled the objection "because [Sparks] wrote this the night of the incident and it's conducted at the time of an identification. I will ask you to redact the SID number." The document was then admitted into evidence.

The lead detective testified that when he spoke to Mr. Sparks at the police station, Mr. Sparks told him the name of his assailant. The detective testified that he then went through the "departmental databases" and found a photograph of appellant. Defense counsel objected and a bench conference ensued. Defense counsel objected "because somehow it implies that Mr. Quick might be someone known to the police, who would be in their database." The trial court overruled the objection.

Preservation

As stated above, "[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a). Md. Rule 4-323(a) provides: "An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." "It is well-settled that when specific grounds are given at trial for an objection, the party objecting will be held to those grounds and ordinarily waives any grounds not specified that are later raised on appeal." *Klauenberg v. State*, 355 Md. 528, 541 (1999)

(citations omitted). *See also Gutierrez v. State*, 423 Md. 476, 488 (2011) ("[W]hen an objector sets forth the specific grounds for his objection . . . the objector will be bound by those grounds and will ordinarily be deemed to have waived other grounds not specified.") (quotation marks and citations omitted).

Although an appellant may present an appellate court with a more detailed version of an argument made at trial, the Court of Appeals has refused to require trial courts "to imagine all reasonable offshoots of the argument actually presented" to them before making a ruling on admissibility. *Starr v. State*, 405 Md. 293, 304 (2008) (quotation marks and citation omitted). *Cf. Sifrit v. State*, 383 Md. 116, 136 (2004) (when the defendant's theory of relevance on appeal was different from the theory he presented to the trial court, the Court of Appeals held that the theory advanced on appeal was not preserved). Specifically, when a defendant objects on grounds of relevance at trial, the defendant fails to preserve for appellate review, the argument that the evidence was unduly prejudicial or consisted of "other crimes" evidence. *See Klauenberg*, 355 Md. at 541 (Court of Appeals held that an objection at trial to testimony limited to relevance did not preserve an appellate argument that the testimony was improper "bad acts evidence") and *Jeffries v. State*, 113 Md. App. 322, 340-42 (appellate argument that evidence was unduly prejudicial and improper other crimes evidence not preserved where objection below was only that evidence was irrelevant), *cert. denied*, 345 Md. 457 (1997).

Notwithstanding the State's argument that appellant has failed to preserve his "other crimes" evidence argument for our review, the preservation issue is not so clear and we will address it. Appellant did not use the words "other crimes" evidence below,

but the clear implication of his objections was that the evidence was inadmissible because it suggested he had been convicted of other crimes. Before we address the merits of appellant's argument, however, we note that appellant has not preserved his "database" argument for our review. Prior to the lead detective's testimony, Mr. Sparks testified. The State asked him on direct examination what happened after he told the police about the assault. Mr. Sparks testified that the police "found [appellant] quickly in the database." Defense counsel objected, and the court advised Mr. Sparks to not tell the jury what the police did. Questioning of Mr. Sparks resumed. By not asking the trial court to strike the "database" testimony, however, appellant failed to preserve his "database" argument for our review. *See Bruce v. State*, 328 Md. 594, 627-28 (1992), *cert. denied*, 508 U.S. 963 (1993) (stating that an immediate objection must be made when an objectionable question is asked or by an immediate motion to strike when the question is unobjectionable but the answer includes inadmissible and unforeseeable testimony), and *Williams v. State*, 131 Md. App. 1, 17, *cert. denied*, 359 Md. 335 (2000) (evidence coming in either earlier or later without objection waives admission of evidence). Nonetheless, even if appellant had properly preserved his arguments for our review, we would affirm.

Photographs and "departmental databases" testimony constitute reversible error?

Assuming without deciding that appellant is correct in that the trial court erred in admitting the photographs and lead detective's testimony about "departmental

databases," we would nonetheless not reverse because any error was harmless beyond a reasonable doubt.

To prevail in a harmless error analysis, the State must satisfy us "that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict." *Dorsey v. State*, 276 Md. 638, 659 (1976) (footnote omitted). *See also Bellamy v. State*, 403 Md. 308, 332 (2008) ("To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record.") (quotation marks and citations omitted). Evidence may be harmless, if it is cumulative of evidence that is properly admitted at trial without objection. *See Yates v. State*, 429 Md. 112, 120 (2012). The "essence" of a harmless error analysis is to determine "whether the cumulative effect of the properly admitted evidence so outweighs the prejudicial nature of the evidence erroneously admitted that there is no reasonable possibility that the decision of the finder of fact would have been different had the tainted evidence been excluded." *Ross v. State*, 276 Md. 664, 674 (1976). *See also Lawson v. State*, 389 Md. 570, 608 (2005) (in a "harmless error" analysis, we must consider the "cumulative effect" of the improper comments). In *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986), the Supreme Court set forth five factors that an appellate court should use to guide its decision in determining to what extent an error contributed to the verdict: the importance of the tainted evidence; whether the evidence was cumulative or unique; the presence or absence of corroborating evidence; the extent of the error; and the overall strength of the State's case.

Here, the objectionable evidence did not contribute to the verdict in any way. The evidence had little, if any, relevance to the issues before the jury because identity was not an issue. The evidence was cumulative because appellant's criminal past was twice put before the jury. First, Mr. Sparks testified on direct examination that he came to know appellant during the first several months he worked for the restaurant, stating: "[Appellant] shared with me about his *former life* and . . . he was very happy to have a job *again* and be . . . steadily employed[.]" (emphasis added). Second, and most important, appellant admitted on cross-examination that he had a prior conviction for extortion. Moreover, there was an abundance of evidence against appellant. Mr. Sparks testified about how appellant assaulted him, and the photographs of his injuries, medical records, and what was portrayed on the video corroborated his testimony. For these reasons, any error in admitting the evidence was harmless.

III.

Appellant argues on appeal that the trial court erred in not merging for sentencing purposes his conviction for second-degree assault into his conviction for robbery. Appellant argues that, because the charging document, the trial court's instructions, and the parties' closing argument did not specify which act comprised the assault separate from the act of robbery, the ambiguity must be resolved in his favor and his assault conviction merges into his conviction for robbery. The State disagrees and points out that in closing argument, it made clear that the kicking of Sparks after the robbery was a separate assault, independent and distinct from the robbery.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Maryland common law prohibit "multiple punishments for the same conduct, unless the legislature clearly intended to impose multiple punishments." *Morris v. State*, 192 Md. App. 1, 39 (2010) (quotation marks and citation omitted). We apply a two-part test to determine the legality of the sentence imposed. *Id*. (citation omitted). First, we determine whether the crime charged is a lesser included offense of the other crime.[4] *Purnell v. State*, 375 Md. 678, 693 (2003). Under this test, "[t]he focus is on the elements of each offense; if all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements, the former merges into the latter." *Marquardt v. State*, 164 Md. App. 95, 148 (quotation marks and citations omitted), *cert. denied*, 390 Md. 91 (2005). Second, we determine whether the charges arose out of the same act. *Jones v. State*, 357 Md. 141, 157 (1999). The State bears the burden of proving distinct acts for purposes of separate units of prosecution. *Morris*, 192 Md. App. at 39 (citation omitted). If a jury could have based multiple convictions on the same conduct but it is not clear whether it actually did so, "we must resolve the ambiguity in favor of appellant and assume that the jury based all of the convictions on the same conduct." *Jones v. State*, 175 Md. App. 58, 88 (2007), *aff'd*, 403 Md. 267 (2008) (citation omitted).

[4] This required evidence test is often labelled the *Blockburger* test based on the Supreme Court's holding and analysis in *Blockburger v. United States*, 284 U.S. 299 (1932).

In addressing appellant's argument that an ambiguity exists, we may look to the charging document, the trial court's instructions, and the parties' closing arguments to see if the jury based its convictions on the same or separate conduct. *See Jones*, 175 Md. App. at 88. *See Snowden v. State*, 321 Md. 612, 619 (1991) (the Court held that Snowden's conviction for assault and battery merged into his conviction for armed robbery in a bench trial where the trial court's rationale was unclear as to whether the assault and battery conviction was a lesser included offense of armed robbery or whether assault and battery was a separate act); *Morris v. State*, 192 Md. App. at 44 (holding that first-degree assault merged into armed robbery because it is a lesser included and where the charging document did not allege an assaultive act separate from the robbery and the jury was not instructed to reach a verdict on a separate act of assault,); *Williams v. State*, 187 Md. App. 470, 477 (holding that first-degree assault merged into armed robbery because it is a lesser included offense and where the charging document was ambiguous as to the particular act that comprised the assault and the trial court did not instruct the jury as to how the assault and robbery charges "related to one another, how they differed, and what the jury needed to find to convict under both charges.") (quotation marks and citation omitted), *cert. denied*, 411 Md. 602 (2009); *Beard*, 42 Md. App. at 280 (where there was no evidence of any "independent assault" apart from the robbery, Beard's convictions for assault should have merged into those for robbery); and *Melville*, 10 Md. App. at 126 (where assault conviction arose out of the element of violence of robbery, the offense of assault merged into offense of robbery for sentencing purposes).

Here, the trial court instructed the jury on robbery, stating, in part: "Robbery is the taking and carrying away of property from someone else by force or threat of force with the intent to deprive the victim of the property." The trial court instructed the jury on the crime of second-degree assault as follows:

> Assault in the second degree is causing offensive physical contact to another person. In order to convict the defendant of assault in the second degree, the State must prove (1) that the defendant caused physical harm to the victim, (2) that the contact was the result of an intentional or reckless act of the defendant and was not accidental, and (3) that the contact was not consented to by the victim.

At no time, however, did the trial court advise the jury that to find appellant guilty of assault, it must find appellant's action separate from those involved in the robbery. Additionally, in closing argument the parties likewise never explained the evidence as it related to the crimes charged, other than the State stating, "Even after he removed the items from Mr. Sparks' pockets, he still kept kicking him." Moreover, the verdict sheet simply set out the name of the four crimes, i.e., robbery, theft, first-degree assault, and second-degree assault, without any explanation as to what conduct went with which crime.

At sentencing, the trial court stated that ordinarily second-degree assault merges into robbery for sentencing purposes, but the court declined to merge those crimes, stating, "there were facts that the jury could find that, in fact, two separate offenses occurred." The court added: "I think there are sufficient facts in this case that a reasonable jury could have found that the assault occurred after the robbery and, therefore, I'm not going to merge the counts." This is true, but the jury was never

appropriately informed; thus, we resolve the ambiguity in appellant's favor. Because the State has failed to prove that the convictions were based on distinct acts, we shall vacate appellant's sentence for assault.

SENTENCE OF IMPRISONMENT FOR FOUR YEARS UPON CONVICTION FOR SECOND-DEGREE ASSAULT VACATED; JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY OTHERWISE AFFIRMED.

COSTS TO BE PAID 70% BY APPELLANT AND 30% BY MAYOR AND CITY COUNCIL OF BALTIMORE.