Circuit Court for Anne Arundel County
Case No.: C-02-CR-17-000986

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 374

September Term, 2018

ALI ISHMAEL HASSAN

v.

STATE OF MARYLAND

Fader, C.J.,
Wells,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: November 15, 2019

Appellant, Ali Ishmael Hassan, was indicted in the Circuit Court for Anne Arundel County and charged with attempted first and second degree murder, first and second degree assault, reckless endangerment and false imprisonment. Appellant elected a court trial and was acquitted of the murder charges but convicted on the remaining counts. He was sentenced to twenty years, with all but fifteen suspended, for first degree assault, to be followed by four years, consecutive, for false imprisonment, all suspended, with the remaining counts merged. Appellant timely appealed and asks us to address the following questions:

> 1. Did the circuit court err in determining that Mr. Hassan's waiver of a jury trial was voluntary?
>
> 2. Did the circuit court abuse its discretion in admitting "prior bad acts" evidence?
>
> 3. Did the circuit court err in admitting hearsay that did not fit within an exception to the rule generally excluding hearsay?
>
> 4. Is the evidence sufficient to sustain the convictions for first degree assault, reckless endangerment and false imprisonment?
>
> 5. Did the circuit court err and abuse its discretion in considering impermissible factors at sentencing?

For the following reasons, we shall affirm.

BACKGROUND

Paige Owen and appellant lived together in a one-bedroom apartment in Laurel, Maryland, and had been in a relationship, that included four children together, for approximately five years when the incident that formed the basis of this criminal case occurred at around 11:00 p.m. on the evening of March 31, 2017. While Owen remained

behind in the bedroom of their shared apartment, appellant, who had been partying in the living room with two friends, left to go to the store. Before he left, however, appellant propped a cellphone on a shelf to record any comings or goings at the front door.

Approximately twenty minutes later, appellant returned, examined the video recording, and confronted Owen while she was alone watching television in the bedroom. Appellant claimed that the video recorded Owen having sex with some unidentified person in the living room while appellant was away. But, Owen testified the recording showed no such thing and simply was a twenty-minute recording of their empty apartment. Owen also testified that appellant showed the video to his friends, and his friends told him to "calm down" because there was no one visible in the recording.

Nevertheless, appellant became irate and started "smacking" Owen in the face and knocked her off the bed. Once she was on the floor, appellant kicked her and broke her rib. Appellant would continue to beat and berate Owen over the next eight hours, falsely claiming that she was cheating on him. The beatings included appellant grabbing Owen by the hair and punching her head with a closed fist. According to Owen's trial testimony, "I could feel my eyes like swelling and getting big" and confirmed that they eventually swelled shut.

At another point, appellant dragged Owen into the bathroom by her hair, ripped off her shirt, cut her hair off down to her scalp, and "started pouring anything in the cabinet he could find" on her, including shampoo, conditioner and bathroom cleaner. In addition, Owen testified that appellant got a piece of toilet paper from the bathroom, and then, "wiped his butt with it and put it – the whole like cotton or tissue in my mouth."

After this, appellant dragged Owen back to the bedroom, by whatever hair that remained, and started choking her. Owen testified that:

> [H]e got even more mad and more mad as the time went on. Eventually he started like choking me, completely sitting on top of me, like my back to the ground, grabbing my neck where I couldn't breathe.
>
> And it was just about literally eight hours of choking, smacking, kicking, punching just over and over again. And if I tried to fight back, I'd get hit back even harder. So, there wasn't any point.

At one point Owen threw up blood onto a piece of paper, because she did not want to soil the carpet, and appellant took that same stained paper and "rubbed it all over my face and hair." Despite this obvious distress, thirty to forty minutes later, appellant choked her again.

Owen was choked "at least four times" during the early morning hours as appellant continued to interrogate her about the purported cellphone video. On approximately three of those occasions, 6'1" appellant, weighing 250 pounds, straddled directly over top 5'3" Owen, weighing 125 pounds, and had, according to Owen, "both of his hands on my throat." Owen sustained "Indian burns" and several abrasions from where appellant placed his hands around her neck.

Furthermore, appellant squeezed harder if he did not like Owen's answers to his interrogation, or if she tried to scream for help. She agreed that, during the ordeal, she became lightheaded and started "to see black." But, she maintained that she never lost consciousness and that appellant would "let go" just before she would pass out.

Owen further testified that she cried throughout the eight hours, and that "I knew if I had put my hands up there or tried to stop something worse would just happen." Asked

if she thought about running away during the assault, Owen testified "that wasn't even like a possibility at all." She also testified that "[i]f I would try to step out of the room, he could easily just step in front of me and . . . physically keep me from doing that." Further, "I didn't really have the chance" of getting away, and that "I knew there was like literally no getting – just walking away. So, I was just trying to calm him down."

Towards the end of appellant's tormenting, for some reason, appellant put Owen's head between his legs and started to shave her head. However, he finally tired and fell asleep. It was at that point that Owen was able to relax and sleep for a short while. When she woke, she managed to escape appellant's grasp as well as the apartment.

Owen testified that she had to crawl out of the apartment because "I couldn't walk. I had blood like dripping out of my mouth, and I was – my whole body was just in just like shock and pain." In addition to the injuries to her eyes, Owen sustained cuts to her lips, lacerations and bruises to her legs and neck, scrapes to her knees, a broken rib and a punctured lung. She was hospitalized for five days. She also testified that, unbeknownst to her at the time, she was four to six weeks pregnant when the assault occurred.

In response to a 911 call, Anne Arundel County Police Officer Robert Weber found Owen at the scene, "crying hysterically" and repeating, "[h]e is going to find me." Over objection, Weber testified that Owen told him that "her boyfriend [had] assaulted her." Weber also was present when Owen was treated at the hospital. According to the officer, Owen "was still crying" and "she was still extremely visibly upset." Weber then witnessed hospital employees "physically pry her eye open. When they did that, she was in extreme pain." Weber testified he knew she was in pain because "[s]he was screaming." And once

Owen's eye was pried open, Weber saw that, other than her pupil, "the entire rest of the eye was completely blood shot."

Kevin Harris, one of the responding paramedics, believed the injury to Owen's eye socket area was "life threatening." He testified, over objection, "[b]ecause the eye is so close to the brain and the brain is very susceptible to injuries. And anything – any injury that would cause that amount of swelling, indicates to me that possibly something happened to the brain." Harris also noticed marks on the left side of Owen's neck that appeared to be the outlines of four fingers.

Casey Green, a responding emergency medical technician ("EMT"), testified that Owen was the "worst . . . that I have seen a patient." Green called for an Advanced Life Support unit to respond because, upon initial contact with her, Owen might be a trauma patient. Green's report indicates that Owen had "strangulation marks on the left side of her neck" and "mas[s]ive swelling" to her right orbital eye socket, which was unable to be assessed further due to "swelling" and "bruising under eyes."

Owen's certified medical records were admitted into evidence at trial. These records show that Owen was diagnosed with the following: "Cerebral concussion; Cervical strain; Contusion of chest wall; Laceration of leg; Laceration of intraoral surface of lip; Pneumothorax, closed, traumatic; Closed fracture of orbit; Rib fracture[.]" More specifically, the pneumothorax, i.e., partial collapsed lung, was a "10% left anterior pneumothorax." Her rib fracture was a "'subtle fracture' of the 10th left rib[.]" And, her

eye injury was diagnosed as an "orbital floor fracture" that did "not require surgical treatment."[1]

After the State rested its case-in-chief, appellant testified on his own behalf. Appellant admitted that, on the night in question, he was with his brother and his friend inside his apartment, "getting high." He smoked two or three marijuana joints, some crack cocaine, and "popped some pills" of Xanax, combined with heroin.

Asked about the recording on his cellphone, appellant claimed that the recording was not from the same evening, but was from two nights earlier. Appellant stated that, although the events of the evening in question were "a blur," he did remember "confronting her." He testified that he remembered thinking that Owen cheated on him. He also remembered Owen becoming "irate" and threatening to electrocute herself in the bathtub before he gave her some drugs to "calm down." He testified, over objection, that Owen is suicidal and has "tried multiple times to kill herself."

Appellant further testified that, when he returned home from the store, he showed the cellphone video to his friends, and they indicated they did not see anything. Appellant then testified "[b]ut after that, all I do remember is going to sleep. I don't remember beating her up or doing any of that." According to appellant, the next thing he remembered was

[1] A "pneumothorax" is "commonly called a collapsed lung" and "is a condition in which air leaks from a lung and builds up in the space between the lung and the chest wall (pleural space)." The "orbit" is the location where the eye sits in the skull and, although the outer walls are "thick and strong," the "inside wall (near the nose) and the orbital floor are very thin and weak." An orbital floor fracture, "can be caused by any accident in which an object hits the face or the face strikes against a hard object."

waking up "with a K-9 standing over top of me" and noticing that "Paige was not there anymore."

Appellant explained that, whenever he snorted Xanax, as he did that evening, "I tend to forget and I lose control. Every time that I have gotten locked up, was because of the Xanax. That is like it is like my worse enemy but I love the feeling." He admitted that he had been treated for Xanax, in 2014, after being arrested for a prior, unrelated driving under the influence charge. He maintained that "I lose memory and black out on the Xanax."

Appellant further testified that he loved Owen and that his "intentions were never to kill her." He denied causing her physical injuries and he did not remember any of the allegations against him. He did not remember punching her in the eye, throwing liquids at her on the night in question, or cutting her hair off. He denied holding her against her will. He also testified that he did not know that Owen obtained a protective order from him. He denied choking her on prior occasions. And, after appellant was cross-examined about what he did and did not remember from the night of the incident, appellant maintained that: "I don't really know what happened but what she said happened is completely what couldn't have happened."

Appellant's witness, Dr. Lawrence Guzzardi, accepted as an expert in the field of emergency room medicine and toxicology, testified that he reviewed the victim's medical reports and opined that the "report did not indicate signs compatible with significant strangulation." He did not see evidence of "tracheal tenderness" or "swelling, bruising of

the neck." There was also no sign of petechia, or the "breaking of the blood vessels in the eye," which are "pathognomonic for strangulation or asphyxiation[.]"[2]

Dr. Guzzardi also noted that the initial examinations of Owen did not reveal injury to her lung and the fractured rib, but agreed that they were present after Owen underwent a CAT scan. But, he testified that her rib fracture did not require surgery and, in his opinion, was not the cause of her partial pneumothorax, i.e., collapsed lung. He also testified that Owen did not sustain a significant head injury or significant respiratory problems. And, according to appellant's witness, the injury to Owen's eye was "just a fracture," and would heal without surgery.

Dr. Guzzardi interviewed appellant and reviewed appellant's medical records and, based on this, testified that appellant "is significantly impaired when he uses Alprazolam, Xanax and the way that he does it when he snorts it." Dr. Guzzardi also testified that appellant could have been "delusional" and paranoid regarding the cellphone video at issue in this case. He further testified, over objection, that appellant "has black outs from Xanax overdoses" and has been told that, during these black outs, "he has done things such as tear things apart, break things, curse people out but he does not remember doing such things."[3]

[2] Dr. Guzzardi generally agreed that the term "choking" refers to "something lodged inside of the throat" and "strangulation or attempted strangulation" is "external pressure applied to the neck or external touching[.]" More specifically, he testified that "Strangulation, as I read the term, implies a death from cessation of oxygen flow to the brain because of either the mechanism of occlusion of the arteries or occlusion of the oxygen carrying trachea or other parts of the neck." He agreed that "asphyxia" is "a process which deprives" the "tissue cells of oxygen[.]" He further agreed that direct injury to the trachea is rarely evident in cases of strangulation, even fatal cases.

[3] Dr. Guzzardi defined a "blackout" as "loss of memory" and that, during such an event, "you can seem relatively normal but the memory is what's lost."

On cross-examination, Dr. Guzzardi agreed that he never spoke with the victim, Owen, the responding paramedics, or the physicians that treated Owen at Prince George's Hospital Center. He did not review her x-rays or CAT scans. And, he agreed there was no toxicology performed on the appellant on April 1, 2017, the morning of the incident.

Dr. Guzzardi then also agreed that, in appellant's interview with another doctor, appellant denied "a history of psychotic symptomology e.g., auditory and visual hallucinations and delusions[.]" And, appellant denied "a history of hallucinations and delusions."

On further cross-examination, Dr. Guzzardi did not recall if he asked appellant what drugs he ingested, and the timing of that ingestion, on the night in question. He agreed, generally, that the information that one of his subjects was able to follow simple commands from a police officer would be relevant to his opinion concerning that individual's mental state following ingestion of controlled dangerous substances. He also agreed that whether that person could walk on his own, could remember details of a recent argument and certain events, and could carry on a coherent conversation would be relevant to his opinion in such a case.

In rebuttal, the State called Detective Daniel Pamer, who testified that he interviewed appellant on April 1, 2017, at approximately 11:00 a.m. Detective Pamer testified that he did not believe appellant was impaired by marijuana or alcohol when he was interviewed.

After hearing argument, the court found appellant not guilty of the attempted murder charges, but guilty on the remaining charges. The court found as follows:

As I indicated the Court [heard] testimony in this case and took evidence over a three-day period in December. Subsequent to that the Court held this matter in order to review all the exhibits and to view the videotaped interview that was introduced into evidence.

Based on all of the evidence I find that Ms. Owen's version of the events on March 31st and April 1st, 2017 is credible. And the fact that the Defendant says that he cannot remember what happened does not mean it did not happen. It also does not mean that he lacked the capacity to form the requisite specific intent at any time during the eight hour period of this incident.

However, the Court cannot find beyond a reasonable doubt that the Defendant's actions amounted to attempted first degree or attempted second degree murder. So, I find the Defendant not guilty on Count 1 and Count 2.

With respect to Count 3, which attempted – which is first degree assault and Count 4, which is second degree assault, I find beyond a reasonable doubt that the Defendant caused physical harm to Paige Owen, that the offensive contact was the result of the intentional and reckless acts of the Defendant and was not accidental. Further, the contact was not consented to by Ms. Owen.

Based on the circumstantial evidence and my inferences therefrom I further find beyond a reasonable doubt that the Defendant intended to cause Paige Owen serious physical injury in the commission of the assaults.

I find that the State has met its burden of proof beyond a reasonable doubt on the issue of specific intent, notwithstanding the Defendant's claim of voluntary intoxication.

I do not find that the Defendant's level of intoxication was so great that he lacked the ability to have the requisite specific intent at any time during the eight plus hours of this incident.

Serious physical injury is defined as injury that creates a substantial risk of death or causes serious and permanent or serious and protracted disfigurement of impairment or loss of the function of any bodily member or organ.

Defendant's expert witness testified in an attempt by the Defense to show that Ms. Owen's injuries lacked the requisite severity. However, it is not the actual severity that is at issue. It is the Defendant's intent to cause such injuries.

> The State has proven that intent, beyond a reasonable doubt. So, I therefore find the Defendant guilty of first degree assault of Paige Owen and I also find him guilty of second degree assault of Paige Owen.
>
> With regard to the reckless endangerment charge, which is Count 5, the State has proven beyond a reasonable doubt that the Defendant engaged in conduct that created a substantial risk of death or serious physical injury to Paige Owen, that a reasonable person would not have engaged in that conduct and that the Defendant acted recklessly.
>
> He was aware that his conduct created a risk of death or serious physical injury to Paige Owen and then he consciously disregarded that risk. So, I find the Defendant guilty on Count 5, reckless endangerment.
>
> The final count, Count 6, false imprisonment, the State has proven beyond a reasonable doubt that the Defendant confined and detained Paige Owen against her will and that the confinement or detention was accomplished by force and threat of force. And that there was no legal justification for the confinement or detention.
>
> I therefore find the Defendant guilty on Count 6, false imprisonment.

We shall include additional detail in the following discussion.

DISCUSSION

I.

Appellant first contends that the court erred in accepting his jury trial waiver on the grounds that his election was made under duress and was not voluntary. Recognizing that the issue is not preserved, appellant asks that we exercise plain error review. The State responds that the issue is not preserved, does not warrant plain error review, and is without merit in any event. We agree with the State.

An entire day of voir dire for purposes of jury selection occurred before appellant informed the court that he wanted a bench trial. Appellant personally explained his reason to the court as follows:

THE DEFENDANT: The reason for that, Your Honor, is because I heard a lot of stuff standing up front and I don't think that I could get a fair trial with the jury, I really don't believe I could because of the circumstances or the allegations. I really don't feel I could get a fair trial. I heard what 30 of them had to say. I saw all the people stand up. Every witness, which I don't know how they are witnesses, they are the police. And they will believe what the police say even if things is not -- I don't feel like I could get a fair trial.

As part of the ensuing waiver inquiry, the following transpired:

THE COURT: All right, let me go a little bit further. I do believe that you are competent but is it your decision to waive a jury trial the result of any threat or coercion?

THE DEFENDANT: What do you mean coercion -- what do you mean --

THE COURT: Has anyone told you that you or any other person would be harmed in some way if you chose to be tried before a jury?

THE DEFENDANT: I was told -- it was actually made under duress because the plea deal at first was four to nine. And when I decided to do a jury trial, it turned up at 25, which is why --

THE COURT: So, you feel that you are doing this under duress?

THE DEFENDANT: I'm definitely doing it under duress and because I don't feel like I can get a fair trial.

THE COURT: You don't think you can get a fair jury trial?

THE DEFENDANT: Not with the jury that we have -- not what I've seen so far. No, Your Honor.

THE COURT: All right, so, are you making this decision based on what you think is best for you?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right, so it is not based -- no one is forcing you to make this decision, correct?

THE DEFENDANT: No, it's not -- I mean it's a personal decision but it's made out of good – it's out of good faith.

THE COURT: All right, is this decision the result of any promise or inducement?

THE DEFENDANT: No, Your Honor.

THE COURT: And have you discussed it with your attorney, have you had enough time to talk to [Defense Counsel] about this?

THE DEFENDANT: I talked to her downstairs.

THE COURT: All right, so, are you -- do you need to talk to her any further?

THE DEFENDANT: No, Your Honor.

After advising appellant further about the nature of a jury trial, including details about selection and composition, as well as the requirement that their verdict be unanimous, appellant maintained that he wanted to waive a jury trial, as follows:

THE COURT: All right, so, do you still waive -- wish to waive a jury trial and be tried by me based on everything that I have told you and your discussions with your counsel?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right, so, based on the foregoing inquiry and knowing of no other facts to suggest otherwise, I find that the Defendant's waiver of a jury trial is knowing and voluntary and trial will therefore be before the Court without a jury.

Do you understand that you can't change that now that you have waived your jury trial, do you understand that?

THE DEFENDANT: Yes, I understand.[4]

[4] Defense counsel then placed the plea offer on the record, indicating that, prior to trial, the State offered to have appellant plead guilty to first degree assault and false (continued)

As both parties acknowledge, there was no objection to the jury trial waiver in the circuit court. It is well-established that Maryland's appellate courts ordinarily will not consider "any issue 'unless it plainly appears by the record to have been raised in or decided by the trial court.'" *King v. State*, 434 Md. 472, 479 (2013) (quoting Md. Rule 8-131(a)). This preservation rule extends to claims concerning a defendant's jury trial waiver. *See Meredith v. State*, 217 Md. App. 669, 674 (2014) ("[T]he appellate courts will continue to review the issue of a trial judge's compliance with Rule 4-246(b) provided a *contemporaneous* objection is raised in the trial court to preserve the issue for appellate review") (citations omitted); *see also Ray v. State*, 206 Md. App. 309, 350 (2012) ("By failing to object to the circuit court's alleged errors, appellant forfeited the right to appellate review of any issue as to the circuit court's acceptance of the not guilty agreed statement of facts or compliance with Maryland Rule 4-246(b)"), *aff'd on other grounds*, 435 Md. 1 (2013).

Appellant asks us to ignore the preservation failure and review this issue under the plain error doctrine. "Plain error is error that is so material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial." *Steward v. State*, 218 Md. App. 550, 565 (citation and internal quotation marks omitted), *cert. denied*, 441 Md. 63 (2014); *Malaska v. State*, 216 Md. App. 492, 524-25 (explaining that plain error review can remedy defects that denied "a defendant's right to a fair and impartial trial"), *cert. denied*, 439 Md. 696 (2014), and *cert. denied*, 135 S. Ct. 1162 (2015). Review for

imprisonment with a cap of 11 years. After that was rejected, the State then offered a plea to first degree assault for 25 years.

plain error is reserved for error that is "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial." *Savoy v. State*, 420 Md. 232, 243 (2011).

"[P]lain error review is a 'rare, rare phenomenon,' undertaken only when the un-objected-to error is extraordinary." *Perry v. State*, 229 Md. App. 687, 710 (2016) (quoting *Pickett v. State*, 222 Md. App. 322, 342 (2015)), *cert. dismissed*, 453 Md. 25 (2017). There are four prongs to plain error review:

> "First, there must be an error or defect [—] some sort of deviation from a legal rule [—] that has not been intentionally relinquished or abandoned . . . by the [defendant]. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the [defendant]'s substantial rights, which . . . means [that the defendant] must demonstrate that [the error] affected the outcome of the [trial] court proceedings. Fourth and finally, if the above three prongs are satisfied, the [appellate court] has the discretion to remedy the error [—] discretion [that] ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings. Meeting all four prongs is difficult, as it should be."

Givens v. State, 449 Md. 433, 469 (2016) (quoting *State v. Rich*, 415 Md. 567, 578 (2010)). *See also White v. State*, 223 Md. App. 353, 403 n.38 (2015) (plain error review is appropriate when the error is "'compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial,'" and "'review under the plain error doctrine 1) always has been, 2) still is, and 3) will continue to be a rare, rare phenomenon'" (internal citations and quotations omitted)). Further, plain error review is suitable only in cases of "'blockbuster errors.'" *Olson v. State*, 208 Md. App. 309, 363 (2012) (quoting *Martin v. State*, 165 Md. App. 189, 196 (2005)), *cert. denied*, 430 Md. 646 (2013). A defendant "is entitled to a fair trial, but not necessarily a perfect one." *Gutierrez v. State*, 423 Md. 476, 499 (2011) (citing *Hook v. State*, 315 Md. 25, 36 (1989)).

In order to assess whether plain error review is warranted, we must consider whether there was error in the first instance. Maryland Rule 4-246 provides as follows:

> (a) *Generally.* In the circuit court, a defendant having a right to trial by jury shall be tried by a jury unless the right is waived pursuant to section (b) of this Rule. The State does not have the right to elect a trial by jury.
>
> (b) *Procedure for acceptance of waiver.* A defendant may waive the right to a trial by jury at any time before the commencement of trial. The court may not accept the waiver until, after an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, the court determines and announces on the record that the waiver is made knowingly and voluntarily.

An accused's right to a trial by jury is guaranteed by the Sixth Amendment to the United States Constitution. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); *Boulden v. State*, 414 Md. 284, 294 (2010). Similar protection is given criminal defendants under Articles 5(a)(1) and 21 of the Maryland Declaration of Rights. *Owens v. State*, 399 Md. 388, 405-06 (2007), *cert. denied*, 552 U.S. 1144 (2008). Because the right to a jury trial is "absolute," *Robinson v. State*, 410 Md. 91, 107 (2009), the right can only be waived if the trial court is "satisfied that there has been an intentional relinquishment or abandonment" of that right. *Powell v. State*, 394 Md. 632, 639 (2006) (citation and quotation marks omitted), *cert. denied*, 549 U.S. 1222 (2007). Whether an accused has made an intelligent and knowing waiver of the right to a jury trial depends on the facts and circumstance of each case. *Walker v. State*, 406 Md. 369, 380 (2008) (citations and quotation marks omitted). And, there is no precise litany of questions that need be asked in order for the Court to allow the waiver; instead the validity of the waiver is to be determined on the

totality of the circumstances. *See Abeokuto v. State*, 391 Md. 289, 318 (2006); *see also State v. Hall*, 321 Md. 178, 182 (1990) (whether there has been an intelligent waiver of the right to a jury trial depends upon the facts and circumstances of each case). Ultimately, "the trial court must satisfy itself that the waiver is not a product of duress or coercion, and further that the defendant has some knowledge of the jury trial right before being allowed to waive it." *Tibbs v. State*, 323 Md. 28, 31 (1991); *accord Hall*, 321 Md. at 182-83.[5]

Here, we first note that there is no claim that appellant was not properly advised of his right to a jury trial and the constitutional guarantees that such a right affords. Instead, appellant's claim is that his waiver was involuntary because he informed the court that his election was made under duress. However, as the State points out, appellant's claim appeared to be directly related to the State's plea offer and to his observations following a day of voir dire of the venire. As the State argues: "Hassan stated that he felt 'under duress' or threatened about going to trial, not that he was 'under duress' or threatened to waive his right to a jury trial." (emphasis omitted). This is supported by the colloquy between appellant and the court when appellant indicated that he did not think he could get a fair

[5] With respect to voluntariness, the Committee Note to Rule 4-246 suggests the following:

> In determining whether a waiver is voluntary, the court should consider the defendant's responses to questions such as: (1) Are you making this decision of your own free will?; (2) Has anyone offered or promised you anything in exchange for giving up your right to a jury trial?; (3) Has anyone threatened or coerced you in any way regarding your decision?; and (4) Are you presently under the influence of any medications, drugs, or alcohol?

trial with the jury that "I've seen so far." He also agreed that he was making the decision because he thought it was "best" for him. Appellant further agreed that: he was not making the decision to waive his right to a jury trial due to any promise or inducement; he talked to his attorney about his election; he understood the nature of a jury trial; and, he wished to waive that right. Under the circumstances presented, we decline to overlook the lack of preservation and engage in plain error review. *See, e.g.*, *Morris v. State*, 153 Md. App. 480, 506-07 (2003) (noting that the five words, "[w]e decline to do so [,]" are "all that need be said, for the exercise of our unfettered discretion in not taking notice of plain error requires neither justification nor explanation.") (emphasis omitted).

II.

Appellant next contends the court erred in admitting evidence of prior bad acts, namely: (1) that he had been physical with the victim on prior occasions; (2) that he put his hands around her neck approximately five times over their four-year relationship; and, (3) that, on June 11, 2018, the victim had applied for a protective order against him concerning one of these incidents. The State responds that the court properly exercised its discretion. We agree.[6]

Prior to trial, the State moved in limine to admit evidence of prior acts of abuse by appellant upon the victim in this case. Due to the fact that appellant elected a court trial,

[6] The State does not assert that this issue is unpreserved for appellate review, therefore, we do not decide that issue and shall proceed to address the merits. *See Whittington v. State*, 147 Md. App. 496, 513 n.3 (2002) (addressing an issue on the merits and noting the lack of a preservation challenge).

the issue was tabled, and the court reserved ruling until after Owen testified at trial. When that occurred later that same day, and during a break in Owen's direct examination, the court heard further argument on the issue. The State noted that, if the defense was going to argue that his voluntary intoxication negated his intent to commit the underlying offenses, then it would like to admit evidence of prior bad acts under Maryland Rule 5-404(b) because they were specially relevant to establish appellant's motive and intent. Again, noting that the trial was proceeding as a court trial, defense counsel agreed to allow the State to elicit the evidence preliminarily, before the court ruled on its eventual admissibility, with the caveat that it could be struck later after argument.

Accordingly, Owen testified that she applied for a protective order as a result of this incident. Prior to this incident, appellant had been "physical" with her and had put his hands around her neck. This occurred multiple times, and once, when they were at appellant's mother's house and in front of other people. Owen obtained a protective order following this latter incident, which occurred in approximately June of 2013.[7] She testified that, in the past four years prior to trial, appellant had either choked her, or had put his hands around her neck, approximately five times.

The court subsequently ruled that this evidence was admissible:

> THE COURT: I am going to -- yes, I am going to. So the three prong test is that if the evidence relates to an offense separate [than] that for which the defendant is presently charged doesn't fit into one of the exceptions, the exceptions are motive, opportunity, intent, preparation, common scheme, or planned, knowledge, identity or absence of mistake or accent. This is a legal

[7] The protective order was admitted into evidence over objection.

> determination and it does not involve an exercise of discretion. And I think this just the 404(b) evidence that was presented does go to motive and intent.
>
> So I am also to consider whether the accused involvement in the other crimes are established by clear and convincing evidence and I do believe that the prior incident in which the evidence was offered to establish – was established by clear and convincing evidence. And I am also to balance the probative value against the prejudicial effect and I do find that the probative value outweighs the prejudicial effect.

We review a trial court's rulings on the admissibility of evidence for abuse of discretion. *Newman v. State*, 236 Md. App. 533, 556 (2018) (citing *Kelly v. State*, 162 Md. App. 122, 143 (2005)). Maryland Rule 5-404(b) provides, in pertinent part:

> Evidence of other crimes, wrongs, or acts . . . is not admissible to prove the character of a person in order to show action in conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

Essentially, the rule "restricts the admissibility of evidence of 'other crimes, wrongs, or acts,' unless that evidence has special relevance to the case." *Odum v. State*, 412 Md. 593, 609 (2010); *see also Klauenberg v. State*, 355 Md. 528, 549 (1999) (defining a "bad act" as "an activity or conduct, not necessarily criminal, that tends to impugn or reflect adversely upon one's character, taking into consideration the facts of the underlying lawsuit"). To determine the admissibility of other crimes evidence, the court must engage in a three-step analysis. *State v. Westpoint*, 404 Md. 455, 489 (2008) (citation omitted). When confronted with alleged other crimes evidence, a trial court first must determine, as a legal matter, whether the evidence fits within one of the exceptions. *State v. Faulkner*, 314 Md. 630, 634-35 (1989). Second, the court must decide whether the defendant's involvement in the other crime has been established by clear and convincing evidence. *Id.*

Third, the court exercises its discretion in balancing the necessity for and probative value of the evidence against any undue prejudice likely to result to the defendant. *Id.* Appellant commendably concedes that the evidence at issue was specially relevant to motive and that the evidence was clear and convincing. *See, e.g., Snyder v. State*, 361 Md. 580, 608-09 (2000) (evidence that the petitioner and victim had a "stormy" relationship, and that there was a fight between the two, one night before the murder, was "probative of a continuing hostility and animosity" toward the victim and therefore, of motive to murder); *Stevenson v. State*, 222 Md. App. 118, 150 (2015) (concluding that evidence of prior "recent acts or recent evidence of violent and physically abusive acts" by the defendant against the murder victim were admissible), *cert. denied*, 443 Md. 737 (2015).

Instead, appellant's argument is that the court erred in balancing the probative value of the evidence against the likelihood of unfair prejudice. More specifically, appellant asserts that, because "defense counsel conceded both the identity of Mr. Hassan as the person who assaulted Ms. Owen and the fact that he committed a second degree assault, the only disputed issue was his intent[.]" Appellant continues that the prior bad acts evidence was not probative of "his intent to commit a more serious assault or an attempted murder of Ms. Owen" and only established that he had assaulted her before.

This Court has explained the balancing aspect of other crimes/bad acts analysis as follows: "The ill effect that militates against admissibility is not prejudice generally, but only *unfair* prejudice." *Oesby v. State*, 142 Md. App. 144, 165, *cert. denied*, 369 Md. 181 (2002). "The probative value must, of course, be measured against the "unfair" component of the prejudicial evidence. When that is the subject of the balancing, necessity is a factor.

We balance 1) the need for the evidence against 2) the tendency of the evidence to prejudice the defendant unfairly." *Id*. at 166. And:

> This final balancing between probative value and unfair prejudice is something that is entrusted to the wide discretion of the trial judge. The appellate standard of review, therefore, is the highly deferential abuse-of-discretion standard. The fact that we might have struck the balance otherwise is beside the point. We know of no case where a trial judge was ever held to have abused his discretion in this final weighing process. As a practical matter, that will almost never be held to have occurred. A properly disciplined appellate court will not reverse an exercise of discretion because it thinks the trial judge's decision was wrong. That would be substituting its judgment for that of the trial court, which is inappropriate if not forbidden. Reversal should be reserved for those rare and bizarre exercises of discretion that are, in the judgment of the appellate court, not only wrong but flagrantly and outrageously so.

Oesby, 142 Md. App. at 167-68.

We are not persuaded that the court's balancing of the prior bad acts evidence was either "bizarre" or "flagrantly and outrageously" "wrong." Whereas both murder and assault charges were in play, intent was clearly an issue and the prior bad acts evidence was probative. Nor do we conclude that the court, in this bench trial, was unable to distinguish that probative value from any danger of unfair prejudice. "The exercise of a judge's discretion is presumed to be correct, he is presumed to know the law, and is presumed to have performed his duties properly." *In re Adoption of Jayden G*., 433 Md. 50, 87 (2013) (internal citations and quotations omitted). The Court of Appeals has also stated:

> Under some circumstances, where intent is legitimately an issue in the case, and where by reason of similarity of conduct or temporal proximity, or both, evidence of other bad acts may possess a probative value that outweighs the potential for unfair prejudice, the evidence may be admissible.

Howard v. State, 324 Md. 505, 514 (1991). We conclude that the prior bad acts evidence was specially relevant, was supported by clear and convincing evidence, and any unfair prejudice was outweighed by its probative value.

III.

Appellant next asserts that the court erred by admitting hearsay answers provided by the victim on standard-issue police department domestic violence paperwork. Appellant argues the evidence did not meet the requirements for the hearsay exception for statements of then existing mental, emotional or physical condition because they were not spontaneous. Appellant also asserts the police report was not admissible as a business record or as relevant to medical treatment because it was made in anticipation of litigation.

The State responds that appellant's arguments are unpreserved because the only ground asserted at trial was that the evidence violated his rights under the Confrontation Clause, and, because appellant failed to object to each instance when the officer offered testimony on the subject matter. The State also responds on the merits, asserting that the evidence amounted to an excited utterance or as a statement of then existing physical condition. The State concludes that any error was harmless beyond a reasonable doubt given other cumulative evidence of Owen's injuries.

During Officer Weber's direct examination, he testified that, as part of his conversations with Owen, he filled out "standard issue departmental domestic violence paperwork." He explained that this form collected general information about the victim and the possible suspect, and included, but was not limited to, questions concerning

strangulation. Weber testified, without objection, that "she indicated that there had been instance of strangulation [sic] so we went down that line of questioning."

Weber was then asked whether Owen reported any breathing changes as a result of the strangulation, and it was at that point that appellant objected. The following transpired at the ensuing bench conference:

> [DEFENSE COUNSEL]: Your Honor --
>
> THE COURT: Basis of your objection?
>
> [PROSECUTOR]: It is hearsay. Statement of an existing physical or emotion condition and these are all physical conditions that she experienced -- she answered yes and that is a hearsay statement and it comes in under the exception of her current physical condition.
>
> [DEFENSE COUNSEL]: But this is a document prepared in anticipation of litigation. This is not -- this is not in regards to any actual observations. This is an actual report. And therefore this should not be admissible or admitted.
>
> [PROSECUTOR]: Two things, I am not introducing the report but second, it only matters if something is prepared in anticipation of litigation. If there is a Crawford issue because the victim did not testify. So they can't be confronted about it. But she did testify. So we are not eve [sic] in the realm of it mattering who it was said to. I think it is (b)(3).
>
> THE COURT: Okay, I am going to overrule the objection.

Although the actual report was not admitted, Officer Weber testified, without further objection, that Owen reported difficulty breathing and hyperventilation. She also had difficulty talking and troubling swallowing. Weber also wrote down that the victim had redness on her face and in her eyes, a bloody nose, cuts and abrasions to her mouth, and scratch marks, bruising and swelling on her neck. Owen also reported that "she had felt dizzy and she had a headache and had lost consciousness."

Maryland's appellate courts ordinarily will not consider "any issue 'unless it plainly appears by the record to have been raised in or decided by the trial court.'" *King*, 434 Md. at 479 (quoting Md. Rule 8-131(a)). And, "to preserve an objection, a party must either object each time a question concerning the [matter is] posed or ... request a continuing objection to the entire line of questioning." *Wimbish v. State*, 201 Md. App. 239, 261 (2011) (citation and quotations omitted).

Further, pertinent to the State's specific argument, "where an appellant states specific grounds when objecting to evidence at trial, the appellant has forfeited all other grounds for objection on appeal." *Perry*, 229 Md. App. at 709 (citing *Klauenberg*, 355 Md. at 541). "While a party need not state the specific grounds for objection unless directed to do so by the court, the Court of Appeals has nonetheless held that where a party voluntarily states his grounds for objection even though not asked, he must state all grounds and waives any not so stated." *Hall v. State*, 225 Md. App. 72, 84 (2015) (citation and quotations omitted).

Notably, defense counsel did not assert a hearsay basis for the objection, nor did she specifically challenge the State's suggestion that the evidence was admissible under Maryland Rule 5-803(b)(3).[8] We are persuaded that appellant's arguments in this Court, that the evidence was inadmissible hearsay, is not properly preserved. Moreover, as the

[8] Under the Maryland Rules, hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). "Except as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible." Md. Rule 5-802.

State notes in its brief, Officer Weber gave similar testimony, both before and after appellant's objection, therefore, this issue is waived for that reason as well.

Indeed, in responding to the court's request for the grounds for appellant's objection, defense counsel simply stated that the police report was inadmissible because it was prepared in anticipation of litigation. Although the prosecutor took this to be an argument under the Confrontation Clause of the Sixth Amendment, *see Crawford v. Washington*, 541 U.S. 36, 51-53 (2004) (proscribing the admission of "testimonial" statements, under certain circumstances), appellant does not raise a constitutional issue on appeal.

Instead, for the first time, appellant directs our attention to *Anderson v. State*, 420 Md. 554 (2011). In that case, where Anderson was convicted of sexual abuse of a minor and second degree sexual offense, the evidence included a written report by Dr. Stephen Boos to Detective Mike Carin of the Montgomery County Police Department. *Anderson*, 420 Md. at 556. Dr. Boos did not testify at trial. The medical report contained detailed allegations from the victim regarding the sexual abuse. *Id*. at 558-61. The Court of Appeals held that the report was "inadmissible hearsay when offered to establish [the victim's] state of mind at the time of her interview," *id*. at 569, and was prepared "in anticipation of litigation, and was not admissible under either the 'business records' exception or the 'statements in contemplation of treatment' exception to the rule against hearsay." *Id*. at 557.

Appellant also argues this was the type of "police report" discussed in *Schear v. Motel Management Corp. of America*, 61 Md. App. 670 (1985). In that case, this Court

recognized that police accident reports, and/or summaries, are admissible as business records. *Schear*, 61 Md. App. at 680 (citations omitted). However, we also held that "[t]he print-outs that appellants sought to introduce, however, are not accident reports; they are merely lists of unverified complaints of crimes made by unidentified individuals." *Id*. at 680-81. We explained:

> It is clearly established, however, that police investigative reports are admissible under the business records exception only to the extent that information contained therein is within the personal observation of the investigating officer and that any information based upon hearsay is inadmissible. As the trial judge noted, since the reported crimes contained in these print-outs were not based upon the personal observations of the investigating officer, they constitute hearsay that is inadmissible under the business records exception.

61 Md. App. at 681 (internal citations omitted).

Although it is arguable that the general rule from *Schear* concerning the admission of police reports based on an investigating officer's personal observations would apply, we conclude that *Anderson* and *Schear* are inapposite. The State was not offering Officer Weber's report as a business record or a statement pertinent to medical treatment. Instead, it was the State's position that Officer Weber's report was admissible as a statement of a then-existing mental, emotional or physical condition.[9]

[9] Whereas the State argued this exception, and not the excited utterance exception as it does for the first time on appeal, we decline to address whether the report was admissible on that basis. *See Williams v. State*, 99 Md. App. 711, 724-25 (1994) (observing that, where the trial court never had the opportunity to find facts to support that an utterance was excited, the appellate court cannot consider the excited utterance exception to the rule against hearsay). *Cf. Morten v. State*, __ Md. App. __, No. 215, Sept. Term, 2017 (filed 09/04/19) (slip op. at 10, 12) (concluding that 911 call, made approximately 24 minutes after the shooting, was not an excited utterance made while under the "throes of the (continued)

That exception is provided for in Maryland Rule 5-803(b)(3):

> [a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or the declarant's future action, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

In understanding this exception, appellant directs our attention to *Cassidy v. State*, 74 Md. App. 1 (*superseded on other grounds by Walker v. State*, 107 Md. App. 502 1995)), *cert. denied*, 312 Md. 602 (1988). There, this Court explained:

> It is a member of the larger family of hearsay exceptions known as "Spontaneous Statements." [6 J. Wigmore, *Evidence* § 1718 (3d ed. 1940)] traces the origins of "Statements of a Physical Condition" to as early as 1678 and points out that "[i]t is for statements of physical pain or suffering that the exception has been longest recognized and the principle most fully and clearly reasoned out." *Id*. at 101 . . . . The statement, to be admissible, had to be of a physical feeling then being experienced. Its reliability rested on its spontaneity. As [C. McCormick, *Law of Evidence* 460 (1st ed. 1954)] pointed out, at 838:
>
> > "Special reliability is considered to be furnished by the spontaneous quality of the declarations, assured by the requirement that the declaration purport to describe a condition presently existing at the time of the statement." (Footnote omitted).
>
> Declarations of existing bodily condition were not required to be made to a physician in order to qualify as a hearsay exception; any person who heard the statement could testify to it. . . . Because of the requirement of spontaneity, however, there were limitations upon the exception:
>
> > "The exception is, however, limited to descriptions of present condition, and therefore excludes description of past pain or

'exciting event'" as the pertinent declaration "conveys neither a sense of immediacy nor a sense of emotional distress").

> symptoms as well as accounts of the events furnishing the cause of the condition." (Footnotes omitted).

McCormick, *supra*, at 838-839.

Cassidy, 74 Md. App. at 24-25.

As Professor McLain also explains:

> Statements of then existing physical condition are often self-serving: for example, a husband may complain to his wife, or an employee to an employer, that his back hurts and he cannot do a task he has been asked to do. The statements are nonetheless admissible: no one could have better perception of one's own physical sensations than oneself, and there is no memory problem when one describes one's present physical condition. The fact-finder, in evaluating the statement, is trusted to take into account any motive that the declarant may have had to be insincere.

6A McLain, *Maryland Evidence: State and Federal*, § 803(3):2, p. 479 (3d ed. 2013).

In this case, Officer Weber testified that Owen was "crying hysterically" and repeating, "[h]e is going to find me" when he interviewed her at the scene. He also saw her at the hospital and she was "still crying" and "still extremely visibly upset." The State suggests that it was at this time that Weber obtained the information from Owen about her then existing physical condition. Under the circumstances, we are persuaded that these statements were admissible under Rule 5-803(b)(3) as statements of her then existing physical condition.

However, even if the court erred, we agree that any error was harmless beyond a reasonable doubt. *See Dionas v. State*, 436 Md. 97, 108 (2013) ("[A]n error will be considered harmless if the appellate court is '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'") (quoting *Smallwood v. State*, 320 Md.

300, 308 (1990)(further citation omitted)); *see also Dove v. State*, 415 Md. 727, 743-44 (2010) ("In considering whether an error was harmless, we also consider whether the evidence presented in error was cumulative evidence. Evidence is cumulative when, beyond a reasonable doubt, we are convinced that 'there was sufficient evidence, independent of the [evidence] complained of, to support the appellant['s] conviction'") (quoting *Richardson v. State*, 7 Md. App. 334, 343 (1969)).

As set forth above, Owen testified at trial that she had difficulty breathing while appellant was strangling her. She suffered numerous injuries, including, but not limited to, a fractured rib, a partially collapsed lung, a fractured eye socket, as well as numerous cuts and bruises. Her injuries were corroborated at trial by the responding paramedic and the EMT, as well as the medical report that was admitted from her extended hospital stay. The information in Officer Weber's report was simply cumulative of this other evidence and any error was harmless.

IV.

Appellant next asserts that the evidence was insufficient to sustain his convictions of first degree assault, reckless endangerment and false imprisonment. In considering a challenge to the sufficiency of the evidence, we ask "'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.'" *Grimm v. State*, 447 Md. 482, 494-95 (2016) (quoting *Cox v. State*, 421 Md. 630, 656-57 (2011)); *accord Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "[W]e defer to the fact finder's 'resolution of

conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Riley v. State*, 227 Md. App. 249, 256 (quoting *State v. Suddith*, 379 Md. 425, 430 (2004)), *cert. denied*, 448 Md. 726 (2016). This Court has noted that in this undertaking, "the limited question before us 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.'" *Smith v. State*, 232 Md. App. 583, 594 (2017) (quoting *Allen v. State*, 158 Md. App. 194, 249 (2004), *aff'd*, 387 Md. 389 (2005)). Finally, we will not reverse a conviction on the evidence "'unless clearly erroneous.'" *State v. Manion*, 442 Md. 419, 431 (2015) (quoting *State v. Raines*, 326 Md. 582, 589 (1992)).

First Degree assault – serious physical injury

Appellant was convicted of that form of first degree assault concerned with the infliction of "serious physical injury," which provides that "[a] person may not intentionally cause or attempt to cause serious physical injury to another." Md. Code (2002, 2012 Repl. Vol.) § 3-202(a)(1) of the Criminal Law ("Crim. Law") Article; *see also Snyder v. State*, 210 Md. App. 370, 385-86 (noting that to raise a second degree assault charge to first degree assault, the State must prove assault and the additional requirement "that the defendant committed the assault with a firearm or with the intent to cause serious physical injury"), *cert. denied*, 432 Md. 470 (2013). "Serious physical injury" is defined as physical injury that "creates a substantial risk of death" or "causes permanent or protracted serious disfigurement; loss of the function of any bodily member or organ; or impairment of the function of any bodily member or organ." Crim. Law, § 3-201(d). The

issue presented is whether the evidence established that appellant intended to cause serious physical injury that created a substantial risk of death.

In *Cathcart v. State*, 169 Md. App. 379 (2006), *vacated on other grounds*, 397 Md. 320 (2007), Cathcart forced the victim to complete various sex acts, and, when the victim refused, Cathcart choked her and beat her into unconsciousness. 169 Md. App. at 382-83. The victim suffered two fractures to her jaw, a broken nose, a dislocated chin, multiple hematomas to the face, and a swollen hand. *Id.* at 383. This Court determined that the victim had suffered serious physical injury sufficient to sustain Cathcart's conviction for first degree assault. *Id.* at 393-94. We noted that Crim. Law § 3-202 prohibits not only causing serious physical injury, but also attempting to cause serious physical injury, and "'a jury may infer the necessary intent from an individual's conduct and the surrounding circumstances, *whether or not the victim suffers such an injury*.'" *Id.* at 393 (quoting *Chilcoat v. State*, 155 Md. App. 394, 403 (2004)) (emphasis added).

In *Chilcoat*, the defendant was convicted of first degree assault following an incident in which he hit a man over the back of the head multiple times with a beer stein. *Chilcoat*, 155 Md. App. at 398. Chilcoat then remarked that the victim looked dead. *Id.* The victim lost consciousness and suffered two skull fractures, which necessitated that doctors replace part of his skull with mesh. *Id.* at 400-01. The neurosurgeon who treated the victim testified that the skull fractures would not normally lead to death, but abscesses were likely, if untreated, which could result in death. *Id.* at 401. This Court determined that the victim had suffered serious physical injury because his injuries may have led to death. *Id.* at 402-03. We stated that the victim's "successful recovery does not change the

nature of the injury he suffered" and that "[i]n determining whether an injury creates a substantial risk of death, the focus is on the injury, not how well the victim responded to medical treatment." *Id*. We explained that the jury "may 'infer that one intends the natural and probable consequences of his act.'" *Id.* at 403 (quoting *Ford v. State*, 330 Md. 682, 704 (1993)). Additionally, we concluded that the jury could have inferred that Chilcoat intended to cause serious physical injury to the victim. *Id.* at 404.

In this case, there was evidence that appellant, over the course of eight hours, and while rebuking her for alleged infidelity, smacked Owen, hit her in the face and eye with a closed fist, and kicked her while she was on the ground. He grabbed her around the neck and choked her, multiple times, to the point where she had difficulty breathing and almost lost consciousness. Owen spit up blood during the incident, and sustained serious injuries to her rib, her lung and her eye, which required hospitalization for several days. A responding paramedic testified that he believed Owen's injuries were "life threatening," and another called for Advanced Life Support to respond because the injuries were the "worst . . . that I have seen a patient."

We are persuaded that the evidence supports appellant's conviction for first degree assault. Indeed, we note that numerous cases have held that choking or strangulation constitutes a serious physical injury. *See, e.g.*, *Kackley v. State*, 63 Md. App. 532, 543 (appellant's choking of the victim supported victim's fears of serious physical injury), *cert. denied*, 304 Md. 298 (1985); *see also Metheny v. State*, 359 Md. 576, 586 (2000) (death by strangulation); *Jackson v. State*, 358 Md. 612, 615 (2000) (victim died from combination of blunt force injuries and asphyxia); *State v. Butler*, 353 Md. 67, 70 (1999) (one of three

murder victims died due to asphyxia); *Dishman v. State*, 352 Md. 279, 300 (1998) (victim died due to lack of air most likely caused by either strangulation or by having mouth taped shut); *Stebbing v. State*, 299 Md. 331, 338-39 (victim died due to strangulation), *cert. denied*, 469 U.S. 900 (1984); *State v. Hallihan*, 224 Md. App. 590, 594-96, 608-10 (2015) (noting that choking creates a substantial risk of death); *Hounshell v. State*, 61 Md. App. 364, 372 (death may be caused by strangulation), *cert. denied*, 303 Md. 42 (1985); *Malekar v. State*, 26 Md. App. 498, 501 (death may be by asphyxiation due to strangulation), *cert. denied*, 276 Md. 747 (1975).

Viewing the evidence in the light most favorable to the State, we conclude that there was sufficient evidence to sustain appellant's conviction for first degree assault. As we held in *Cathcart* and *Chilcoat*, first degree assault prohibits causing *or attempting to cause* severe physical injury. A rational fact finder could have inferred from appellant's repeated blows to the victim, including, but not limited to, choking her close to the point of unconsciousness, that he intended to cause her serious physical injury. We also are persuaded that appellant incorrectly focuses on Dr. Guzzardi's opinions regarding the victim's response to medical treatment. *See Chilcoat*, 155 Md. App. at 403 ("'The fortuity of prompt medical treatment and speedy recovery by the victim is not a primary consideration.'" (quoting *Konrad v. Alaska*, 763 P.2d 1369, 1376 (Alaska Ct. App. 1988)).

Appellant also argues the State failed to sufficiently undermine his defense of voluntary intoxication. "[G]enerally voluntary intoxication does not excuse or justify criminal conduct." *Newman v. State*, 236 Md. App. 533, 564 (2018). Moreover:

> Evidence of drunkenness which falls short of a proven incapacity in the accused to form the intent necessary to constitute the crime merely establishes that the mind was affected by drink so that he more readily gave way to some violent passion and does not rebut the presumption that a man intends the natural consequence of his act.

Bazzle v. State, 426 Md. 541, 553-54 (2012) (quoting *Hook v. State*, 315 Md. 25, 31 n.9 (1989); *see also Shell v. State*, 307 Md. 46, 62 (1986) ("The question . . . is whether a defendant has reached that stage of intoxication that renders him incapable of forming the requisite *mens rea* which is a necessary element of all specific intent crimes." (citation and quotation marks omitted)).

Here, appellant admitted that he remembered portions of the incident, including going to the store and returning to confront Owen with a cellphone video. He also remembered "telling her I was angry and I told her that I cheated on her and I remember her trying to kill herself. And I remember calming her down with some drugs." In addition, appellant remembered going back to the bedroom and finding Owen upset. Asked to relay details from that conversation, appellant declined, but explained that he did remember that conversation at one point and could have testified to it had the case gone to trial when it was originally scheduled. And, appellant also remembered waking up with a K-9 hovering over him and he remembered going to the police station and speaking with some officers. There was also direct evidence, both from Detective Pamer, and the video recording of appellant's interview itself, where appellant spoke about the events that had just transpired hours earlier, from which the trial court could evaluate whether appellant was still impaired within just a few hours after the assault. We are satisfied that the defense of voluntary intoxication did not negate appellant's specific intent.

Reckless endangerment

Appellant next asserts that the evidence was insufficient to prove reckless endangerment because he did not create a substantial risk of death by his actions. Crim. Law § 3-204(a)(1) provides that "[a] person may not recklessly: (1) engage in conduct that creates a substantial risk of death or serious physical injury to another[.]" The statute focuses "on deterring reckless behavior that posed a risk of serious injury or death *before* the injury or death occurred." *Jones v. State*, 357 Md. 408, 426 (2000) (emphasis added). And, "[i]t is the reckless conduct and not the harm caused by the conduct, if any, which the statute was intended to criminalize." *Minor v. State*, 326 Md. 436, 442 (1992); *see also Kilmon v. State*, 394 Md. 168, 174 (2006) ("Unquestionably, the proscription against recklessly endangering conduct is, and was intended to be, a broad one"); *Holbrook v. State*, 364 Md. 354, 374 (2001) (noting that "reckless endangerment is an inchoate crime, for it is intended to deal with the situation in which a victim is put at substantial risk of death or serious bodily harm but may, through a stroke of good fortune, be spared the consummated harm itself") (citation and quotations omitted); *State v. Pagotto*, 361 Md. 528, 548 (2000) (observing that "reckless endangerment does not require that any actual harm occur to another"); *State v. Albrecht*, 336 Md. 475, 501 (1994) ("[A] defendant may be guilty of reckless endangerment even where he has caused no injury"). For similar reasons as those cited in our discussion of appellant's first degree assault conviction, we conclude that appellant's actions of beating, kicking and choking Owen, over a period of eight hours, were reckless and put her at a substantial risk of death or serious bodily injury. The evidence was sufficient to sustain his conviction for reckless endangerment.

False imprisonment

As for appellant's conviction for false imprisonment, appellant argues the evidence was insufficient "[b]ecause Ms. Owen did not attempt to leave the room during the assault[.]" "To obtain a conviction for false imprisonment, the State was required to prove: (1) that appellant confined or detained [the victim]; (2) that [the victim] was confined or detained against her will; and (3) that the confinement or detention was accomplished by force, threat of force, or deception." *Jones-Harris v. State*, 179 Md. App. 72, 99, *cert. denied*, 405 Md. 64 (2008); *see also Marquardt v. State*, 164 Md. App. 95, 130 ("[F]alse imprisonment is most frequently the product of either an assault or a battery") (citation omitted), *cert. denied*, 390 Md. 91 (2005).

Asked if she thought of running away, Owen testified that "that wasn't even like a possibility at all." She also testified that when she would "scream to get out" of the bedroom, appellant would put his hands around her throat to silence her. Harris, the paramedic, also testified, over objection, that Owen told him that "she was held in her apartment for most of the night," and that "during the night she was kicked, strangled, punched, multiple different objects were thrown at her." The evidence of false imprisonment was sufficient.

V.

Finally, appellant contends the court erred by making impermissible considerations at sentencing. Appellant asserts that: (1) the sentencing guidelines were inaccurate; (2) the court considered charges that had been nol prossed; and, (3) the court considered the victim's pregnancy when exceeding the guidelines. The State responds that appellant did

not object at sentencing and that the asserted grounds do not constitute an illegal sentence. On the merits, the State argues that inaccurate or misapplied sentencing guidelines are not an illegal sentence and that, even if so, the guidelines were properly calculated and there was ample reason to exceed the guidelines. The State also replies that the court did not consider bald accusations of criminal conduct at sentencing.

By way of background, at the sentencing hearing defense counsel argued the sentencing guidelines were inaccurate in that, with respect to the offense score, there was no evidence of permanent injury or death in this case, and that no weapons were used in the assault. The State responded as follows:

> Thank you. Regarding the victim injury, Ms. Owen did have permanent injury. And in the Sentencing Guidelines manual it defines permanent injury. It says it can be physical or psychological.[10]
>
> Here she has permanent injury because of both. Here she has permanent injury because she still cannot lay on one side because of her broken rib and collapsed lung. She testified as to that. And I would proffer to the Court to this day, over a year after this incident, she still cannot lay on one side of her body without having pain because of the Defendant's actions. So, that is physical.

[10] "Victim injury means physical or psychological injury to the crime victim, the cause of which is directly linked to the conduct of the defendant in the commission of the convicted offense. Victim injury, whether physical or psychological, shall be based on reasonable proof. Psychological injury shall be based on confirmed medical diagnosis or psychological counseling or treatment." This contact "must be confirmed in writing or otherwise by the counseling or treatment provider." *See* Md. State Comm'n on Criminal Sentencing Policy, Maryland Sentencing Guidelines Manual, version 11.0, p. 19 (July 2019) (Hereinafter, "Sentencing Guidelines"). Although Owen's stepmother testified at the sentencing hearing, the victim did not appear and no written evidence of psychological injury, pursuant to these guidelines, appears in the record.

(continued)

Psychological, she has Post Traumatic Stress Disorder. She has night terrors every single evening. She is in therapy twice of week in the State of Hawaii. She has permanent injury both psychological and physical and those are defined in the Guidelines manual. And it goes into examples of that.

It says psychological injury including counseling and treatment. Talks about rape crisis hotlines, similar services, counseling or treatment and goes on and on.

Regarding weapon, it also defines what weapon presence means. It does not mean it has to have been used as a weapon in this case but mere presence. It says weapon presence means the presence of any article or device that reasonably appears capable of causing injury or the presence of an article that could result in conviction under CR-4-101.[11]

Note that that is an "or" so it does not have to be an article that is listed in CR-4-101, it could be something capable of causing injury. And scissors, whether they resulted in a particular injury in this case or not, are capable of causing injury. And in fact, actually he did cut off all her hair, and so arguably that is an injury, as well. So, there is weapon presence.

In addition to that, if we are getting down into the points, we included no points for special victim vulnerability, however, Ms. Owen was pregnant when this occurred. And in the Guidelines manual it also goes into what special victim vulnerability means and it includes something permanent or also something not permanent, a condition that is sort of a temporary status.[12]

So, actually, Ms. Owen [sic] could have received a point for that. The Defendant's Guidelines would then be seven to thirteen years on first degree assault.

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[11] "Weapon presence" is defined as "the presence of any article or device that reasonably appears capable of causing injury *or* the presence of an article that could result in conviction under CR § 4-101." Sentencing Guidelines, p. 20 (emphasis added). The "weapon" was the scissors that appellant used to remove chunks of Owen's hair.

[12] The sentencing guidelines worksheet does not indicate that there was a special victim vulnerability due to Owen's pregnancy at the time.

(continued)

After a further response from defense counsel, the court ascertained that appellant thought the guidelines for the primary offense, first degree assault, should be two to seven years. However, the court replied that "I think that the Guidelines are accurate."[13]

Defense counsel then further objected on the grounds that information that appellant was charged with violating numerous prior protective orders should not be considered because those charges were ultimately nol prossed. Counsel also wanted the court to disregard information that someone fired shots into the victim's, Owen's, apartment after the incident at issue.[14] But, after the State responded that both dismissed cases and even uncharged offenses may be considered at sentencing, the court overruled defense counsel's objection. Defense counsel also argued that appellant did not know, nor could have known, that Owen was pregnant at the time.

Disposition proceeded and, after then hearing a victim impact statement from the victim's stepmother and allocution by the defendant, personally, the court sentenced appellant to twenty years, with all but fifteen suspended, for first degree assault, to be followed by four years, consecutive, for false imprisonment, all suspended, with the

[13] Pertinent to the discussion at disposition, the Sentencing Guidelines worksheet used by the court assigns an offense score of 8 for first degree assault and an offender Score of 1. This created a range of 5-10 years using the sentencing matrix for offenses against persons. Appellant's worksheet would have altered the offense score to 6 for first degree assault, thereby creating a range of 2-7 years. *See* Sentencing Guidelines, p. 31.

[14] The State's sentencing memorandum indicated that appellant had eight (8) prior Peace and Protective Orders filed against him by six individuals, including two by Owen, four by other women, and one by appellant's stepfather.

remaining counts merged. In reaching that verdict, the court made the following comments:

> All right. All right. Well, in sentencing Mr. Hassan I have to say that it is heartbreaking to hear Ms. Henry, his mother, have to be in a position to have to ask for leniency and mercy for her son. She is in a position that no mother ever wants to find herself in. And the Court is influenced by that.
>
> But the Court also is influenced by the nature of the crime and the fact that Mr. Hassan tortured Ms. Owen for eight hours. He has a long history of domestic violence with this victim and with others. He has shown throughout this proceeding a lack of remorse and contrition, even in just his statement here today in court, it was mainly about his rights and very little about Ms. Owen.
>
> I do believe that Mr. Hassan is impulsive and I think that he is extremely dangerous. We cannot attribute it all to drugs. Some of his behaviors in the courtroom, after his arrest, during the trial were extremely disturbing. And presumably at that point in time he was not under the influence of drugs.
>
> The Court's primary goal in this case is protection. And that is protection of the victim and other members of society who might cross Mr. Hassan's path.
>
> I reviewed the Presentence Investigation report. And based on that and what I have seen and heard in court, I believe that Mr. Hassan, at this point in time, is a very dangerous man.

The court also stated:

> Just so the record is -- it is on the records, the reasons for the deviation from the Sentencing Guidelines are No. 11, I believe the level of harm was excessive. No. 16, the vicious and heinous nature of the conduct. No. 17, the recommendation of the State's Attorney's Office and Parole and Probation. And No. 18, other circumstances. And those other circumstances are his lack of remorse, his history of domestic violence, his behavior inside and outside of the courtroom after he was arrested and while he has been incarcerated.
>
> (Defendant mumbling at Defense table.)

> THE COURT: And also the fact that he subjected the victim to eight hours of torture by hitting her, kicking her, choking her and committing other horrific acts upon her. And finally, because the victim was pregnant.
>
> So, I -- also think we should mark this matter as a domestic violence matter. . . .

Maryland Rule 4-345(a) provides that "[t]he court may correct an illegal sentence at any time." A motion to correct an illegal sentence is not waived "even if 'no objection was made when the sentence was imposed' or 'the defendant purported to consent to it[.]'" *Johnson v. State*, 427 Md. 356, 371 (2012) (quoting *Chaney v. State*, 397 Md. 460, 466 (2007)). Whether a sentence is illegal is a question of law that we consider *de novo*. *Bonilla v. State*, 443 Md. 1, 6 (2015).

However, "the scope of this privilege, allowing collateral and belated attacks on the sentence and excluding waiver as a bar to relief, is narrow." *Colvin v. State*, 450 Md. 718, 725 (2016) (citation omitted). As the Court of Appeals has explained, "[t]he purpose of Rule 4-345(a) is to provide a vehicle to correct an illegal sentence where the illegality inheres in the sentence itself, not for re-examination of trial court errors during sentencing." *Meyer v. State*, 445 Md. 648, 682 (2015) (citations omitted). In other words, there is no relief under Rule 4-345(a) where "the sentences imposed were not inherently illegal, despite some form of error or alleged injustice." *Matthews v. State*, 424 Md. 503, 513 (2012) (citations omitted). A sentence is considered "illegal" for purposes of Rule 4-345(a) only where "there either has been no conviction warranting any sentence for the particular offense or the sentence is not a permitted one for the conviction upon which it was imposed

and, for either reason, is intrinsically and substantively unlawful." *Colvin*, 450 Md. at 725 (citations and quotations omitted).

"[I]t is well established that [a] court has a power to impose whatever sentence it deems fit as long as it does not offend the maximum and minimum penalties." *State v. Parker*, 334 Md. 576, 592-93 (1994) (citation and quotations omitted); *accord Jennings v. State*, 339 Md. 675, 682-83 (1995). The purpose of the Maryland Sentencing Guidelines is to insure that "like criminal offenders . . . receive like sentences for like offenses." *Jennings*, 339 Md. at 680 n.1 (citations and quotations omitted).

However, sentencing guidelines in Maryland are not mandatory, and any deviation from them is not a ground to have the sentence vacated or require a new sentencing hearing. *Teasley v. State*, 298 Md. 364, 367 (1984) ("the Guidelines are not mandatory; instead, they complement rather than replace the judicial decision-making process or the proper exercise of judicial discretion") (citation and quotations omitted); *accord Jennings*, 339 Md. at 680 n.1 (citation omitted); *Saenz v. State*, 95 Md. App. 238, 251 (1993). The Guidelines are not mandatory and "[j]udges, therefore, may sentence outside the range suggested by the Guidelines, either more or less severely, but in doing so they are requested to state reasons in writing for departing from the range of sentences recommended by the Guidelines." *Jennings*, 339 Md. at 680 n.1 (quoting *Teasley*, 298 Md. at 367). And, it is not an impermissible consideration "for a trial judge not to apply the Guidelines, or to apply them improperly." *Teasley*, 298 Md. at 370-71. Even if a trial judge errs in applying the sentencing guidelines, or fails to apply them at all, a criminal defendant is not entitled to a new sentencing hearing. *Id*. at 370; *accord Saenz*, 95 Md. App. at 251.

Here, we are persuaded that, even if the guidelines worksheet was inaccurate, that does not equate to an illegal sentence and, in any event, would not be cause for a resentencing. Indeed, we note that the court exceeded even the State's recommended guidelines, but provided reasons for doing so, including appellant's "lack of remorse, his history of domestic violence, his behavior inside and outside of the courtroom" and "the fact that he subjected the victim to eight hours of torture[.]"

Nor are we persuaded that the court relied on impermissible considerations by considering nol prossed charges or the fact that the victim was pregnant at the time of the assault. With respect to the nol prossed charges relating to prior protective orders, we note that a sentencing court in a criminal proceeding is "'vested with virtually boundless discretion.'" *Martin v. State*, 218 Md. App. 1, 44 (quoting *State v. Dopkowski*, 325 Md. 671, 679 (1992)), *cert. denied*, 440 Md. 463 (2014), *cert. denied*, 135 S.Ct. 2068 (2015). In considering an appropriate sentence, "the sentencing judge may inquire into the past criminal record of the defendant and hear evidence and receive reports in aggravation or mitigation of punishment[.]" *Logan v. State*, 289 Md. 460, 480 (1981). Further, although "bald accusations" may not be considered:

> In considering what is proper punishment, it is now well-settled in this State that a judge is not limited to reviewing past conduct whose occurrence has been judicially established, but may view "reliable evidence of conduct which may be opprobrious although not criminal, as well as details and circumstances of criminal conduct for which the person has not been tried."

Logan, 289 Md. at 481 (quoting *Henry v. State*, 273 Md. 131, 147-48 (1974)).

As for the fact that Owen was pregnant at the time of the assault, the Court of Appeals has stated:

> "It is elementary that in passing sentence in a given case the sentence should be fashioned, to the best of the sentencing judge's ability, to the facts and circumstances surrounding the crime and the individual then being sentenced." Certainly the effects of the crime on the victim whether economical, physical, psychological, or all three fall within these relevant permissible considerations. There is no justification for limiting the broad discretion of the judge with regard to the victim's role in sentencing.

Reid v. State, 302 Md. 811, 820-21 (1985) (quoting *Henry*, 273 Md. at 150).

JUDGMENTS AFFIRMED.

COSTS TO BE ASSESSED TO APPELLANT.