UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2385

September Term, 2014

NAHVARJ ELLIJAH RAY MILLS

v.

STATE OF MARYLAND

Krauser, C.J.,
Berger,
Reed,

JJ.

Opinion by Reed, J.

Filed: May 16, 2016

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

Appellant, Nahvarj Ellijah Ray Mills, was indicted in the Circuit Court for Charles County, Maryland, and charged with second-degree rape and second-degree assault. A jury acquitted him of the rape count, but convicted him of second-degree assault. After appellant was sentenced to ten years, with all but eight years suspended, he timely appealed and asks the following questions:

I. Was the evidence sufficient to sustain a conviction for second-degree assault?

II. Did the trial court abuse its discretion in admitting and playing for the jury a recording of a police interview that included inadmissible and prejudicial material?

III. Did the lower court abuse its discretion in failing to permit defense counsel to introduce documents to impeach the alleged victim's credibility?

IV. Does a sentence of 10 years with all but 8 years suspended for second degree assault amount to cruel and unusual punishment under the facts of this case?

For the following reasons, we shall affirm.

FACTUAL AND PROCEDURAL HISTORY

On July 25, 2012, at around 8:30 p.m., Janaya A. celebrated her sixteenth birthday by going out with her friend, Janelle Slye, as well as Martel Garner and appellant.[1] Janaya testified that she first met appellant in 2010 on Facebook, and then, in March 2010, in person. After picking Janaya up from her home in Capitol Heights, appellant stopped at a

[1] It is unnecessary to give the full name of the minor victim in this case. *See Muthukumarana v. Montgomery County*, 370 Md. 447, 458 n.2 (2002); *Thomas v. State*, 429 Md. 246, 252 n.4 (2012).

liquor store and bought vodka. He then drove the group to Garner's townhouse, located in Charles County, Maryland.

Once they arrived, the four of them went to the basement. They then began drinking shots of alcohol. Janaya, who weighed 110 pounds and had never drank alcohol before, testified that she had three "big" shots of "straight vodka." She then remembered going into a bedroom, located off the main room, but was not sure if appellant asked her to go there or if she just walked in by herself. Janaya then testified, without objection, that once she got to the bedroom, she "blacked out."

When Janaya woke up, her underwear was off and appellant "was having sex with me." Janaya did not consent to having sex with appellant. She further testified that she did not think she was going to have sex that night because "I was on my period, so I didn't want to have sex."

After she told appellant to "Stop," Janaya blacked out again. When she woke a second time, she saw appellant standing near the bed with his pants up. Janaya could not specifically recall if appellant continued to have sex with her after she asked him to stop. However, she did testify that she saw someone running around the room, and appellant then stated "It was me." Janaya clarified that "he told me it was him having sex with me." Thereafter, Janaya testified, again without objection, that her friend, Janelle, started telling her "Come on, put your pants on. It's time to go, we have to go."

Janaya maintained that she never had sex before July 25, 2012, and had never had sex before with appellant. She denied ever telling appellant that she wanted to have sex with him. She further testified, "I didn't tell him to have sex with me."

After she put her clothes back on, Janaya went outside and threw up. Janaya then got back into appellant's car, fell asleep, and did not wake up until he dropped her off at the top of the hill leading into her neighborhood. Janaya then walked home.

Meanwhile, and starting at around 12:30 a.m., Janaya's grandmother, Gloria Profit, became concerned because Janaya was not home by her midnight curfew. Profit called Janaya's cellphone a couple times but Janaya did not answer. Eventually, Profit spoke to Janaya and Janaya appeared "out of it." When Janaya finally arrived home sometime after 3:00 a.m., her clothes were in disarray, she smelled of alcohol, and she was crying. When Profit asked her what happened, Janaya responded, "I don't know, Nana, I don't know what happened. I'm sorry, I apologize." Profit testified that Janaya had never consumed alcohol before or since the night of this incident.

After Profit noticed that Janaya was not wearing any underwear, Janaya told her that she had been raped. Profit called the police and then Janaya was transported to Prince George's Hospital.

While en route in the ambulance, Janaya started flailing around and would not keep still on the gurney. She also started throwing up, and Profit testified that "you could smell the alcohol all over again." Janaya remained combative at the hospital, but also was crying and apologetic, "saying she was sorry for what had happened, and everything."

Janaya was later transported to another hospital, Civista Medical Center in La Plata ("Civista"). On cross-examination, Profit testified that she believed that Janaya was a virgin. She agreed she would be "very surprised" to hear that Janaya had sexual relations with appellant on several prior occasions.

Janaya was examined on July 26, 2012, at 9:30 a.m. at Civista by Amy Motz, who was accepted at trial as an expert in forensic examination. Janaya had small contusions to her wrist, forearm and thighs, as well as a suction hematoma, or "hickey," to her neck, none of which required medical treatment. Although Janaya's vaginal area was "reddened and irritated," the genital examination was incomplete because Janaya was unable to "tolerate" the exam. Janaya's blood alcohol at that time was also determined to be 60 milligrams per deciliter.

Motz further testified that Janaya told her that she performed oral sex on appellant. Janaya also remembered that appellant attempted to insert his penis into her anus. And, she told Motz that appellant ejaculated inside her vagina, but she was unsure if he used a condom. She also told Motz that she had had no prior intercourse and was a virgin.

The Investigation

Charles County Police Detective Kim Selkirk, the lead investigator in this case, spoke to Janaya at Civista at around 11:00 a.m. on July 26, 2012. Because Janaya was groggy and falling in and out of sleep, Detective Selkirk spoke to Janaya's grandmother, Profit, and told her to contact her later. Later that afternoon, Profit brought Janaya to the Sheriff's Office in Waldorf.

Janaya told Detective Selkirk where the incident occurred and Selkirk drove Janaya to a location in White Plains, Charles County, Maryland. A search warrant was eventually executed at that location.

Detective Selkirk obtained a statement from appellant on February 19, 2013. After appellant waived his *Miranda*[2] rights, he gave a recorded statement and admitted that he and his friend, Garner, met two girls and that one of them said that "she wanted to get fucked up for her birthday." So, he went and bought alcohol and took the girls to Garner's house, where they were "drinking and partying" in the basement. Appellant estimated that he and Janaya then had sex for twenty minutes.

According to appellant, during their sexual encounter, Janaya kept asking if appellant loved her, and appellant replied that he did. Appellant asserted that Janaya never told him that she did not want to have sex. He also believed that she had had sex before and was not a virgin. He maintained that he wore a condom during sex, did not ejaculate inside her, and that, if she was sore afterwards, that was because "I'm sure we weren't having slow, gentle, romantic sex." He continued to deny raping her. After their encounter ended, Janaya threw up, apparently several times, and in several locations, throughout the house. Appellant then drove Janaya back home.

The next day, appellant received a text from Janaya, simply stating, "Ray." After he did not respond, she left another message stating, "'If you don't text me back, I'm going to the police, I'm going to accuse you of rape,' and all this other shit." Appellant returned the text, then did not hear from her again. A few days later, the police went to Garner's house and seized items for evidence.

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Appellant claimed that he knew the victim and that they remained friends on Facebook, at least as of the time he spoke to Detective Selkirk. Appellant then questioned whether remaining friends on Facebook was consistent with the victim's claim that he raped her.

Detective Selkirk then informed appellant that Janaya told her family that she had been raped, shortly after appellant dropped her off. Selkirk later had Janaya text appellant, under police supervision. Selkirk explained that was done "to engage people in conversations to see if they are going to say something about it. I mean, you know, if you think you're just talking to her, you might actually tell the truth. If you're talking to me . . . you might lie." Appellant replied that he understood but that his version of events undermined the tactic, stating, "so, so that just went out the window. That was it. That proved nothing." Selkirk agreed, noting that Janaya did not contact him after that and "that was the end of it."

During the interview, and pertinent to the second issue raised by appellant on appeal, Detective Selkirk then addressed Janaya's intoxication, stating, "she doesn't have as much experience as you do when it comes to drinking, okay? She's a little behind you are [*sic*], she weighs less than you do, so it's going to take a lot less to get her drunk." Selkirk suggested that appellant might "want to rethink the way you're doing things."

Appellant maintained that he did not force Janaya to drink, and Selkirk explained, "You're not getting it. . . I'm not saying that you're doing anything wrong with girls that you do on a daily basis, I'm not saying you are." Appellant replied, "I don't have to change what I'm doing." This referred back to statements appellant made earlier when he told the

Detective that he and Garner went to clubs, or used Facebook, to meet girls and bring them back to each other's houses, and that "this doesn't normally happen." Selkirk then suggested that "maybe you want to rethink what you're doing, because you're saying, 'I know (inaudible), but you don't know her.' Maybe if you knew her, you knew her last name –." After appellant stated "I don't know her last name," Selkirk replied, "Yeah, exactly . . . exactly what I'm saying."

Detective Selkirk then suggested that appellant try to learn more about a girl first, "if you know a girl, you know her family, you know where she's from, you know how old she is, maybe you wouldn't get caught up in anything, that's all I'm saying. . . . Maybe you want to rethink the way you're doing things. I'm trying to give you advice on your future – " Appellant agreed, noting that he and Garner talked about this incident after the police searched Garner's house, and Garner told him, "Yeah, I don't want to drink anymore."

Selkirk and appellant then discussed "levels of rape," including forcible rape and raping someone when they are intoxicated. Appellant confirmed that he understood that "if the girl is not awake, and people are just fucking her, then yeah, clearly that's rape. She has no idea what's going on." However, appellant stated, "She was awake." He continued, "I didn't carry her in the room, I didn't see a girl, and throw her in bed, and strip her clothes off, and rape her. It was like, she wanted to have sex, she wanted to drink, she wanted to go in the room." Appellant maintained "[s]he was fucking awake, laying on the bed, fucking asking me if did I [*sic*] love her? I didn't rape this girl. I swear to god, I did not— ."

Again, and related to an issue on appeal, Detective Selkirk then noted that Janelle Slye told Selkirk that, when she walked into the bedroom, Janaya was "out on the bed." Janelle clarified that Janaya's eyes were closed and unresponsive and her pants were off. Selkirk then stated, "It sounds kinda shaky, man?" and, "If you're not, like, in a coma, you're going to wake up." Appellant replied, "there was no point that I was fucking her that she was passed out" and "at not point in time was I ever just fucking a dead body, you know what I'm saying? . . . the whole time I was fucking her, she was asking me, did I love her, you know what I'm saying?"

Detective Selkirk then gave appellant a copy of the search warrant, stating, "I'm not trying to hide anything, you know? I'm telling you what she said, what her friend said." Selkirk agreed that "a lot of what you're saying matches what they're saying. The only thing that is different, like I told you, Janelle said she walked in there, and Janaya was out." Again, appellant indicated that Janaya must have fallen asleep after they had sex.

At that point, Detective Selkirk then suggested that appellant needed "to change the way you are doing things. That's all I'm saying. I'm not saying you are [a] rapist, I'm not saying you're going out and finding girls that you can rape. I'm not saying that. I'm saying, you don't want to be in this seat again, you need to change the way you're doing things, the way you're thinking. The way you're thinking is wrong." Selkirk continued that appellant did not know Janaya's last name, did not know her medical history, and that "obviously, you were having sex with her without a condom on." Appellant corrected Selkirk and stated that he did use, and always used, a condom during intercourse.

Appellant then stated, "I don't want to end up here, I don't want to end up in some clinic, I don't want to be in jail, I swear to god, I am not going to jail for something I did not do. . . . And that's why I've been telling Martel from day one. I'm like, we didn't do shit, you know what I'm saying? The only thing we did was drink." Selkirk then returned to Janaya's level of intoxication, observing that "[s]ome girls look like they are okay, but you know how much they've had to drink, so they might not be okay. They might not even remember, even if they look like they're awake and talk to you, they could black out." Appellant agreed that he had passed out on prior occasions and did not remember things that occurred, even while he was awake.

Towards the end of the interview, Detective Selkirk informed appellant that, after further investigation, she would forward the information to the State's Attorney's Office and they would make a decision whether to charge appellant. After appellant questioned the process further, Selkirk replied that "it might come down to what she is saying and what you said. They have to weigh what each person says and decide who is telling the truth." Appellant returned to the fact that Janaya was still his friend on Facebook and that undermined her claim. Selkirk then admonished appellant, telling him that "if you don't want to be in this situation again, you have to change the way you're doing thing[s]. That's all I'm saying. Don't go out every weekend and look for another girl, you know? . . . [D]o you think if you're dating a girl for a while and you have sex with her, that you would be in this position right now?" After appellant agreed with the officer, Selkirk stated "it might come down to what she said versus what you say."

Appellant then stated he did not want to go to jail and did not want to tell his grandparents that he was being accused of rape. Detective Selkirk responded by indicating that "you're just nonchalant about it, about some sixteen year old coming to your house, you getting her wasted, you're nonchalant about it. You're like, 'We do this all the time.'" Further, "she's sixteen, you know? If you were with a twenty-three year old, twenty-four year old, it might not have happened, but she's sixteen. She got so wasted because she doesn't drink all the time."

Detective Selkirk then indicated that what was on Facebook was not "legit," observing that "I know you have shit on there that you wouldn't do, you and Martel holding guns and shit." But that, "I don't expect you guys to go out and do a drive-by. I don't see you doing that, but that's what you're portraying yourself to be on Facebook." Appellant replied, "you don't see me doing that, do you see me raping somebody?" and Selkirk answered, "Man, I don't know enough to know." The interview concluded with Selkirk and appellant again discussing the fact that the information would be turned over to the State's Attorney and that they would make a decision whether to charge appellant.

The Appellant's Defense

In his defense, appellant first called his friend, William Franklin. Franklin testified that, on some unknown prior occasion two years before trial, in either July or August of 2012, he was with appellant, Janaya and a "chubby" girl in a car. Franklin and the unidentified "chubby" girl got out of the car for a period of time, leaving appellant and Janaya in the back seat. When he returned, he saw appellant throw a condom out the

window and saw Janaya "fixing herself up" with her clothes in disarray and her hair "messed up."

On cross-examination, Franklin admitted he was "close friends" with appellant and did not want to see anything bad happen to him. Franklin also confirmed that he had two prior convictions for theft and one prior conviction for attempted theft.[3] In addition, when confronted with certified copies of this prior record, Franklin agreed that he was incarcerated in July 2012, the same time he testified that he witnessed this exchange between appellant and Janaya. Franklin then changed his prior testimony and recalled that the alleged prior incident between appellant and Janaya occurred three years before trial, sometime in the summer of 2011. Franklin also testified that, during the summer of 2011, he and appellant would "pick up girls" two or three times a week. Franklin was unable to recall how many different girls he saw appellant with during the summer of 2011.[4]

Martel Garner testified that appellant called him on July 25, 2012 informing him that two girls from Capitol Heights wanted to "hang out that night." Garner indicated that the four of them went to the basement of his residence in White Plains, had a few vodka drinks, and then, he saw appellant and "Janay" walk into the bedroom, holding hands.

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[3] After the defense opened the door to specifics about the attempted theft conviction, the jury learned that Franklin was originally charged with second degree burglary in the prior case.

[4] At the conclusion of Franklin's testimony, the jury was instructed, without objection, that Franklin violated the rule on sequestration by sitting in the courtroom during the State's opening statement. The jury was informed that this was a factor they could consider in evaluating Franklin's testimony.

Garner testified that no one was drunk or stumbling at the time. After speaking to the other girl for a while, Garner left her on the couch and went upstairs. When he came back down twenty minutes later, this girl told him she had to leave and then went to knock on the bedroom door. The other girl in the bedroom, presumably Janaya, told the other girl, "no, leave us alone," indicating she wanted to stay.

Garner went back upstairs again and, upon his return, he found the girl he had been speaking with vomiting. After he told her to clean it up, Garner opened the door to the bedroom and started flirting with Janaya. He testified that she stated, "I want Ray," and Garner then left the room. Garner also overheard Janaya asking appellant if he loved her and heard appellant tell her to "shut up basically." Garner also testified that he heard "[s]ex sounds like moaning" coming from the bedroom. He maintained that Janaya never passed out that evening.

After cleaning up more vomit, Garner and Janaya walked outside to the car. Janaya "seemed fine," and Garner maintained that no one was intoxicated. He further testified that the reason people vomited was because "it was cheap liquor." Garner and appellant then drove the girls home. At no time did Garner hear any "complaints" from Janaya.

On cross-examination, Garner testified that this incident happened in January 2012. Garner further testified that appellant knew Janaya from "past communications with her or whatever." Garner agreed with the prosecutor that, when they were leaving his house, he asked appellant to pull up because he believed that Janaya was "too drunk to make it all the way to the car." Garner then testified, "I did ask him to pull the car over cause [*sic*] I

didn't want her to walk that far." Garner agreed that he spoke to Detective Selkirk and told her that he helped Janaya to the car because "the alcohol set in."[5]

We shall include additional detail in the following discussion.

DISCUSSION

I. SUFFICIENCY OF THE EVIDENCE

Appellant first contends the evidence was insufficient to sustain his conviction for second-degree assault because Janaya "voluntarily engaged in all of the activity she remembered with Appellant," thereby consenting to the assault. The State asks us to reject this argument because there was evidence suggesting that Janaya did not consent.

The test of appellate review of evidentiary sufficiency is 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.'" *State v. Coleman*, 423 Md. 666, 672 (2011) (quoting *Facon v. State*, 375 Md. 435, 454 (2003)); *accord Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The Court's concern is not whether the verdict is in accord with what appears to be the weight of the evidence, "but rather is only with whether the verdicts were supported with sufficient evidence—that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offense charged beyond a reasonable doubt." *State v. Albrecht*, 336 Md. 475, 479 (1994). "We 'must give

[5] The jury was also informed that Garner violated the sequestration order by remaining in the courtroom during the State's opening statement. And, they were told they could consider this as they evaluated his testimony.

deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [the appellate court] would have chosen a different reasonable inference.'" *Cox v. State*, 421 Md. 630, 657 (2011) (quoting *Bible v. State*, 411 Md. 138, 156 (2009)); *see also Wallace v. State*, 219 Md. App. 234, 248 (2014) (observing that the appellate court "need not decide whether the jury could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence") (quoting *State v. Mayers*, 417 Md. 449, 466 (2010)). Further, we do not "'distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence.'" *Montgomery v. State*, 206 Md. App. 357, 385 (quoting *Morris v. State*, 192 Md. App. 1, 31 (2010)), *cert. denied*, 429 Md. 83 (2012).

There are three judicially recognized forms of assault in Maryland:

> 1. A consummated battery or the combination of a consummated battery and its antecedent assault;
>
> 2. An attempted battery; and
>
> 3. A placing of a victim in reasonable apprehension of an imminent battery.

Lamb v. State, 93 Md. App. 422, 428 (1992), *cert. denied*, 329 Md. 110 (1993); *accord Cruz v. State*, 407 Md. 202, 209 n.3 (2009). The court here instructed the jury on the battery form of assault as follows:

> The Defendant is also charged with the crime of assault.
>
> An assault is causing offensive physical contact to another person.

> In order to convict the Defendant of assault the State must prove first, that the Defendant caused offensive physical contact with or physical harm to [Janaya A.]
>
> Second, that the contact was the result of an intentional or reckless act of the Defendant and was not accidental.
>
> And third, that the contact was not consented to by [Janaya A.][6]

At common law, battery was defined as "the unlawful, unjustified, offensive and non-consensual application of force to the person of another." *Hickman v. State*, 193 Md. App. 238, 256 (2010); *see also Nicolas v. State*, 426 Md. 385, 403 (2012) ("[A]n assault of the battery variety is committed by causing offensive physical contact with another person"). More specifically, "[a] conviction for the intentional battery variety of second-degree assault requires that the State adduce 'legally sufficient proof that the perpetrator intended to cause harmful or offensive contact against a person *without that person's consent* and without legal justification.'" *Hickman*, 193 Md. App. at 257 (quoting *Elias v. State*, 339 Md. 169, 183-84 (1995), emphasis in *Hickman*).

Here, after consuming vodka, apparently for the first time, sixteen-year-old Janaya "blacked out." She woke and found appellant "having sex with me." Throughout trial, Janaya maintained that she did not consent to the sexual encounter, in fact observing at one point that she was "on my period, so I didn't want to have sex." She further testified that she told appellant to stop.

[6] This instruction is virtually identical to the pattern instruction for the crime. *See* Maryland State Bar Ass'n, *Maryland Criminal Pattern Jury Instructions* 4:01 (2012).

This Court has observed that "[a]n assault and battery may be committed by taking indecent liberties with a girl or woman without her consent." *Jones v. State*, 4 Md. App. 445, 446-47 (1968) (citation omitted), *cert. denied*, 251 Md. 750 (1969). Moreover, we have stated "if the appellant, without the consent of [the victim], took indecent liberties with her while she was in an unconscious condition by placing his hands upon her, pulling her clothing from her body and getting on top of her, he thereby committed an assault and battery upon her." *Avery v. State*, 15 Md. App. 520, 548, *cert. denied*, 266 Md. 733 (1972), *cert. denied*, 410 U.S. 977 (1973). Because it is also well established "that the testimony of even a single eyewitness, if believed, is sufficient evidence to support a conviction" *Marlin v. State*, 192 Md. App. 134, 153 (2010), *cert. denied*, 415 Md. 339, we conclude the evidence was sufficient to sustain appellant's conviction.

II. REDACTION OF HEARSAY

Appellant next contends the trial court erred in not redacting portions of Detective Selkirk's interview with appellant because the interview included hearsay and the officer's opinions. More specifically, appellant asserts that the interview included hearsay statements from Janaya, Janelle Slye, and the nurse examiner, Motz. He also finds error in the admission of Selkirk's opinions about appellant's state of mind and his credibility.

The State responds that this Court should not address appellant's complaint because it is not properly presented. The State also notes that the trial court expressly instructed the jury not to consider Detective Selkirk's statements. As to the merits, the State does not address appellant's arguments that Selkirk's statements contained hearsay and opinions

about his state of mind, but does assert that Selkirk's statements only "provided context and did not include statements of disbelief."

Detective Selkirk obtained a statement from appellant on February 19, 2013. After Selkirk testified that appellant was read and waived his *Miranda* rights and gave a recorded statement, the following ensued:

> [PROSECUTOR]: Okay, and I have, for the record, I have marked this as State's Exhibit Number Nineteen. And what I am going to ask you to do is come around and take a look at my computer.
>
> OFFICER SELKIRK: Okay.
>
> [PROSECUTOR]: The CD is in there already, and I have marked the jewel case as State's Exhibit Number Nineteen.
>
> [DEFENSE COUNSEL]: Are you . . . how are you going to do this?
>
> [PROSECUTOR]: Let me try this. Well, it's not working. Let's do this.
>
> [DEFENSE COUNSEL]: Did you connect this up?
>
> [PROSECUTOR]: Not yet. I'm going to offer it into Evidence, then play it.
>
> [DEFENSE COUNSEL]: Alright.
>
> [PROSECUTOR]: Well let's do this. Will you stipulate to it coming in?
>
> [DEFENSE COUNSEL]: Yeah.
>
> [PROSECUTOR]: The State offers State's Nineteen into Evidence.
>
> [THE COURT]: Any objection?
>
> [DEFENSE COUNSEL]: No, Your Honor. I just stipulated.

The State then began playing the recording of appellant's statement for the jury, which is also transcribed into the record. After a few minutes of the recording were played, Selkirk could be heard telling appellant that Janaya apparently "became intoxicated to the point where, according to her, and according to the records, . . .[s]he can't say whether or not she can have sex." After informing appellant there was a record of Janaya's blood alcohol level, Selkirk stated, "if it's above a certain amount, either she (inaudible), and I don't know how she appeared to you, but I talked to her friend, and her friend told me . . . um . . . you know, how she appeared to her."

At this point, defense counsel objected to the further playing of the statement and asked that it be redacted. At a bench conference, counsel explained that "if you are playing my client's statement, I have no objection to that, whatsoever. But the interview is just not admissible, particularly with the detective interjecting comments and so on." Counsel also stated "we still have all this extraneous stuff from the detective. My client's statement is clearly admissible, but not all this."

The State initially responded that "we can tell the jury to disregard anything she is saying." The State also indicated that it was not going to play a portion of the statement concerning appellant's prior unrelated incarceration. However, the State indicated that "I don't want the jury to think that in between the parts we are skipping, she is beating the crap out of him, or that she is tricking him, or there is any kind of, you know . . ." The State then noted that the statement had already been admitted without objection. After that, the following ensued:

> [DEFENSE COUNSEL]: Well, I thought he was just putting his statement. I didn't understand he was going to put this whole back and forth interview.
>
> [PROSECUTOR]: There's no way to just put the statement in.
>
> [DEFENSE COUNSEL]: Then you can't put it in.
>
> [THE COURT]: Well, I am going to overrule the objection. I think it is more important for the jury to hear the whole thing. If there is a curative instruction you want me to give, I will (inaudible).
>
> [DEFENSE COUNSEL]: Well, they can't hear about him . . . I would have to ask for a mistrial if they hear about him being in jail.

After the court and the parties confirmed there would be no evidence about appellant's prior incarceration, defense counsel asked the court to issue a limiting instruction:

> [DEFENSE COUNSEL]: What I want the jury to be told is to ignore everything that is said by Detective Selkirk. Do not consider it at all, but just what Mr. Mills is saying on this.
>
> [PROSECUTOR]: I mean, no, they have to make a determination about whether the statement was voluntary. They have to.
>
> [DEFENSE COUNSEL]: Oh, we agree it is voluntary. I mean, it's not a question of voluntary. He is not under arrest, and he was read his Miranda.
>
> [PROSECUTOR]: It's . . . they are not to dis-consider it. Any factual statements, they are not to consider. But they can consider the words coming out of her mouth, and how that affects what comes out of his mouth.
>
> [DEFENSE COUNSEL]: Whoa, whoa, whoa, no. She is a police officer. She is there . . . she's not there . . . she's not the kindergarten police officer. She is there to arrest him.
>
> [THE COURT]: (Inaudible.) What if I phrase it like, her statements are not the evidence here. The evidence is Mr. Mills' statements, and that's where they need to focus?

> [PROSECUTOR]: That's fine.
>
> [DEFENSE COUNSEL]: Okay, can we have that now, before we continue?
>
> [PROSECUTOR]: That's fine.
>
> [DEFENSE COUNSEL]: Thank you.
>
> [THE COURT]: Ladies and gentlemen, I need to caution you that the statements made by Detective Selkirk are not evidence. What is evidence here are the statements made by the defendant, Mr. Mills. And that's where you need to focus your attention, on what he is saying.
>
> We are playing the entire interview so that you have the whole context, so that . . . with one exception. There is one very small part that we are going to not play because it simply is not relevant to the case, and is not information that I can allow you to hear. Otherwise, we are playing the entire interview so that it's all before you. I am just asking you to focus your attention on Mr. Mills' statements, because that is what you need to be hearing and evaluating, okay? Go ahead.

After the court issued its limiting instruction, the remainder of appellant's recorded statement was resumed, without any further objection. We also note that, although there are no jury notes included with the record on appeal, pursuant to their request during deliberations, appellant's recorded statement was played for the jury again, without objection.

Maryland Rule 8-131(a) provides, in pertinent part:

> 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 the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

Additionally, Maryland Rule 4-323(a) provides, in part:

> 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. The grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative, so directs. The court shall rule upon the objection promptly. . . .

> The purposes of the preservation rules are:

> "(a) to require counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings, and (b) to prevent the trial of cases in a piecemeal fashion, thus accelerating the termination of litigation."

Fitzgerald v. State, 384 Md. 484, 505 (2004) (quoting *County Council v. Offen*, 334 Md. 499, 509 (1994)); *accord Maryland State Bd. of Elections v. Libertarian Party of Maryland*, 426 Md. 488, 517 (2012); *Robinson v. State*, 404 Md. 208, 216-17 (2008).

In this case, appellant originally stipulated to the statement as a whole. But, after the initial portion of the statement was played in court, appellant objected, notably for the first time, raising the general objection that Detective Selkirk's statements were "inadmissible." Arguably, this general objection could be sufficient to preserve the three more specific arguments being raised on appeal, *i.e.*, that Selkirk's statements (1) contained hearsay; (2) included improper lay opinions of appellant's state of mind; and, (3) were inadmissible assessments of appellant's credibility. *See Handy v. State*, 201 Md. App. 521, 538 (2011) ("[A]ppellant's subsequent general objection, immediately before the testimony was admitted, was sufficient to preserve all grounds of objection") (citing *Johnson v. State*, 408 Md. 204, 223 (2009)), *cert. denied*, 424 Md. 630 (2012).

As for the first argument, beyond broad general assertions that Selkirk's statements contained hearsay, appellant only questions those portions of Selkirk's statement

concerning assertions from Janaya and Janelle about Janaya's wakefulness during the encounter. We conclude this argument was waived when Janaya offered testimony addressing that same issue without objection. *See Yates v. State*, 429 Md. 112, 120-21 (2012) ("Where competent evidence of a matter is received, no prejudice is sustained where other objected to evidence of the same matter is also received") (citation and internal quotation marks omitted).

Furthermore, as to the entirety of appellant's question presented, we observe that presentation of this issue during trial did not simply end with a general objection. Conceding that his client's statement was admissible, defense counsel specifically asked for an instruction as to the portion of the interview containing Selkirk's statements. As the Court of Appeals has explained, where "[petitioner] did not object to the course of action proposed by the prosecution and taken by the court, and apparently indicated his agreement with it, he cannot now be heard to complain that the trial court's action was wrong." *Gilliam v. State*, 331 Md. 651, 691 (1993); *see also Parker v. State*, 402 Md. 372, 405 (2007) ("A litigant who acquiesces in a ruling is completely deprived of the right to complain about that ruling[.]") (citation and internal quotation marks omitted); *Grandison v. State*, 305 Md. 685, 765 ("By dropping the subject and never again raising it, [appellant] waived his right to appellate review"), *cert. denied*, 479 U.S. 873 (1986).

Moreover, supporting our conclusion that appellant affirmatively waived this issue, after the court issued its limiting instruction, counsel never again raised any objection to the playing of the remainder of the interview, nor did he specifically cite any of the passages to which appellant now takes more specific complaint on appeal. Moreover, we

also note that there was no challenge to the substance of the court's limiting instruction by defense counsel at trial. Properly instructed, the jury is presumed to follow the court's instructions in reaching their verdict. *See Spain v. State*, 386 Md. 145, 160 (2005) ("Maryland courts long have subscribed to the presumption that juries are able to follow the instructions given to them by the trial judge, particularly where the record reveals no overt act on the jury's part to the contrary"). Thus, based on our consideration of the record, we hold that this issue was waived and not properly presented for appellate review.

Even if the remaining two arguments concerning the nature of Detective Selkirk's opinions were preserved, appellant would not prevail. Generally:

> Determinations regarding the admissibility of evidence generally are left to the sound discretion of the trial court. *Hajireen v. State*, 203 Md. App. 537, 552, *cert. denied*, 429 Md. 306 (2012). This Court reviews a trial court's evidentiary rulings for abuse of discretion. *State v. Simms*, 420 Md. 705, 724-25 (2011). *Accord Nixon v. State*, 204 Md. 475, 483 (1954) (reviewing trial court's ruling excluding evidence based on inadequate chain of custody for an abuse of discretion). A trial court abuses its discretion only when "no reasonable person would take the view adopted by the [trial] court," or when the court acts "without reference to any guiding rules or principles." *King v. State*, 407 Md. 682, 697 (2009).

Easter v. State, 223 Md. App. 65, 74-75 (2015).

Concerning appellant's claim that Detective Selkirk's statements included assessments of his state of mind, Maryland Rule 5-701 provides:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Appellant cites *Bell v. State*, 114 Md. App. 480 (1997), in support of his argument that Detective Selkirk's statements improperly speculated on his mental state. In that case, two lay witnesses offered personal opinions concerning whether appellant had reason to fear imminent bodily harm, which was an element of appellant's self-defense claim. *Bell*, 114 Md. App. at 507. This Court concluded the court erred in admitting the testimony, over objection, because their testimony on appellant's state of mind was not "helpful to a clear understanding of [their] testimony or the determination of a fact in issue." *Id.* at 509 (citing Maryland Rule 5-701). Although the prosecutor could have argued that appellant did not fear imminent harm based on the witnesses' factual observations, it was error for the court to admit the witnesses' personal opinions on the subject. *Id.*

We conclude that *Bell* does not apply. Throughout her questioning, Detective Selkirk repeatedly told appellant that she was not saying his modus operandi, to wit, of seeking out female companionship was wrong, per se. Her statements were instead suggestions that, while arguably bearing on his culpability, were not evidence of his particular state of mind. They certainly were not akin to the evidence directly impacting an element of a claim, as was the case in *Bell, supra*.

As for appellant's other assertion, that Detective Selkirk improperly questioned his credibility, the primary case on that point is *Crawford v. State*, 285 Md. 431 (1979). In *Crawford*, the Court of Appeals reversed a first-degree murder conviction, holding that the trial court had erred in allowing the jury to hear evidence of the defendant's tape recorded interrogations during which police officers expressed disbelief in the defendant's story. *Crawford*, 285 Md. at 443. The defendant did not deny killing the victim but alleged that

she had done so in self-defense. Further, defense counsel did not object to the accused's statements themselves, but did not want the jury to hear the comments from the police during the course of the interviews. *Id.* The Court made the following observations, regarding when the police questioned her shortly after the homicide:

> [T]hroughout the questioning the police attempted to have [Crawford] recant her version of the incident by indicating their disbelief in her story, by exhorting her to tell the truth and arguing with her, by recounting what other persons, some named, some unnamed, had told them, by stating their opinions as to what had occurred, and by referring to what the victim had said when he was deposed five months before her death in a civil proceeding regarding custody of the accused's daughter, Renee.

Crawford, 285 Md. at 433.

The trial court admitted the recordings of two police interrogations in their entirety—the first interrogation lasted two hours, the second lasted about an hour and a half. *Crawford*, 285 Md. at 433. In its opinion, the Court of Appeals quoted extensively from the tapes to show the police's repeated disbelief of the accused's version of events. For example, the defendant told the officers that her struggle with the victim "'happened on the bed and we tusseled [*sic*] and we landed on the floor.'" *Id.* at 439. One of the officers then said, "'Jeannie, I don't buy it, how did her throat get cut?'" *Id.* The trial court overruled defense counsel's objection to the officer's comment that he "didn't buy it." *Id.*

At another point, the officer said to the defendant, "'Ms. Crawford, it is very improbable that [the victim] received all those wounds and you didn't receive any[.]'" *Crawford*, 285 Md. at 440. Further, the officer "expressed doubt as to how the victim got on the floor suggesting that she was rolled off the bed by the accused when she took the bed linens off." *Id.* at 440. He said, "'Now we can tell by the injuries received on her

. . . . We can tell exactly where she was laying and how she was laying,'" implying that the defendant's statements regarding where and how the victim was laying was untrue. *Id.* Again the trial court overruled defense counsel's objection. *Id.* The Court of Appeals concluded that "[t]he tapes clearly brought out the obvious disbelief of the police in the accused's version of what happened, a disbelief predicated on what the police had learned from other persons." *Crawford*, 285 Md. at 447.

We are persuaded that *Crawford* is distinguishable. As the State points out, the only time that Detective Selkirk even approached an assessment of appellant's credibility was her comment, during a discussion of Janaya's wakefulness, or lack thereof, during the sexual encounter, that "It sounds kinda shaky, man?" This was not the type of repeated, and arguably calculated, degradation of a suspect's credibility as occurred in *Crawford*. This was an isolated statement by a police detective who, otherwise, did not challenge aspects of appellant's version of events. While the officer did seem to disapprove of appellant's behavior concerning his method of meeting girls, the officer did not go out of her way to suggest that appellant was lying about his story, as was the case in *Crawford*. Accordingly, even were we to address the merits, we conclude that the trial court properly exercised its discretion in admitting the appellant's statement, subject to the limiting instruction requested by defense counsel.

III. Admissibility of Impeachment Evidence

Appellant next asserts that the trial court erred in not permitting impeachment of Janaya with her Facebook messages. The State responds that this issue is meritless because:

(a) appellant did not meet the foundational requirements for this type of impeachment; and (b) the prior statements were not inconsistent with Janaya's trial testimony.

Towards the end of the trial, appellant's counsel sought to recall Janaya to have her identify statements from her Facebook account as "rebuttal evidence." Apparently recognizing that "rebuttal evidence" is ordinarily elicited by the State in response to new, material evidence introduced by the defense, *see, e.g., Collins v. State*, 373 Md. 130, 142 (2003), defense counsel proffered that the Facebook messages were nevertheless admissible because they established a relationship between Janaya and appellant, contrary to Janaya's alleged denial that "she had any relationship with this man."

The State objected and argued, *inter alia*, that the messages were "not impeachment because Janaya readily admits that she became Facebook friends with the Defendant in 2010. That's not in dispute." Therefore, the State argued, the Facebook messages were not inconsistent with Janaya's trial testimony.[7] After hearing further argument, the court ruled as follows:

> THE COURT: So far I'm agreeing with the State that it's not even impeachment evidence because it doesn't refute any testimony that she gave.
>
> She said that they had Facebook exchanges. Her testimony was that she had not had sex with him before.
>
> I'm not seeing that this is helpful in any way, shape or form.
>
> [DEFENSE COUNSEL]: To the State it's not.

[7] The State also objected to the belated disclosure of the proposed impeachment on discovery grounds, but those grounds are not at issue on appeal.

THE COURT: To the jury.

I'm not going to allow this.

The right of confrontation under the Sixth Amendment includes a criminal defendant's opportunity to "'cross-examine a witness about matters which affect the witness's bias, interest or motive to testify falsely.'" *Martin v. State*, 364 Md. 692, 698 (2001) (quoting *Marshall v. State*, 346 Md. 186, 192 (1997)). A criminal defendant's constitutional right to cross-examination, however, is not boundless. *Pantazes v. State*, 376 Md. 661, 680 (2003). Trial judges have "'wide latitude . . . to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues . . . or interrogation that is . . . only marginally relevant.'" *Smallwood v. State*, 320 Md. 300, 307 (1990) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). We will not disturb the exercise of that discretion in the absence of clear abuse:

> [O]ur sole function on appellate review is to determine whether the trial judge-imposed limitations upon cross examination that inhibited the ability of the defendant to receive a fair trial. . . . Consistent with that discretion, we note, however, that the trial judge, and not this Court, is in the best position to determine whether the introduction of certain impeachment evidence would enmesh the trial in confusing or collateral issues.

Merzbacher v. State, 346 Md. 391, 413-14 (1997).

As part of its foundational argument, the State asserts that the appellant sought to recall Janaya solely as a subterfuge in order to admit the alleged prior inconsistent Facebook statements. Although a party may impeach its own witness under Maryland Rule 5-607, the Court of Appeals has provided that "[t]here must be a legitimate purpose in

calling a witness beyond merely as a means of putting before the jury inadmissible evidence used to impeach the calling party's own witness." *Walker v. State*, 373 Md. 360, 388 n.8 (2003). To the extent that appellant wanted to recall Janaya as part of the defense case, solely to impeach her with her Facebook messages, we agree with the State that this was improper.

The State also contends that appellant could not use the Facebook messages because he did not satisfy the foundational requirements of Maryland Rules 5-613 and 5-616. Maryland Rule 5-616(b)(1) provides that "[e]xtrinsic evidence of prior inconsistent statements may be admitted as provided in Rule 5-613(b)." Maryland Rule 5-613 provides:

> (a) Examining witness concerning prior statement. A party examining a witness about a prior written or oral statement made by the witness need not show it to the witness or disclose its contents at that time, provided that before the end of the examination (1) the statement, if written, is disclosed to the witness and the parties, or if the statement is oral, the contents of the statement and the circumstances under which it was made, including the persons to whom it was made, are disclosed to the witness and (2) the witness is given an opportunity to explain or deny it.
>
> (b) Extrinsic evidence of prior inconsistent statement of witness. Unless the interests of justice otherwise require, extrinsic evidence of a prior inconsistent statement by a witness is not admissible under this Rule (1) until the requirements of section (a) have been met and the witness has failed to admit having made the statement and (2) unless the statement concerns a non-collateral matter.

The State specifically asserts that appellant did not meet these requirements "because he did not ask Janaya about the Facebook message when he questioned her on cross-examination," but appellant nevertheless sought to recall Janaya as a defense witness and "have her authentic[ate] these and put these into evidence as rebuttal evidence." Subject to the aforementioned law restricting a party's ability to call a witness solely as a

subterfuge to impeach that same witness, we do not agree that a party may only impeach a State's witness during cross-examination.

However, as the trial court recognized, what appears to be required before a party may impeach a witness with these types of statements is that "the prior statement of the witness must be established as inconsistent with his trial testimony." *Hardison v. State*, 118 Md. App. 225, 237-38 (1997) (citing *Stevenson v. State*, 94 Md. App. 715, 721 (1993)). The same would be true had appellant sought to admit the statements substantively. *See Tyler v. State*, 342 Md. 766, 775 (1996) ("[A] witness's prior testimony is admissible as substantive evidence when the prior testimony is *inconsistent* with the witness's in-court testimony, and the witness is subject to cross-examination concerning the statement at the trial where the statement is admitted") (emphasis in original). An inconsistency may contain "both positive contradictions and claimed lapses of memory." *Tyler*, 342 Md. at 777 (quoting *Nance v. State*, 331 Md. 549, 564 n. 5 (1993)).

Here, the proffered Facebook message that was identified for the record stated "I was gon text you later on tonite and tell you come see me tomaar." The exhibit included in the record indicates the message was from an account identified as "Imissyou Marshall" and transpired on August 28, 2011. However, contrary to a suggestion that this message was directed to appellant, the message included with the record does not identify the recipient.

Comparing this message to Janaya's trial testimony, Janaya testified she first met appellant on Facebook in approximately 2010. She testified that "I don't know if I messaged him, or he messaged me, but that's how we ended up meeting." She met him in

person in March 2010 in a parking lot, when she was in ninth grade. Janaya did not see appellant again until July 2012. Janaya also testified that appellant was not her boyfriend, and she maintained that she did not have sex with appellant before July 2012.

We are persuaded that the proffered message was not inconsistent with Janaya's trial testimony. Janaya admitted that she met appellant through Facebook, and there was nothing in the message that contradicted Janaya's testimony that she never had sexual relations with appellant, prior to the night in question. Accordingly, because there was no inconsistency, we hold that the trial court properly exercised its discretion in prohibiting the proposed impeachment with the Facebook messages. *See Fields v. State*, 168 Md. App. 22, 41 (concluding that trial court properly limited cross-examination of key State's witness, because that witness had already admitted she lied for the appellant, and that "the identities of the persons to whom she lied was of little discernible consequence"), *aff'd*, 395 Md. 758 (2006).

IV. CONSTITUTIONALITY OF SENTENCE

Finally, appellant asserts that his ten-year sentence with all but eight years suspended is grossly disproportionate to his crime and amounts to cruel and unusual punishment. The State disagrees , as do we.

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., Amend. VIII. Maryland's Declaration of Rights includes an analogous provision: "That excessive bail ought not to be required, nor excessive fines

imposed, nor cruel or unusual punishment inflicted, by the Courts of Law." Md. Decl. of Rts., Art. 25.

In *Solem v. Helm*, 463 U.S. 277, 287-88 (1983), the United States Supreme Court incorporated a principle of proportionality into the evaluation of non-capital criminal sentences under the Eighth Amendment. The Court stated that "a criminal sentence must be proportionate to the crime for which the defendant has been convicted." *Id.* at 290. The threshold inquiry focuses on the gravity of the offense and the harshness of the penalty. *Id.* at 290-91. In *State v. Bolden*, 356 Md. 160 (1999), the Court of Appeals summarized the *Solem* comparative analysis as one guided by objective criteria, including "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for the commission of the same crime in other jurisdictions." *Bolden*, 356 Md. at 165-66. In *Thomas v. State*, 333 Md. 84 (1993), the Court of Appeals explained that

> [a] criminal sentencing decision is never one easily made, and involves a plethora of considerations, both obvious and subtle. Thus, it would be illogical to conduct any review of a sentence using stringent and rigid standards. Only rarely should a reviewing court interfere in the sentencing decision at all, especially because the sentencing court is virtually always better informed of the particular circumstances. Thus, we emphasize that challenges based on proportionality will be seriously entertained only where the punishment is truly egregious.

Thomas, 333 Md. at 96-97.

The Court has suggested guidelines to be applied when there is an appellate challenge to an allegedly "grossly disproportionate" sentence:

> In considering a proportionality challenge, a reviewing court must first determine whether the sentence appears to be grossly disproportionate.

> In doing so, the court should look to the seriousness of the conduct involved, the seriousness of any relevant past conduct as in the recidivist cases, any articulated purpose supporting the sentence, and the importance of deferring to the legislature and to the sentencing court. If these considerations do not lead to a suggestion of gross disproportionality, the review is at an end.

Id. at 95.

The maximum penalty for second-degree assault is ten years, pursuant to statute. Md. Code (2002, 2012 Repl. Vol.), § 3-203(b) of the Criminal Law Article. There is no dispute that appellant was sentenced within the maximum penalty. In assessing the proportionality of the sentence to the crime, we shall provide further detail of pertinent facts leading up to the court's disposition.

After the jury rendered its verdict finding appellant guilty of second-degree assault, defense counsel asked the court to let appellant remain free on bond pending disposition. The State proffered that appellant had two pending trial dates in Prince George's County. One was for an attempted theft less than $10,000, and the other concerned charges of failure to obey a lawful order and disorderly conduct. The court also learned that appellant had been recently charged and convicted of driving while suspended. After ordering a pre-sentencing investigation ("PSI"), the court revoked appellant's bond and remanded him, pending disposition. After its ruling revoking bond, there was an outburst in the courtroom and the following ensued:

> THE COURT: You can leave the room now.
>
> The behavior described in the course of this trial –
>
> THE DEFENDANT: Judge, actually –
>
> [DEFENSE COUNSEL]: Listen. Just listen.

> THE COURT: That description, right out of your mouth, Mr. Mills, the behavior that you admitted to, that came right out of your mouth, leads me to believe that you are dangerous.
>
> THE DEFENDANT: What behavior?
>
> THE COURT: You're an out of control – Yes, you.
>
> THE DEFENDANT: No, I'm saying what behavior?
>
> THE COURT: Your nonstop sexual predation on women. Getting them drunk, getting yourself drunk, and pretending it's consent.
>
> THE DEFENDANT: I didn't get anyone drunk.
>
> THE COURT: You need to have a long, hard thought about how you've been living your life. You are lucky I'm not sentencing you today. Bond revoked.

Thereafter, in addition to the PSI ordered by the court, a pre-sentence competency evaluation was completed by the Office of Forensic Services, with the Department of Health and Mental Hygiene. This evaluation noted the nature of the offense, that the behavior alleged was considered "dangerous," and that appellant's risk of recidivism was considered moderate. The PSI recommended that appellant be sentenced within the Maryland sentencing guidelines. The original guidelines recommendation was for incarceration between six months and three years.

At disposition, appellant's counsel noted that the guidelines inaccurately indicated there was a non-permanent injury in this case. The State agreed and the guidelines were amended to a recommendation of probation to eighteen months. Also at disposition, the

court heard from the victim's grandmother, and the victim, in aid of sentencing. Their written statements are included with the record on appeal. [8]

The State asked the court to sentence appellant above the guidelines, noting appellant's history in the community, his attitudes towards women, his lack of remorse, and his prior convictions and traffic record. The State also contended that appellant was "a predator. He shows predatory behavior. And, it's scary." Accordingly, the State asked the court to sentence appellant to ten years, suspending all but eight and a half, to be followed by a period of supervised probation.

After hearing from defense counsel, appellant's mother, appellant's godmother, appellant's friend, and appellant himself , the court sentenced appellant to ten years, with all but eight years suspended, to be followed by five years supervised probation. In doing so, the court noted:

[8] At the sentencing hearing, appellant's counsel cross-examined the victim's grandmother, asking her whether she was aware of Janaya's postings on Facebook. [S. 12-13] After confronting the victim's grandmother, defense counsel was unable to question the victim herself, and in fact, objected after the victim "choked up" and left the courtroom in tears while addressing the court. [S. 14-15] Although appellant does not pursue this objection on appeal, we note that the right to confrontation, and the strict rules of evidence, do not extend to ordinary sentencing proceedings in the same manner as during trial. *See United States v. Powell*, 650 F.3d 388, 393 (4th Cir. 2011) ("[I]n holding that the Confrontation Clause does not apply at sentencing, we join every other federal circuit court that hears criminal appeals"), *cert. denied*, 132 S.Ct. 350 (2011); *Driver v. State*, 201 Md. 25, 31-32 (1952) ("[T]he sentencing judge may consider information, even though obtained outside the courtroom, from persons whom the defendant has not been permitted to confront or cross-examine"); *Miller v. State*, 67 Md. App. 666, 671 ("It has long been recognized in this State that the procedure in the sentencing process is not the same as that in the trial process"), *cert. denied*, 307 Md. 260 (1986); *see also In re Billy W.*, 387 Md. 405, 433-434 (2005) (observing that the strict rules of evidence do not apply at sentencing hearings).

> Second-degree assault is a very elastic charge. It can mean everything from a push, a shove, up to a full punch in the face, breaking someone's jaw. It is often a compromise from a more serious offense.
>
> The guidelines in Maryland are not mandatory, and they reflect typical sentencing. But, there are standard reasons for departing from the guidelines, so there is some elasticity built in there. The Court is not required to follow the guidelines, and they are not appropriate in this case.

In departing from the guidelines, the court wrote that appellant "is a sexual predator—shows no remorse" and that appellant exhibited "extreme narcicism [*sic*] and history of predatory behavior." At the hearing, the court addressed appellant:

> You show no remorse. You're cocky. You're trying to manipulate the situation. You said over and over again it weren't [*sic*] no big deal . . . my buddy and I, we do this all the time . . . this is what we do . . . this is what we do . . . we go out . . . we drink . . . we get women drunk, and we have sex with them whether they are comatose or not. That is not manly behavior. It is self-centered cowardly behavior. It is manipulative, ruthless behavior of a sexual predator who shows no sign or insight or [*sic*] remorse.

The court continued:

> I am not sentencing you for rape. If I were, you would be doing a twenty-year sentence; you would be registering as a sex offender; you would be under mandatory registration reporting with very, very strict terms of probation for as long as I could make them.
>
> This is the pattern of behavior that you admitted to yourself. No one is doing this to you but you, yourself, by your choices. [Janaya] absolutely made poor decisions. No question about it. But, she still had some faith in humanity . . . some thought that the people she was spending time with would look out for her best interests . . . would make sure she was safe . . . and the[n] she ran across you.

Based on our review of the record, we are persuaded that there was no suggestion of gross disproportionality in the court's disposition. Accordingly, we conclude there is no merit to appellant's claim that his sentence amounted to cruel and unusual punishment.

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