Circuit Court for Frederick County
Case No. 10-K-16-059233

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2089

September Term, 2017

JOHN WALTER MULLICAN, IV

v.

STATE OF MARYLAND

Fader, C.J.,
Beachley,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: February 6, 2019

A jury in the Circuit Court for Frederick County convicted appellant, John Walter Mullican, IV, of first and second-degree assault. The trial court sentenced appellant to twenty-five years' imprisonment for first-degree assault, suspending all but twenty years. The second-degree assault merged for sentencing purposes. Appellant timely appealed and presents the following four questions for our review:

1. Did the trial court err in admitting the 911 recording?
2. Did the trial court err in refusing to grant the motion for mistrial?
3. Did the trial court impermissibly foreclose appellant's right to confront the complaining witness through cross-examination and restrict his right to present his defense?
4. Did the trial court err in admitting highly prejudicial photographs?

For the reasons that follow, we affirm the judgment of the circuit court.

FACTS AND LEGAL PROCEEDINGS

At approximately midnight on October 26, 2016, deputies from the Frederick County Sheriff's Office responded to a 911 call for a domestic disturbance. When they arrived, the 911 caller, Elizabeth Tonti, was locked in an upstairs bathroom.

After the police secured the scene, Ms. Tonti exited the house, her face "partially deformed," bloody, and swollen. To the deputies, she appeared "pretty out of it"—crying and shaking—and was having a "hard time talking." Upon the officers' entry into the house, "[i]t looked like something happened in the living room," due to "multiple pieces of broken furniture" and blood on the sofa. Ms. Tonti identified her attacker as appellant, her boyfriend. Appellant was not in the house when the officers arrived.

At appellant's trial, Ms. Tonti testified that she met appellant in July 2016 and dated him "on and off," but "[m]ore off," in the three months leading up to the incident. In mid-October 2016, she went to Florida to be with her ill mother, leaving appellant to stay at her house to take care of her many animals.

Apparently, after approximately two weeks, appellant grew tired of caring for the animals and asked Ms. Tonti to come home. Ms. Tonti returned home at approximately 7:00 p.m. on October 25, 2016, following her mother's funeral. While she checked on her animals, appellant sat on her front porch, drinking a beer. Ms. Tonti perceived appellant to be intoxicated because he appeared agitated and was slurring his words.

Shortly thereafter, Ms. Tonti and appellant went to a bar where they each drank a few beers before returning to her house. Once they arrived, appellant declared that he was not ready to go inside, turned his rented truck around, and hit Ms. Tonti's car on his way down the driveway. He drove them to a nearby field where he continued to drink alcohol.

The pair then returned to Ms. Tonti's house, where they each drank approximately four more beers and lounged in the hot tub. Appellant became "strange," telling Ms. Tonti she should submit to his male dominance, so she got out of the hot tub and went inside to dry off and get another beer. Appellant followed her inside. Ms. Tonti then told appellant to leave and began gathering his belongings, which apparently caused him to become angry.

When appellant taunted Ms. Tonti about her mother's recent death, she tried to hit

him, but he grabbed her wrists. He then twisted her wrists, which prompted Ms. Tonti to bite him, hoping he would let go. This caused appellant to get "really angry," and he punched her in the face "at least a few" times. He then grabbed her ears and hit the back of her head on a stone coffee table. Next, appellant grabbed her around her upper arms and under her armpits and shook her, before pinning her head against the sofa.

Afterwards, appellant apologized and told Ms. Tonti that he loved her, but he continued to restrain her and refused to call an ambulance. When he let her up, she ran to retrieve her cell phone from the kitchen, but he reached it first. Ms. Tonti then tried to plug in her landline phone, but "[appellant] snapped the cord in half." Ms. Tonti ran upstairs and grabbed appellant's cell phone before locking herself in her bathroom and calling 911.[1]

Upon surveying her injuries, Ms. Tonti realized that her nose was broken, one eye was swollen shut, and her head and face were bleeding. She told the 911 dispatcher that her boyfriend, appellant, had punched her in the face and hit her. Appellant can be heard in the background of the recording telling Ms. Tonti to open the door. Ms. Tonti appears to try to convince him that she has not called anyone and begs him to leave.

Once the police arrived and determined that appellant had left the property, Ms. Tonti was able to exit the bathroom and the house. She was transported to Frederick Memorial Hospital by ambulance and was treated in the emergency room. She remained

[1] The 911 call, which will be discussed in greater detail below, was played for the jury.

in the hospital for three or four days, having suffered a fractured skull, a brain bleed, a broken nose that required surgery, an occipital fracture, significant bruising, and a laceration on the back of her head large enough to require staples to close.[2] At the time of trial, she still suffered neurological damage from the brain bleed—including left side weakness and tremors—and was awaiting further surgery.

A few weeks after the incident, appellant messaged Ms. Tonti on Facebook, asking her to return his phone. She agreed to meet him at a Walmart, where she gave him his phone and then went back with him to the trailer where he was staying.

Appellant's rendition of the events differed from Ms. Tonti's. He testified that upon her return from Florida on October 25, 2016, Ms. Tonti was distraught about her mother's death, so they talked and drank beer. After having a few more drinks at a bar, they mutually agreed to go to a nearby field where they had intercourse before returning home to use the hot tub, drink, and listen to music.

After an argument about the equality of men and women, appellant got out of the hot tub and went into the kitchen. Ms. Tonti, who was "pretty inebriated," followed him, continuing the argument and telling him to leave her house.

According to appellant, Ms. Tonti swung at him, so he grabbed her wrists. When she bit his wrist, he let her go and retreated to the living room. She followed and screamed at him and bit his chest. He then pushed her away from him, which caused her to fall over

[2] The court admitted into evidence several photographs of Ms. Tonti's injuries.

a chair and hit her head on a piece of furniture. She got up and hit him repeatedly, so he punched her in the face twice to get her to stop.

Appellant claimed he did not intend to hurt Ms. Tonti. He denied hitting her head against a table or holding her head against the couch. Instead, he claimed that he grabbed some paper towels to stop the bleeding from her face. He also denied breaking her phone cord to prevent her from calling the police.

Appellant further testified that when Ms. Tonti locked herself in the bathroom, he asked where his phone was and "if she was okay." He then left the house, leaving her cell phone outside the bathroom door. He did not think to call an ambulance or take her to an urgent care facility because he "was in shock." Instead, he drove back to the field where they had been earlier and slept in his truck to avoid driving home drunk.

Although he claimed he acted in self-defense against Ms. Tonti's attack, appellant did not go to the police because he was afraid no one would believe him. Instead, he went to stay with a friend in Virginia. A few weeks later, he called Ms. Tonti to see how she was, and she met him in West Virginia.

As stated above, on May 19, 2017, a jury in the Circuit Court for Frederick County convicted appellant of first and second-degree assault. On November 7, 2017, the court sentenced appellant to an executed term of twenty years for first-degree assault. As stated above, appellant filed a timely appeal.

DISCUSSION

I.

Appellant first contends that the trial court erred in admitting into evidence the recording of Ms. Tonti's 911 call. He argues that the recording of the 911 call, which was admitted for the truth of the matters contained therein, comprised hearsay not subject to a recognized exception, and served to unfairly bolster Ms. Tonti's trial testimony.

Prior to Ms. Tonti's direct examination, defense counsel moved *in limine* to preclude the State from entering the recording of the 911 call into evidence on the grounds that, because Ms. Tonti was present to testify, "[t]here's no hearsay exception [for] that," and "there's nothing that they could use it for except to bolster her testimony[.]" When the State advanced an argument that "it's clearly an excited utterance[,]" defense counsel responded that Ms. Tonti was present to testify and that "excited utterance doesn't apply to the victim . . . when she's here to testify[,]" but acknowledged that "it might be an excited utterance . . . if she's not here[.]" The court overruled the objection and permitted the State to play the 911 recording for the jury.[3]

In his brief, appellant argues that the trial court erred in admitting the recording under the excited utterance exception to the hearsay rule because "the State failed—as a matter of form—to elicit the requisite foundational testimony as to the 'excitement' at the time of the 911 call." He claims that Ms. Tonti relayed the details of the attack in "lengthy

[3] Defense counsel renewed her objection when the State later sought to admit the recording as State's Exhibit 6.

narrative form," which contradicted the requisite excitement for application of the excited utterance exception.

The State responds that this argument is unpreserved because it differs from his objection to the trial court, *viz*., that the excited utterance exception to the hearsay rule did not apply to the 911 recording because Ms. Tonti was present to testify. We agree that appellant's argument is not preserved.

There is no doubt that the recording of the 911 call contained hearsay because it contained out-of-court statements by Ms. Tonti offered to prove that appellant assaulted her.[4] At trial, appellant objected to the introduction of the recording on the ground that no hearsay exception, including excited utterance, applied because Ms. Tonti was present to testify.[5] Appellant did not argue, as he does on appeal, that Ms. Tonti's lengthy narrative to the 911 dispatcher negated the requisite excitement necessary for the excited utterance exception. Furthermore, the trial court never made any findings regarding Ms. Tonti's excitement. Accordingly, appellant failed to preserve the issue for our review. *See State v. Jones*, 138 Md. App. 178, 218 (2001) ("But, when particular grounds for an objection are volunteered or requested by the court, 'that party will be limited on appeal to a review

[4] Hearsay is "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). Generally, hearsay is not admissible "[e]xcept as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes." Md. Rule 5-802.

[5] The excited utterance exception to the hearsay rule does not require that the declarant be unavailable as a witness. Rule 5-803(b)(2).

of those grounds and will be deemed to have waived any ground not stated.'" (quoting *Leuschner v. State*, 41 Md. App. 423, 436 (1979))).[6]

II.

Appellant next argues that the trial court abused its discretion in declining to grant his motion for mistrial after the State played for the jury an unredacted version of the 911 recording, which revealed that he was on parole at the time of the incident. According to appellant, the revelation, whether intentional or inadvertent, that he had a criminal past constituted irrelevant "bad acts" evidence and was sufficiently prejudicial to warrant a mistrial.

During the playing of Ms. Tonti's 911 call, the jury heard the following:

911 Dispatcher No. 1: You're doing good.

[6] We note that, even had the court erred in admitting the 911 call, the error would have been harmless. *See Frobouck v. State*, 212 Md. App. 262, 283 (2013) (erroneously admitted hearsay statements are reviewed for harmless error). Ms. Tonti testified that it was appellant, her boyfriend, who attacked and injured her, which, if believed by the jury, was sufficient to convict appellant of assault. *See Shrader v. State*, 10 Md. App. 94, 101 (1970). Specifically, the identity of the person who assaulted Ms. Tonti was not at issue and she described her injuries in much more detail during her trial testimony than she did in the 911 call. In light of this testimony, it is unlikely that the 911 call influenced the jury's verdict.

Moreover, as the Court of Appeals made clear in *DeLeon v. State*, 407 Md. 16, 31 (2008), a defendant waives an objection to the admission of evidence when evidence on the same point is admitted without objection elsewhere at trial. This rule applies to complaints of inadmissible hearsay. *See, e.g.*, *Jones v. State*, 310 Md. 569, 588-89 (1987), *judgment vacated on other grounds*, 486 U.S. 1050 (1988). As mentioned, Ms. Tonti testified, without objection, that appellant was the person who injured her, and she provided details as to how she sustained the injuries. Additionally, appellant admitted that he punched Ms. Tonti, although he claimed self-defense. Therefore, no prejudice inhered to appellant from the similar statements contained in the 911 call recording.

Ms. Tonti: He's running.

911 Dispatcher No. 1: He's running away?

Ms. Tonti: Yeah. He's on parole.

911 Dispatcher No. 1: He's on?

911 Dispatcher No. 2: Parole.

911 Dispatcher No. 1: On, he's on parole.

At that point, defense counsel objected, and the court sustained the objection.

Defense counsel asked to approach the bench, where she moved for a mistrial because appellant's parole status had been revealed, notwithstanding the State's pretrial assurance that the reference had been redacted. The prosecutor explained that another member of the State's Attorney's Office, who was out of the office that week, had redacted the recording, and the prosecutor believed she had been playing the redacted version. Rather than rule on the motion for mistrial, the court issued a curative instruction to the jurors and dismissed them for the night.[7]

After the jury left the courtroom, the prosecutor explained that the State's Attorney's Office employee who had redacted the recording had sent the prosecutor an e-mail advising

[7] The instruction was:

> All right. Ladies and gentlemen, the information in the last statement that you heard on the tape you need to disregard. That means you are to put it out of your minds; it did not happen. You are not to consider it in any of your thoughts, deliberations, or any thoughts about what to do as far as this case goes. Does that -- does everybody understand that? It's gone.

that she had not redacted the statement because she thought Ms. Tonti said, "he knows he's going to get in trouble, not he's on parole."[8] The court accepted the prosecutor's assurance that the issue arose from a misunderstanding, but permitted defense counsel to set forth an argument in support of a mistrial. Appellant's counsel argued that in this "he-said-she-said" case, the State was intentionally trying to admit improper statements. However, appellant's counsel stated that she had agreed not to oppose a redacted version of the 911 recording or to require the testimony of a custodian of records, based on the understanding that the State would neither mention nor impeach appellant with his prior offenses.

The court held its ruling on the motion for mistrial in abeyance until the following morning. At the start of the second day of trial, the State reiterated that the revelation that appellant was on parole at the time of the assault was inadvertent and provided the court the pertinent e-mails from the employee who had redacted the recording.

The court, finding no purposeful intent on the part of the State to reveal appellant's parole status to the jury, denied appellant's motion for mistrial, finding that the curative instruction sufficiently remedied the situation. The court noted that the jurors nodded in agreement to its instruction to disregard appellant's parole status. The court also advised

[8] The State's Attorney's Office employee did redact, however, a different statement wherein Ms. Tonti described an unrelated incident between her and the appellant.

it would give another instruction at the end of the case.[9]

We review a court's ruling on a motion for mistrial under the abuse of discretion standard. *Nash v. State*, 439 Md. 53, 66-67 (2014). "Our determination of whether a trial court abused its discretion 'usually depends on the particular facts of the case [and] the context in which the discretion was exercised.'" *Wardlaw v. State*, 185 Md. App. 440, 451 (2009) (quoting *King v. State*, 407 Md. 682, 697 (2009)). "Regarding the range of a trial judge's discretion in ruling on a mistrial motion, reviewing appellate courts generally afford a wide berth." *Nash*, 439 Md. at 68. We remain mindful that because the grant of a mistrial is "an extraordinary measure, it should only be granted where manifest necessity as opposed to light or transitory reasons, is shown." *Ezenwa v. State*, 82 Md. App. 489, 518 (1990).

In various instances, this Court has addressed the issue of whether a mistrial is required when a witness makes reference to the defendant's status as a prisoner and concluded it is not. *See Wagner v. State*, 213 Md. App. 419, 460, 463 (2013) (holding that a motion for mistrial based on the statement, "I knew he was locked up[,]" was properly denied because the "bald statement was isolated, unsolicited and unlikely to cause

[9] The court later instructed the jury:

> The following things are not evidence and you should not give them any weight or consideration: any testimony that I struck or told you to disregard and any exhibits that I struck or did not admit into evidence and any questions that the witnesses were not permitted to answer and objections of the lawyers. Also, when I did not permit the witness to answer a question, you must not speculate as to the possible answer. If, after an answer was given, I ordered that the answer be stricken, you must disregard both the question and the answer.

significant prejudice"); *Mitchell v. State*, 132 Md. App. 312, 328-29 (2000), *rev'd on other grounds*, 363 Md. 130 (2001) (upholding trial court's denial of defendant's motion for mistrial when a witness stated that a friend of Mitchell's told him that Mitchell was "locked up" where the court was not "persuaded that any significant damage resulted from [witness's] remark, as it was a single, isolated statement that was wholly unresponsive to the State's question, and the court's curative instruction was adequate to overcome any taint"); *Turner v. State*, 48 Md. App. 370, 377 (1981), *rev'd on other grounds*, 294 Md. 640 (1982) (affirming trial court's denial of mistrial when witness said he had not spent time with the defendant because he was "locked up," as "the response given . . . was inadvertent and unexpected[,]" and "the bald statement that 'he was locked up then' would seem to carry very little prejudicial information"); *see also Burral v. State*, 118 Md. App. 288, 297-98 (1997) (concluding that an "inadvertent reference to prison" did not amount to inadmissible "other crimes" evidence).

We have no difficulty concluding that being on parole is as indicative of a criminal past as being or having been "locked up." However, as in the cases cited above, the reference to appellant's parole status was an isolated statement during Ms. Tonti's lengthy 911 call. The record reveals that the prosecutor was as surprised as defense counsel when the statement was made, believing that the reference to parole had been redacted from the recording. The court accepted the State's assurance that the playing of the unredacted version was inadvertent. The court gave an immediate curative instruction to the jury, and from its unique ability to view the response and demeanor of the jurors, determined (at

least inferentially) that the jurors would follow the court's instructions to disregard the statement concerning parole. We note that the court again instructed the jury at the close of the evidence to disregard any evidence it had struck.[10]

Finally, there was no dispute that appellant caused the injuries to Ms. Tonti; the only real issue for the jury's consideration was whether appellant inflicted the injuries intentionally or in self-defense. To that end, the jury heard testimony from both appellant and Ms. Tonti and reviewed photographs of Ms. Tonti's injuries and the scene of the crime to aid them in that determination. A single reference to appellant's parole status was not likely to have contributed to the jury's verdict and we do not perceive prejudice sufficient to warrant the extraordinary remedy of a mistrial. Therefore, the trial court did not abuse its discretion when it denied appellant's motion for a new trial.

III.

Next, appellant argues that the trial court erred when it declined to permit him to confront Ms. Tonti on cross-examination by introducing into evidence an allegedly "staged" photograph of an injured Ms. Tonti, accompanied by a text message to appellant stating, "look what you did to me." He claims that the photo and text supported his argument that, because Ms. Tonti had previously made false assertions that he injured her, her statements to the 911 dispatcher on the night in question were similarly false, and that

[10] *See Cantine v. State*, 160 Md. App. 391, 409 (2004) (quoting *Wilson v. State*, 261 Md. 551, 568-69 (1971)) ("When the trial court 'has admonished the jury to disregard the [objected to] testimony, it has been . . . consistently held that the trial court has not abused its discretion in refusing to grant a motion for a mistrial.'")

he should have been permitted to confront her with that evidence.

Prior to trial, the State filed a written motion *in limine* to preclude the defense from introducing into evidence the "staged" photograph of Ms. Tonti, taken approximately two months prior to the incident in question, which showed her bloodied arm. The parties and the court agreed at the start of trial that defense counsel would not make any reference to the photo in opening statement, and the court would conduct a hearing if and when appellant attempted to introduce the photo into evidence.

On the second day of trial, appellant sought to introduce the photo to support the allegation that "the victim misrepresents the truth." According to appellant, Ms. Tonti had sent the "kind of gruesome and gory" photo of herself covered in blood to appellant with a text message, "look what you did to me[.]" Defense counsel acknowledged that she had provided the photo without the text message to the State before trial. Apparently, the text message allegedly accompanying the photo was not available because defense counsel advised the court that appellant would testify about the contents of the text. Appellant insisted that the photo would serve to impeach Ms. Tonti because it showed that she had a history of fabricating and then blaming appellant for causing injuries.

The State, which only learned of the potential existence of the text message at trial, responded that Ms. Tonti had explained that when she and appellant were not in a relationship, he had sent her videos of himself with other women. As a result, Ms. Tonti was "very depressed," and when she accidentally cut her arm approximately two months before the incident in question, she sent him a photo of the blood with a text message to

the effect of "I'm hurting really bad," not that he had physically caused the injury. Therefore, the State argued, the photo did not bear on Ms. Tonti's truthfulness or credibility and was irrelevant to the charges before the court.

The court agreed with the State that the photo had "nothing to do with this incident at all" and noted that the photograph preceded the assault by two months. The court therefore granted the State's motion *in limine*.

On appeal, appellant asserts that the court infringed upon his constitutional right to confront a witness. That argument, however, was not presented to the trial court. Instead, appellant merely argued that the photograph would be used to impeach Ms. Tonti. Because the constitutional issue was not presented to the trial court, we decline to address it on appeal. *Hall v. State*, 22 Md. App. 240, 245 (1974) (declining to address a constitutional argument not presented to the trial court); *Collins v. State*, 164 Md. App. 582, 605-08 (declining to address a constitutional argument not raised despite changes in the law). We will therefore analyze the issue under Maryland evidence law.

We review a trial court's decision to admit evidence under an abuse of discretion standard. *Sifrit v. State*, 383 Md. 116, 128-29 (2004) (citing *Merzbacher v. State*, 346 Md. 391, 404 (1997)). "If the trial court's ruling is reasonable, even if we believe it could have gone the other way, we will not disturb the ruling on appeal." *Peterson v. State*, 196 Md. App. 563, 585 (2010). We recognize that the right of a criminal defendant to present a defense is fundamental, but it

> is nonetheless subject "to two paramount rules of evidence, embodied both in case law and in Maryland Rules 5-402 and 5-403. The first is that *evidence*

> *that is not relevant to a material issue is inadmissible*. The second is that, *even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of* unfair prejudice, *confusion of the issues, or misleading the jury*."

Muhammad v. State, 177 Md. App. 188, 274 (2007) (quoting *Smith v. State*, 371 Md. 496, 504 (2002)). "Relevance is a relational concept. Accordingly, an item of evidence can be relevant only when, through proper analysis and reasoning, it is related logically to a matter at issue in the case, *i.e.*, one that is properly provable in the case." *Snyder v. State*, 361 Md. 580, 591 (2000). However, "a witness's credibility is always relevant. And when a trier of fact must rely primarily—if not solely —on witness testimony to assess guilt or innocence, credibility takes on greater importance." *Devincentz v. State*, 460 Md. 518, 551 (2018) (internal citation omitted).

Here, the issues at trial concerned the events of October 26, 2016. When ruling on the State's motion *in limine* to preclude defense counsel's use of the photograph, the court had before it (1) the proffered photo with defense counsel's assertion about the content of the text message and (2) the State's explanation of the photo as given by Ms. Tonti. The text message itself was not produced, and the sole reason given at trial for admission was to impeach Ms. Tonti. The photo did not depict, or attempt to depict, any of the events of October 26, 2016. Moreover, the photo had minimal relevance to Ms. Tonti's credibility about the injuries she sustained on October 26, 2016, because appellant did not substantially dispute that he caused her injuries. The only issue before the jury was whether appellant intentionally caused the injuries or whether he acted in self-defense. The photo was therefore irrelevant to whether appellant assaulted Ms. Tonti on October 26, 2016. To

the extent that the photo was relevant for impeachment, during cross-examination, appellant's counsel confronted Ms. Tonti with discrepancies between the 911 call and her testimony, as well as previous unrelated incidents in which she misrepresented the truth. This line of questioning allowed appellant to sufficiently impeach Ms. Tonti for potential untruthfulness. *See Merzbacher*, 346 Md. at 414 (holding that the ability to ask about potential witness bias on cross-examination was "sufficient and protective" of cross-examination rights). We perceive no abuse of discretion in the trial court's ruling to preclude admission of the photo.

IV.

Finally, appellant contends that the trial court abused its discretion in admitting six photographs, over objection, that depicted the injuries Ms. Tonti sustained on October 26, 2016. The prejudicial effect of the cumulative photos, appellant claims, outweighed their probative value and "was, to say the least, overkill."

Prior to trial, appellant filed a written motion *in limine* to limit the number, types, and methods for displaying photos of Ms. Tonti's injuries. He claimed that the approximately 300 photos were more prejudicial than probative because they were "gory, bloody, and cumulative" and would serve only to "inflame the passions of the jury" and "invoke sympathy for the victim," when there was no dispute that appellant caused the injuries.

On the first day of trial, defense counsel asked the court to review the photographs depicting Ms. Tonti's injuries and limit them to a "reasonable amount" of probative photos.

Initially, the State presented the court with fifty-seven photos. The court eliminated photos it found duplicative, leaving thirteen photos. Defense counsel offered no objection to the proposed admission of the thirteen photos.

After looking through the photos eliminated by the court, the prosecutor requested that six photos be re-included and that one be swapped for one of the selected thirteen photos, on the grounds that the additional photos showed handprint-shaped bruises on Ms. Tonti's wrists, bruises around her ears, and bruises under her arms. According to the prosecutor, these photos supported Ms. Tonti's expected testimony that appellant squeezed her wrists, grabbed her by the ears to slam her head against a table, and aggressively picked her up under her arms. In addition, the photos showed other bruises not seen in the thirteen photos selected by the court. Defense counsel opposed "any that were added in after the [c]ourt's ruling" permitting the admission of the original thirteen photos and specifically objected to the six photos the State sought to add.[11]

The court ruled that it would permit the admission of the nineteen photos—the thirteen originally agreed upon by counsel, and the additional six requested by the State—

[11] The State argues that appellant did not preserve the issue of the admission of three of the six photos, by objecting on grounds different from those presented on appeal. We are satisfied, however, that the court understood appellant's objections to relate to the cumulative and potentially inflammatory nature of the photos and do not perceive the specific objections to bar preservation.

To the extent that appellant's argument may be read to imply that the admission of *all* the photos was improper due to their cumulative nature, however, that issue is unpreserved because defense counsel did not object to the originally selected thirteen photos. He only preserved the issue with regard to the six photos the court agreed to admit over and above the thirteen agreed-upon photos.

for the purpose of refuting appellant's claim that he accidentally injured Ms. Tonti. At the time the State offered the photos into evidence, defense counsel renewed her objection, which the court overruled.

As with any evidence,

> the general rule regarding admission of photographs is that their prejudicial effect must not substantially outweigh their probative value. The balancing of probative value against prejudicial effect is committed to the sound discretion of the trial judge. The trial court's decision will not be disturbed unless "plainly arbitrary," . . . because the trial judge is in the best position to make this assessment.
>
> Photographs must also be relevant to be admissible. We have found crime scene and autopsy photographs of homicide victims to be relevant to a broad range of issues, including the type of wounds, the attacker[']s intent, and the *modus operandi*. . . . The relevancy determination is also committed to the trial judge's discretion.

Ayala v. State, 174 Md. App. 647, 679-80 (2007) (quoting *State v. Broberg*, 342 Md. 544, 552 (1996)); *see also Mason v. Lynch*, 388 Md. 37, 52 (2005) ("The very few cases finding reversible error are ones where the trial courts admitted photographs which this Court held did not accurately represent the person or scene or were otherwise not properly verified.").

This Court has previously "upheld the admission of photographs showing the victim's wounds for the purpose of proving a brutal assault." *McDonald v. State*, 61 Md. App. 461, 472 (1985) (citing *Fuller v. State*, 45 Md. App. 414, 420 (1980)). In *Price v. State*, 82 Md. App. 210 (1990), notwithstanding the defendant's argument that autopsy photos "inflamed and prejudiced the jury," we reiterated that we often permit the admission of photographs depicting the condition of the victim and the location of injuries on his or

her body to "allow the jury to visualize the atrociousness of the crime[.]" *Id*. at 222-23 (quoting *Johnson v. State*, 303 Md. 487, 502 (1985)).

Here, the trial court properly concluded that the probative value of the photographs was not outweighed by the potential for unfair prejudice. *See Booze v. State*, 111 Md. App. 208, 227 (1996), *rev'd on other grounds*, 347 Md. 51 (1997) ("the question is not whether the photographs were prejudicial, but whether they were *unfairly* prejudicial"). The record shows that the court considered the photos, engaged in discussion with the parties, and ultimately decided which photos would be admitted. In doing so, the court agreed with the State that the additional photos showed injuries to different parts of Ms. Tonti's body and were corroborative of the nature and extent of the injuries she received.

The court also properly determined that the photos were not impermissibly cumulative. As the Court of Appeals noted in *Johnson*, 303 Md. at 503-04, "all photographic evidence is in some sense cumulative. The very purpose of photographic evidence is to clarify and communicate facts to the tribunal more accurately than by mere words." As previously noted, the trial court found that the admitted photos were not impermissibly duplicative because the six additional photos showed different injuries. The court did not err in making that determination.

Accordingly, we cannot say that the trial court abused its discretion in admitting all nineteen injury photos into evidence. The photos of Ms. Tonti's injuries were probative as to whether appellant intentionally caused them, and whether the injuries rose to the level of serious bodily injury required for a finding of first-degree assault. In conjunction with

both Ms. Tonti's and appellant's testimony, the photographs, which we conclude were not unfairly prejudicial or cumulative, aided the jury's determination of that issue.

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