Circuit Court for Harford County
Case No.: 12-K-15-001661

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2516

September Term, 2017

TYRONE THOMAS NORDINE

v.

STATE OF MARYLAND

Leahy,
Shaw Geter,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: April 3, 2019

Appellant, Tyrone Thomas Nordine, was tried by a jury in the Circuit Court for Harford County, and convicted of attempted first degree murder, first degree burglary, first degree assault, two counts of use of a firearm in the commission of a felony or crime of violence, and illegal possession of a regulated firearm.[1] Appellant was thereafter sentenced to life for attempted first degree murder and a concurrent sentence of twenty (20) years for first degree burglary. The life sentence is to be followed by a consecutive twenty (20) years for use of a firearm in commission of the burglary, the first five without parole, as well as a concurrent twenty (20) year sentence, the first five without parole, for the second use conviction. Finally, appellant was sentenced to a consecutive fifteen (15) years, the first five without parole, for illegal possession of a regulated firearm, and that sentence also was ordered to run consecutively to the life sentence for attempted murder. On this timely appeal, appellant asks this Court to address the following:

> 1. Did the circuit court err in denying defense counsel's motion to suppress the photo array identifications made by Ms. Jacobs and Ms. Donaldson?
>
> 2. Did the circuit court err or abuse its discretion in admitting irrelevant evidence as motive evidence?
>
> 3. Did the circuit court err and abuse its discretion in admitting "other bad acts" evidence?

[1] Appellant was acquitted of conspiracy to commit first degree murder. We note that these verdicts were entered in what amounted to appellant's third trial on the underlying charges. As appellant notes in his brief, his first two trials ended in mistrials on September 2, 2016 and February 24, 2017, after the respective juries were unable to reach unanimous verdicts.

4. Must the docket entries and the commitment record be corrected to reflect that the sentence on Count 7 was imposed consecutively to Count 1 but not to Count 5?

For the following reasons, we shall remand this case so the commitment record and docket entries may be corrected on Count 7. Otherwise, the judgments are affirmed.

BACKGROUND

Motions Hearing

This case involves a home invasion and a shooting that occurred in Edgewood, Maryland on September 20, 2014, shortly after 4:00 a.m. The victim, Latonya Jacobs, survived and identified appellant as her assailant. Several motions were litigated prior to trial, and one of those concerned the photographic lineup prepared in connection with this case. Detective Michael Pachkoski, of the Forensic Service Unit for the Harford County Sheriff's Office, created that photographic lineup.[2] To his knowledge, these six photographs, one of which was appellant's photograph, were shown separately to two witnesses, on or around September 30, 2014 and October 1, 2014, by another detective.[3]

Detective Pachkoski explained that, in selecting the five other photographs used in the lineup, he selected two subjects from the Harford County inmate database, and three subjects from the database for the New Jersey Department of Corrections. New Jersey "provide[s] very good image quality," and the detective was able to "search through a wider

[2] The photo "lineup" in this case was a collection of six separate manila folders, each containing a separate photograph of a different individual.

[3] Detective Pachkoski explained that the photographs were normally presented by a different detective to avoid bias during the presentation.

range of images as far as date of birth, race, ethnicity." That database also provided a variety of subjects with "beards, mustaches, long hair, short hair."

Using appellant's photograph, which he obtained from Detective Andrew Lane, Detective Pachkoski observed that appellant was an African-American male with long hair and a goatee, wearing a red shirt. The detective then found five other similar images, testifying that he tried "to be fair to the defendant by trying to find images that depicts a subject who is listed as the same race, same approximate age, similar hair and facial features."

On cross-examination, Detective Pachkoski testified that he had been assigned to the Forensic Service Unit for eleven of his thirteen years with the Sheriff's Office, that he was trained in the preparation of photo arrays, and that he had prepared over a hundred photo arrays. He explained the process for selecting the photographs in more detail, indicating that he began with the suspect's photograph, as well as their listed age and race, and then accessed other databases in an effort to match age, race, facial hair, hair color, hair length, and skin tone. He also testified that, although he tried to find similar looking subjects, "I can't make them all look the same because what would the point of the lineup be?" He confirmed that he used this process to create the photo lineup in this case.

On redirect examination, Detective Pachkoski acknowledged that skin tone was a factor when he selected the photographs in this case. He testified that "several of the subjects had darker skin tones. Several subjects had a lighter skin tone. I try to make a variety, create variety."

At the conclusion of the testimony, defense counsel alleged that the photographs selected by Detective Pachkoski were "[n]ot a fair and accurate depiction" on the grounds that "[t]he composition of the line-up would lead to a very easy identification" and was impermissibly suggestive. Appellant's counsel continued that "his photo is off the rails different from the other five photos[.]" More specifically, counsel argued:

> Now, our client is clearly a light-skinned African-American individual. When you go through those photos, all six of them, you really only see one true light-skinned African-American individual. There are photos in there of extremely dark-skinned African-American individuals. Knowing that the witnesses already have an idea in their head of what they're looking for, as soon as they see it's a dark-skinned individual, they're flipping past him immediately. That's what makes it impermissibly suggestive. Looking through that line-up, you don't have – I'm not looking for an exact composition – but not even a similar composition of other individuals in that line-up. You have essentially someone who looks like [the prosecutor] and someone who looks like myself and saying, Can you pick the differences between the two. It's just an unfair line-up to begin with, Your Honor. …

After hearing from the State, the court denied the motion to suppress the extra-judicial identification. The court first found, in pertinent part:

> [I] don't agree with you that every single mail [sic] in this array is of a dark-skinned African-American male. That is the furthest from the truth. The document will speak for itself. We have different variations of color. The first one appears to be darker. The second one does not, it appears to be lighter skin. The third one appears to be actually more lighter than the first one. The next one appears to be a lighter skin. The one after that also appears to be a lighter skin. And the last one is maybe a darker skin. So I don't know how you can say they're all darker than Mr. Nordine.

The court then ruled, in part, as follows:

> The [c]ourt considered the testimony of the detective, who was not part of the investigation, who was someone who was given a photograph of Mr.

> Nordine and, based on that photograph, looked for individuals who had some similar but not exact qualities. As he testified, he does that for purposes of fairness to Mr. Nordine and not to anyone else and to ensure there is nothing that would suggest to anyone viewing it one person over another.
>
> The photograph of Mr. Nordine is a photograph of him in a red shirt. His hair is long. The texture of his hair is unclear to me as to whether it's braids or straight. It's not a completely accurate picture in terms of telling the manner or style of hair. Long – loose is not consistent. It appears it has some type of texture to it. The other individuals have long hair. Some of them are in a red shirt. The photograph of Mr. Nordine, he is a lighter skinned African-American male. As I mentioned before, there are photographs of ranging skin colors. The first one, I would say, is probably the darkest one, followed by perhaps the lightest one, maybe a little bit darker. But the other ones appear to have lightness in their skin tone, as well.
>
> There is nothing about these pictures, in looking at both sets that were presented to the witnesses, that jumps out in flipping through them that would suggest that one picture in particular is the one that someone would fall upon. So the [c]ourt does not find the defense has met their burden to establish that the photo arrays were impermissibly suggestive at all. So your motion is denied.

Trial

On September 20, 2014, at approximately 4:22 a.m., officers from the Harford County Sheriff's Office responded to 1002 Crimson Tree Court, Apartment C, located in what was described as a high crime area of Edgewood, Maryland, after receiving a call from a neighbor about possible shots fired. Officers found Latonya Jacobs inside the apartment, in the first bedroom at the top of the stairs, suffering from a gunshot wound to the head. Although she was seriously wounded, Jacobs was able to tell the responding officers that she was shot by a "black male, light-skinned, approximately six feet tall, wearing a gray hooded sweatshirt that was covering his face."[4]

[4] Jacobs did not recall speaking with the police on the day of the shooting.

Latonya Jacobs survived the ordeal and testified at trial. She explained that she lived in a two-story condominium with her three children. She was asleep in her upstairs bedroom with her three-year-old daughter when, at around 4:00 a.m., she heard a "loud banging sound" coming from downstairs. Jacobs got up, ran downstairs, and saw that two men had kicked the locked door down and entered her residence without permission. Jacobs turned and ran back up the stairs to her bedroom, followed by these home invaders. Although she tried, Jacobs was unable to prevent the men from pushing the bedroom door open.

Jacobs then testified that one of the men, without saying a word, pointed a gun at her and shot her twice in the head with a handgun. Jacobs testified that her television was on and she could see the shooter by its light. He stood around six foot one or six foot two and was wearing a dark-colored hoodie that partially covered his mouth, his nose, as well as his hair. However, Jacobs saw the shooter's eyes, noting their "blueish or green color," and that they weren't "regular eyes." She was able to see that he was "light-skinned," but she was not entirely sure of his race. Jacobs then positively identified appellant, an individual she had never met and did not know, in court and in a photographic lineup, as the shooter.

At around the same time of the shooting, Jacobs' neighbor, Felicia Donaldson was awake and heard a noise that "sounded like somebody kicking on someone's door." Donaldson, who lived across the street from Jacobs in this multi-unit condominium complex, got up and then heard Jacobs, who she knew as an acquaintance, yell "What the

fuck?" followed by a gunshot. Donaldson looked out her window and saw Jacobs being chased from her own front door back up the stairs into her residence by an African-American male. Donaldson then heard two more gunshots.

After this, two African-American males ran out of Jacobs' residence, one of whom was "short and pudgy," and the other was "tall, light skin, and he had on a gray Nike hoodie" and had a gun in his hand. Donaldson had seen this same tall man a few days earlier in the neighborhood. She identified appellant, in court, as that man.[5]

Donaldson further testified that she saw appellant a few days after the shooting when he came to her residence. At that time, appellant told her "I don't know who's going around saying something about me. I don't know what you think you saw but you better act like you didn't see it or it's going to be a problem." Donaldson interpreted appellant's statement to be a threat, testifying that it "aggravated" her and "made me want to say something even more." She then called the police to report what she saw on the evening of the shooting.

When Donaldson met with the police, she gave a statement and identified appellant in a photographic lineup. On the back of appellant's photograph, Donaldson wrote "I saw him coming out Ms. Tonya's house at the time of the shooting." She agreed she was paid $1,300 from Crime Stoppers after she provided her information to the police, but denied the payment was in exchange for her trial testimony.

[5] After she saw appellant run from the residence carrying a gun, Donaldson called 911, but did not tell the operator that she could identify appellant, testifying that she was "afraid they was gonna come after me." The 911 call was played for the jury, over defense objection.

Howard Burch lived in the same condominium complex and also was outside Donaldson's residence at around 4:00 a.m. on September 20, 2014. As he walked outside, he heard "some commotion coming from Tonya's home." Burch then saw "two gentlemen in black coming out of her house." Burch recognized the taller of the two men as someone he had seen in the area on prior occasions. He identified appellant, in court and in a photographic lineup, as that man. He agreed that he did not see any weapons at the time. Burch also testified that he was present at Donaldson's residence when appellant stopped by. Burch overheard appellant state "I better not hear my name out of anybody else's mouth again."[6]

No gun or other ballistics evidence was ever recovered in connection with this case. Nor was there any video surveillance of the area in question. The parties stipulated that appellant was prohibited from possessing a regulated firearm, including a handgun.

We shall include additional detail in the following discussion.

DISCUSSION

I.

Appellant first contends that the trial court erred in not suppressing the extrajudicial identifications by Jacobs and Donaldson on the grounds that he was the only person with light-colored eyes and that three of the men depicted in the photographs have dark skin.

[6] Burch told Harford County Sheriff's Deputy Christopher Majewski that, although he did not know the person's name, he believed the individual was known as "Tay." The officer ran that nickname through police databases and discovered that "Tay" was associated with one "Donte Damond Strand." However, the officer agreed that "Tay" could be a used as a nickname for a variety of given names.

The State responds that appellant never challenged the identification based on his eye color and that argument is unpreserved. The State maintains that the argument is without merit in any event. We agree with the State.

Maryland's appellate courts ordinarily will not consider "any issue 'unless it plainly appears by the record to have been raised in or decided by the trial court.'" *King v. State*, 434 Md. 472, 479 (2013) (quoting Md. Rule 8-131(a)). "[W]here an appellant states specific grounds when objecting to evidence at trial, the appellant has forfeited all other grounds for objection on appeal." *Perry v. State*, 229 Md. App. 687, 709 (2016) (citing *Klauenberg v. State*, 355 Md. 528, 541 (1999)), *cert. dismissed*, 453 Md. 25 (2017). As appellant never raised a claim that the photographic lineup was deficient because of his eye color, we do not consider this claim on appeal.

Nevertheless, as to the contention that was properly preserved, our standard of review is as follows:

> "'[W]e look only to the record of the suppression hearing and do not consider the evidence admitted at trial.'" *James v. State*, 191 Md. App. 233, 251, 991 A.2d 122 (2010) (quoting *Massey v. State*, 173 Md. App. 94, 100, 917 A.2d 1175 (2007)). We accept the findings of fact and credibility determinations of the circuit court unless they are clearly erroneous, and we examine the evidence and inferences reasonably drawn from the evidence in the light most favorable to the party prevailing before the circuit court, in this case the State. *McFarlin v. State*, 409 Md. 391, 403, 975 A.2d 862 (2009). We review the trial court's conclusions of law *de novo* and make our own independent assessment by applying the law to the facts of the case. *Id.*; *see also Gatewood v. State*, 158 Md. App. 458, 475-76, 857 A.2d 590 (2004), *aff'd*, 388 Md. 526, 880 A.2d 322 (2005).

Wallace v. State, 219 Md. App. 234, 243-44 (2014).

As has been explained, "[d]ue process protects the accused against the introduction

of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures." *James v. State*, 191 Md. App. 233, 251-52 (2010) (quoting *Webster v. State*, 299 Md. 581, 599-600 (1984) (in turn quoting *Moore v. Illinois*, 434 U.S. 220, 227 (1977)) (internal quotation marks omitted), *cert. denied*, 415 Md. 338 (2010). "The admissibility of an extrajudicial identification is determined in a two-step inquiry." *Smiley v. State*, 442 Md. 168, 180 (2015). "'The first question is whether the identification procedure was impermissibly suggestive.'" *Id*. (quoting *Jones v. State*, 310 Md. 569, 577 (1987)). "If the procedure is not impermissibly suggestive, then the inquiry ends." *Id*. "If, however, the procedure is determined to be impermissibly suggestive, then the second step is triggered, and the court must determine 'whether, under the totality of circumstances, the identification was reliable.'" *Id*. (quoting *Jones v. State*, 310 Md. at 577). "If a *prima facie* showing is made that the identification was impermissibly suggestive, then the burden shifts to the State to show, under a totality of the circumstances, that it was reliable." *Id*.

The motions court found that the extrajudicial identification was not impermissibly suggestive and so, did not reach the reliability factor. "'[T]he scope of identification procedures constituting "impermissible suggestiveness" is extremely narrow.'" *Morales v. State*, 219 Md. App. 1, 14 (2014) (quoting *Jenkins v. State*, 146 Md. App. 83, 126 (2002), *rev'd on other grounds*, 375 Md. 284 (2003)). "'To do something impermissibly suggestive is . . . to feed the witness clues as to which identification to make[,]'" *Morales*, 219 Md. App. at 14 (quoting *Conyers v. State*, 115 Md. App. 114, 121 (1997)), or "where

the police, in effect, repeatedly say to the witness: 'This is the man.'" *In Re: Matthew S.*, 199 Md. App. 436, 448 (2011) (citations and some internal quotation marks omitted). "'All other improprieties are beside the point.'" *Morales*, 219 Md. App. at 14 (quoting *Conyers*, 115 Md. App. at 121).

In assessing whether a photo lineup was impermissibly suggestive, this Court has stated:

> We do not believe that a lineup must be composed of clones in order to comport with fairness. *Webster v. State*, 299 Md. 581, 620, 474 A.2d 1305 (1984). Slight variations in ages and heights among the persons included in a lineup do not make the procedure per se unfair. *Pope v. State*, 7 Md. App. 533, 535, 256 A.2d 529 (1969).

Chambers v. State, 81 Md. App. 210, 215 (1989).

Different skin tones may be a factor in this determination. S*ee, e.g.*, *Gaskins v. State*, 10 Md. App. 666, 681 (1971) (concluding trial court did not err in finding "that the differences in skin coloration were not such as to make the lineup an impermissibly suggestive one violative of appellant's right to due process of law"), *cert. denied*, 261 Md. 724 (1971), *cert. denied*, 404 U.S. 1040 (1972). However, "[s]kin tone is only one of the factors to be considered in deciding 'reasonable similarity' and differences in skin tone alone will not render a lineup unduly suggestive." *People v. Garris*, 952 N.Y.S.2d 634, 636 (N.Y. App. Div. 2012) (citation omitted), *leave to appeal denied*, 21 N.Y.3d 912 (N.Y. 2013).

During direct examination, Jacobs testified that she picked out photograph number four, and wrote on the back "The one that shot me." On cross-examination, Jacobs agreed that, on or around October 7, 2015, when she spoke to Detective Kramer, she told him that

number four "look like the one that shot me." On redirect, Jacobs explained that, to her, there was no difference between her statements and that "[a]t the time I felt that was him." Asked how certain she was that the person depicted in photograph number four, and the person seated in court was the shooter, Jacobs replied "[a] thousand percent." She also testified that, as she looked at him in court, that appellant had light colored eyes and that those eyes were the same ones she saw when she was shot on September 20, 2014.

On September 30, 2014, Donaldson was shown a similar lineup, testifying that she went through each individual photograph and made a positive identification of appellant. She agreed that she wrote "I saw him coming out Ms. Tonya's house at the time of the shooting," and signed the photograph identifying appellant. She confirmed that appellant was wearing a hoodie when she saw him, but that it was not covering his head.

We have considered this testimony, as well as the photographs that were shown to the victim and the witness, and conclude that, although there are some differences in skin tone of the six individuals included therein, those differences were not so remarkable as to undermine the motion court's findings. *See generally, State v. Austin*, 710 A.2d 732, 745 (Conn. 1998) ("The defendant's photograph was not so distinctive in skin tone from the other individuals in the photographs as to 'suggest to [the witness] that [the defendant] was more likely to be the culprit'") (citation omitted); *Smith v. State*, 433 S.E.2d 694, 697 (Ga. Ct. App. 1993) ("[W]hile the police might be expected to make a good faith effort to duplicate his skin color, Smith has presented no authority that a failure to match complexions requires reversal"); *People v. Joiner*, 104 N.E.3d 1251, 1262 (Ill. App. Ct. 2018) (rejecting contention that array and lineup were impermissibly suggestive for several

reasons, including differences in skin tone, stating, "[w]hile defendant's skin tone appears to be darker than the other four individuals, it is not extraordinarily so"); *Perez v. State*, 41 S.W.3d 712, 721 (Tex. App. 2001) (concluding photo lineup was not impermissibly suggestive, noting that "[t]he skin color difference between appellant and the other five men is, in our view, minimal"). We hold that the motions court properly denied the motion to suppress the extrajudicial identifications.

II.

Appellant next asserts that the trial court erred by admitting irrelevant evidence of motive, namely that the victim's boyfriend, Lloyd Barnes, was involved in a shooting four days before this incident and about a half mile away from the apartment. The State responds that the evidence was relevant in this case to prove appellant's intent, as its theory was that Jacobs was targeted as retaliation following the shooting involving Barnes.

This issue was discussed prior to appellant's second trial, defense counsel argued that any evidence relating to an incident that occurred four days prior to the shooting in this case and involving Lloyd Barnes, the fiancé of the victim, Latonya Jacobs, was irrelevant and inadmissible at trial. Counsel asserted that there was no connection between the two incidents that would provide a motive for the case at hand. Evidence concerning this prior incident was elicited during the State's direct examination of Detective Lane at the first trial, and was recounted by defense counsel at the motions hearing as follows:

> The State inquires: "Corporal Lane, what was the status of Mr. Barnes, Ms. Jacobs' fiancé, as of September 20th, 2014?"
>
> Response by Detective Corporal Lane: "He was incarcerated."
>
> Question from the State: "Why was he incarcerated?"

> "He had been charged with a shooting." Response from Detective Lane.
>
> "When was the shooting alleged to have happened?" Question from the State.
>
> Answer from Detective Lane: "September 14th – excuse me – September 16th of 2014."
>
> The next question: "And where was that shooting alleged to have taken place?
>
> Detective Corporal Lane: "Brookside Drive, approximately half a mile from the location where this incident occurred."

Defense counsel contended that this specific testimony was inadmissible because, other than the fact of the shooting and the relationship between Barnes and the victim, that:

> There's no connection in terms of the victim of that shooting having any ties to Mr. Nordine, having any ties to the people who gave testimony in this case, that being Ms. Jacobs and Felicia Donaldson, or any other circumstances that would raise [sic] to a situation where there was evidence that those two incidents were so interwoven in terms of one explaining the other where a motive would rise as to why this happened on September 20th, 2014.

Defense counsel maintained that the evidence was irrelevant. After further argument, the court observed:

> It was clear from the testimony that Mr. Barnes – Mr. Barnes was the victim's fiancé and the purpose that the State was introducing that was to establish motive as to why would someone want to go into this victim's house and also relevant on the issue, this [c]ourt found, as to the intent of why somebody went into that house. The facts that came out concerning that was that someone went into her house with a deliberate purpose. Mr. Nordine is charged with attempted first degree murder and conspiracy to commit first degree murder, which are specific intent crimes. The act of that, the act of going into the house was for the specific reason of attempting to kill the individual. There is a question as to why did this occur? What would be the reason? Or was this simply a botched robbery? Something to that effect. The element of intent is relevant and so that motive then comes into play,

> and particularly in this case where you have evidence that four days prior her fiancé was involved in a shooting where he's the shooter and then we have, four days later, someone in the middle of the night breaking into her house and shooting her in the head, which is relevant as I found previously in the prior case. It's clear one can view this as a retaliatory act with the intent to kill the target.

After hearing additional argument, the court ruled that it would allow the evidence, finding as follows:

> As I indicated previously, this is not a case where there's an allegation that Mr. Nordine was involved in that shooting four days prior. The [c]ourt does find relevant motive in this case to be retaliation in light of the fact that, four days prior, Ms. Jacobs' fiancé was involved and charged in a shooting. Mr. Nordine here is charged with attempted first degree murder, as well as conspiracy to commit first degree murder, as well as breaking and entering with the intent to commit a crime of violence, specifically first degree murder. The issues of premeditation, the issues of intent are relevant and must be proven by the State. There is nothing at least presented to the [c]ourt in any way of anyone conceding or agreeing or stipulating to those facts. So the State certainly has to establish that this was an intentional act in which she was the target, as well as establishing, because they have the burden of proof, that it was Mr. Nordine who was the one who committed that crime. So the [c]ourt does find that it's relevant and the [c]ourt does find the probative aspect of that evidence is not substantially outweighed by any prejudice. So the motion is denied.

At appellant's third trial, the one at issue on appeal, Jacobs testified that Barnes was the father of her youngest child. Over a continuing objection, Jacobs then testified that Barnes was in jail at the time of the shooting. She also testified that she was unsure why he was arrested but testified that he "turned hisself in" "on the same day when what happened to me happened."[7]

[7] Prior to her testimony as to Barnes's whereabouts, the court reiterated its earlier ruling, finding that motive and intent were issues in this case and that the evidence about Barnes was relevant.

Detective Andrew Lane testified concerning Barnes as well. Prior to his testimony, defense counsel reiterated the motion on the same grounds and was granted a continuing objection. Detective Lane then testified as follows:

> Q. Corporal, you indicated you were familiar with Mr. Barnes, Ms. Jacobs' fiancé?
>
> A. Yes, sir.
>
> Q. And where was Mr. Barnes the morning of the shooting at Ms. Jacobs' residence?
>
> A. He was incarcerated.
>
> Q. Are you familiar with the nature of the investigation of why Mr. Barnes was incarcerated?
>
> A. He was incarcerated in reference to a separate shooting investigation that occurred in that area.
>
> Q. When you say "in that area," how close in that area?
>
> A. Within a half mile.
>
> Q. And in relation to the shooting at Ms. Jacobs' house, when was the other shooting that Mr. Barnes was alleged to be involved in? When did that occur?
>
> A. Approximately seven days.
>
> Q. Before?
>
> A. Before. Yes, sir.

The Court of Appeals has explained the standard for reviewing a circuit court's admission of evidence as follows:

> [O]rdinarily a trial court's ruling[s] on the admissibility of evidence are reviewed for abuse of discretion. [A] court's decision is an abuse of discretion when it is well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally

> acceptable. Further, even with respect to a discretionary matter, a trial court must exercise its discretion in accordance with correct legal standards. As such, we examine a trial court's admissibility determinations for an abuse of discretion.

Wheeler v. State, 459 Md. 555, 560 (2018) (internal citations and quotations omitted).

When the issue is one of relevance, the standard of review is slightly different because "'[t]rial judges do not have discretion to admit irrelevant evidence.'" *Fuentes v. State*, 454 Md. 296, 325 (2017) (quoting *State v. Simms*, 420 Md. 705, 724 (2011)). "Relevant evidence" is defined under Maryland Rule 5-401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." "The determination of whether evidence is relevant is a matter of law, to be reviewed *de novo* by an appellate court.'" *Fuentes*, 454 Md. at 325 (quoting *DeLeon v. State*, 407 Md. 16, 20 (2008)). A trial court's weighing of the probative value of the evidence against its harmful effects, however, is subject to the more deferential abuse of discretion standard. *Id*. at 325-26 n.13.

The lead count in this case was attempted first degree murder. Murder is a single common law crime in Maryland that has been defined as "'the killing of one human being by another with the requisite malevolent state of mind and without justification, excuse, or mitigation.'" *Kouadio v. State*, 235 Md. App. 621, 627 (2018) (quoting *Ross v. State*, 308 Md. 337, 340 (1987); *Harrison v. State*, 382 Md. 477, 488 (2004)). Pertinent to this case, murder in the first degree can be established by evidence that the death was "a deliberate, premeditated, and willful killing" or "committed in the perpetration of or an attempt to

perpetrate" a number of enumerated felonies, including, but not limited to, first degree burglary. Md. Code (2002, 2012 Repl. Vol., 2018 Supp.) § 2-201(a) of the Criminal Law Article.

The Court of Appeals has explained that

> For a killing to be "willful" there must be a specific purpose and intent to kill; to be "deliberate" there must be a full and conscious knowledge of the purpose to kill; and to be "premeditated" the design to kill must have preceded the killing by an appreciable length of time, that is, time enough to be deliberate. It is unnecessary that the deliberation or premeditation shall have existed for any particular length of time. Their existence is discerned from the facts of the case.

Tichnell v. State, 287 Md. 695, 717-718 (1980); *accord Bryant v. State*, 393 Md. 196, 215-16 (2006); *Wood v. State*, 209 Md. App. 246, 317 (2012), *aff'd*, 436 Md. 276 (2013).

In addition, all murder requires proof of malice which is defined as "the intentional doing of a wrongful act to another without legal excuse or justification" and as including "any wrongful act done willfully or purposely." *Kouadio*, 235 Md. App. at 627 (citations omitted). The kinds of malevolent states of mind that qualify for murder are "'(1) the intent to kill, (2) the intent to do grievous bodily harm, (3) the intent to do an act under circumstances manifesting extreme indifference to the value of human life (depraved heart), or (4) the intent to commit a dangerous felony.'" *Kouadio*, 235 Md. App. at 627-28 (quoting *Harrison v. State*, *supra*, 382 Md. at 488). "[W]here an attempted murder is charged, the State must show a specific intent to kill - an intent to commit grievous bodily harm will not suffice." *State v. Earp*, 319 Md. 156, 164 (1990); *see also Townes v. State*, 314 Md. 71, 75 (1988) ("A person is guilty of an attempt when, with intent to commit a

crime, he engages in conduct which constitutes a substantial step toward the commission of that crime") (citations omitted).

Here, we are persuaded that the evidence that the victim's fiancé was incarcerated following a shooting that occurred a few days earlier at a nearby location was relevant evidence for the factfinders to consider in this attempted murder case. As the Court of Appeals has explained, "[m]otive is the catalyst that provides the reason for a person to engage in criminal activity." *Snyder v. State*, 361 Md. 580, 604 (2000). Further, motive is relevant to proof of intent. *Id.*; *see also Johnson v. State*, 332 Md. 456, 471 (1993) ("Like intent, motive is a mental state, the proof of which necessarily requires inferences to be drawn from conduct or extrinsic acts"). Indeed, other than the fact of the shooting itself, there was little evidence of motive or appellant's intent. Jacobs did not know appellant and had never seen him before. And, nothing was taken from her residence during the course of the home invasion. Under these circumstances, one possible explanation for the events in this case is that the shooting may have been in retaliation for Barnes' illegal activities. *See, e.g.*, *Wilder v. State*, 191 Md. App. 319, 344 (in prosecution for first-degree assault, "[t]estimony that Wilder had earlier threatened to come to the house with a weapon ha[d] special relevance to establishing the identity of the shooter in this case, and it is also relevant to Wilder's motive for revenge against" the victims), *cert. denied*, 415 Md. 43 (2010).

Appellant cites two cases involving other crimes analysis to argue that, whereas there was no evidence connecting appellant to Barnes or his actions, there was no evidence

of motive for the shooting at issue. One of the cases relied upon by appellant provides the following:

> Evidence as to acts, transactions, or occurrences to which accused is not a party, or as to other matters with which he is not shown to have any connection, * * * is inadmissible, unless it is so interwoven with other relevant evidence as to make it impossible to try the case without admitting it. The mere fact that an act or transaction occurs outside the presence of accused does not require its exclusion.

Perrera v. State, 184 Md. 51, 56-57 (1944); *accord Harrison v. State*, 276 Md. 122, 157 (1975).

Unlike this case, *Perrera* and *Harrison* concern other crimes issues involving "[p]ropensity evidence, or evidence suggesting that because the defendant is a person of criminal character it is more probable that he committed the crime for which he is on trial, is not admissible into evidence." *Hurst v. State*, 400 Md. 397, 407 (2007). Evidence concerning the victim's fiancé in this case did not need to meet the same strictures of other crimes analysis. *See, e.g., Sessoms v. State*, 357 Md. 274, 281 (2000) (holding that the other crimes test does not apply to crimes, wrongs, or acts, committed by anyone other than the defendant). Instead, as explained by the Court of Appeals, "the test of relevance is whether, in conjunction with all other relevant evidence, the evidence tends to make the proposition asserted more or less probable." *Snyder*, 361 Md. at 592 (citations omitted); *see also Spriggs v. State*, 226 Md. 50, 52 (1961) ("[A] probability of connection of proffered evidence with a crime is enough to make it admissible, its weight being for the trier of fact to evaluate"); *Bloodsworth v. State*, 76 Md. App. 23, 35-36 ("Evidence need not be positively connected with the accused or the crime in order to render it admissible

where there is a probability of its connection with the accused *or the crime*....") (emphasis added, citations omitted), *cert. denied*, 313 Md. 688 (1988).

Moreover, we agree with the State that any error in admitting this evidence was harmless beyond a reasonable doubt. *See Dionas v. State*, 436 Md. 97, 108 (2013) (An error is harmless when a reviewing court is "'satisfied that there is no reasonable possibility that the evidence complained of - whether erroneously admitted or excluded - may have contributed to the rendition of the guilty verdict'") (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)). The primary issue in this case was not *why* Jacobs was shot, but *who* shot her. This determination depended upon the identifications from Jacobs, Donaldson, and Burch. Appellant's identity could be considered from that evidence, and his intent could be determined by the fact of his pointing a gun at Jacobs and shooting her multiple times in the head. Any error in admitting evidence that suggested a motive for the crime was harmless beyond a reasonable doubt.

III.

Appellant next asserts that the trial court erred by admitting other bad acts evidence from Donaldson, namely, that appellant threatened her not to say anything about what she saw with respect to the shooting. Appellant's specific contention is that there was not clear and convincing evidence to support Donaldson's account of the alleged threat. The State responds that the trial court properly exercised its discretion. We agree.

Prior to appellant's first trial, appellant's counsel moved to exclude the following statement that appellant allegedly made to Felicia Donaldson four days after the shooting:

"I don't care what is going on, trying to describe me or trying to figure out who I am, whether I shot her or what. Keep my name out of your M.F. mouth. If I go to jail, it's going to be some problems." Appellant argued this statement amounted to either witness intimidation or a second degree assault and was inadmissible as a prior bad act under Maryland Rule 5-404(b). Appellant further argued that there was not clear and convincing evidence that the statement was even made and that Ms. Donaldson's account was uncorroborated, as there were no other witnesses to the statement, nor did Ms. Donaldson ever report the statement to the police.

After hearing from the State, the motions court ruled that the statement was specially relevant to establish consciousness of guilt and identity. The court stated, in pertinent part:

> So here, when I look at the statement and I look at the manner in which it came about a couple days after the incident in question, the manner of the questioning that was done, how Ms. Donaldson on her own in the first initial statement she made at page 3 wasn't subject to some type of questioning by the police but her, on her own, saying what he said, that all can be inferred as threats. Then, later on making more statements about it, she testifies in this manner consistent with how it appears – consistent with what her statement was on September 30th. It seems to the [c]ourt that that would be sufficient to establish by clear and convincing evidence that there were threats made to her by the defendant and the [c]ourt finds it to be relevant on the issue of, number one, identity because she does identify who it was, the defendant, and also to establish consciousness of guilt. Coming to a witness who is known to have seen something to make sure that she wouldn't say anything demonstrates that consciousness of guilt.
>
> When you weigh the probative versus the prejudice, while yes, there is going to be some prejudice attached to that, no question about it, but the probative aspects of that substantially outweigh any prejudice. So the [c]ourt will allow it. However, it is subject to reconsideration by the [c]ourt in the event that in her testimony things may not be as they appear to be. So I would prepare myself for those statements to come in and if, in the course of the trial, there appears to be a different appearance or manner in which the

> testimony is presented that would call into question whether or not that happened, obviously any motion in limine is subject to being reconsidered by the [c]ourt.

This motion was renewed prior to appellant's second trial. Appellant maintained that Donaldson's accounts of the incident at issue, including her statement to police and her testimony at appellant's first trial, were inconsistent. In her statement, Donaldson alleged that appellant came to her house and stated "I don't care who it is going around trying to describe me or trying to figure out who I am, whether I shot her or not. Keep my motherfucking name out of your mouth" and "If I go to jail, it's going to be some problems." Whereas in her trial testimony, according to the defense proffer at the motion in limine hearing, Donaldson said appellant came to her friend's house four days later and stated "he don't know what's going on around, putting his name in their mouth, he don't care. But whatever you think you saw, better act like you ain't seen it or it's going to be some problems." The motions court questioned whether this was a "material difference" that would undermine the second prong of the other bad acts test, i.e., whether the evidence was clear and convincing.

After hearing argument, the court noted that Donaldson was the witness who lived across the street from the victim and provided information to Crime Stoppers about the identity of the person who entered and exited the victim's residence. Donaldson's testimony also concerned appellant's apparent consciousness of guilt. The court then again denied the motion in limine, ruling, in pertinent part:

> Now, while it is true that there are some inconsistencies in her testimony as to the number of people that were present when she testified

> that Mr. Nordine came into the house and said what he said to who actually answered the door, to the actual full statements that may vary, that in and of itself I don't find would in any way detract from my prior finding that there was clear and convincing evidence that this incident occurred; that she had an encounter with Mr. Nordine; and that Mr. Nordine, in essence, made a threat to leave his name out of it.
>
> I also found and I still find that clear and convincing evidence can be established by the testimony of a witness. While a witness may very well say something that is not expected by the parties, that is not the case here. The substance of her testimony included this interaction that she said happened a few days after the shooting. I did have an opportunity to observe her in her testimony [at the first trial], direct and cross-examination, and there was nothing in her testimony that would suggest to me that her testimony was not clear about the incident that she encountered with Mr. Nordine after the shooting. Her testimony could very well, as I found, convince a trier of fact that she was threatened because of her role in this case.

The motion again was renewed during appellant's third trial and the court granted a continuing objection after defense counsel reiterated that there was not clear and convincing evidence that appellant made the statements to Donaldson, primarily on the ground that Donaldson's account was not corroborated. In overruling this objection, the court maintained that the evidence was relevant to identity and consciousness of guilt. The court also stated that it had presided over the two prior trials of this case, had heard testimony from Donaldson on the matter, and that, while the ultimate determination was up to the jury, "[t]he witness's testimony about the event is sufficient to establish the clear and convincing standard." The court also found that the probative value outweighed the danger of unfair prejudice.

Thereafter, as indicated, Donaldson testified that appellant told her "I don't know who's going around saying something about me. I don't know what you think you saw but you better act like you didn't see it or it's going to be a problem."

Maryland Rule 5-404(b) provides:

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

To determine the admissibility of other crimes or bad acts evidence, the court must engage in a three-step analysis. *State v. Westpoint*, 404 Md. 455, 489 (2008) (citing *Wynn v. State*, 351 Md. 307, 317 (1998)). First, the evidence must fall within one of the exceptions listed in Rule 5-404(b), or otherwise have special relevance to some contested issue in the case. *State v. Faulkner*, 314 Md. 630, 634-35 (1989). The determination of whether evidence has special relevance is a legal determination that does not involve any exercise of discretion. *Westpoint*, 404 Md. at 489 (citing *Wynn*, 351 Md. at 317).

After determining whether the contested evidence falls within an exception to the general bar on the use of other crimes evidence, the court must find that the accused's involvement in the other crimes is established by clear and convincing evidence. *Faulkner*, 314 Md. at 634. This Court "will review this decision to determine whether the evidence was sufficient to support the trial judge's finding." *Id*. at 635. "A reviewing court looks only at the legal question of whether there was some competent evidence which, if believed, could persuade the fact finder as to the existence of the fact in issue." *Emory v. State*, 101 Md. App. 585, 622 (1994).

If that requirement is met, the trial court then must weigh the necessity for and probative value of the other crimes evidence against any undue prejudice likely to result

from its admission. Specifically, the party offering the evidence has "the burden of demonstrating that the probative value substantially outweighs the potential for unfair prejudice." *Harris v. State*, 324 Md. 490, 500-01 (1991). The trial court's conclusion to admit or deny this evidence based on its probative value will be reviewed under an abuse of discretion standard. *See Faulkner*, 314 Md. at 641 ("A decision to admit other crimes evidence which is clearly incorrect 'on this question of balancing probative value against danger of prejudice will be corrected on appeal as an abuse of discretion.'") (citation omitted).

Appellant does not assert that his alleged statements to Donaldson were not bad acts or were not specially relevant. *See, e.g.*, *Copeland v. State*, 196 Md. App. 309, 316-17 (2010) (holding that appellant's threats to kill victim and her family in order to intimidate victim constituted consciousness of guilt and were admissible other crimes evidence). Instead, his primary challenge is that admission of the evidence failed under the "clear and convincing" prong of the other crimes analysis.

The Court of Appeals has said that the sufficiency threshold is met when the evidence is "clear and convincing to the trial judge." *Cross v. State*, 282 Md. 468, 478 (1978). This determination protects the defendant against the risk that unsubstantiated charges of past misconduct will unduly influence the jury. *See Lodowski v. State*, 302 Md. 691, 728 (1985) (noting a concern that prior crimes evidence may be improperly admitted when the record is "devoid of evidence that the crime was in fact committed"), *cert. denied*, 475 U.S. 1086, *vacated*, 475 U.S. 1078, *rev'd on other grounds*, 307 Md. 233 (1986). In addition, the Court of Appeals has explained that "[t]o be clear and convincing, evidence should be 'clear' in the sense that it is certain, plain to the understanding, and unambiguous

and 'convincing' in the sense that it is so reasonable and persuasive as to cause you to believe it." *Vogel v. State*, 315 Md. 458, 470-71 (1989) (citation omitted).

We observe that a similar argument to that raised herein was discussed in *Emory*, *supra*. There, we stated the following with respect to the clear and convincing test:

> What is being referred to, of course, is a burden of persuasion. The first question is that of who is it who must be persuaded clearly and convincingly. Since the persuasion is a prerequisite to a trial judge's ruling on admissibility, it self-evidently is the trial judge who must be thus persuaded. It is not the jury.

Emory, 101 Md. App. at 622.

We continued:

> Reference to that burden of persuasion is a guideline or message to the trial judge, in his ancillary fact-finding capacity, as to that degree of certainty he should feel about a defendant's involvement in other crimes before admitting evidence as to that involvement.
>
> When it comes to appellate review, however, the question becomes that of whether the State met its *prima facie* burden of production with respect to the other crimes. A reviewing court looks only at the legal question of whether there was some competent evidence which, if believed, could persuade the fact finder as to the existence of the fact in issue.

Id.

We are persuaded that the burden of production was met in this case. Notably, the Court of Appeals has upheld a trial court's finding of clear and convincing evidence based on the direct testimony of a person with knowledge of the other crimes. *See Vogel*, 315 Md. at 461 (admitting other crimes evidence of prior acts of sexual misconduct with a child); *see generally Archer v. State*, 383 Md. 329, 372 (2004) ("[T]he testimony of a single eyewitness, if believed, is sufficient evidence to support a conviction") (citing *Branch v. State*, 305 Md. 177, 183-84 (1986), and *Walters v. State*, 242 Md. 235, 237-38 (1966)). As

one out-of-state court has explained: "The rationale for admitting such uncorroborated evidence is clear: if a … victim's testimony alone is sufficient to establish proof beyond a reasonable doubt -- a much higher standard -- it should be enough to satisfy the clear and convincing requirement." *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998); *see also State v. Oates*, 611 N.W.2d 580, 585 (Minn. Ct. App. 2000) ("Clear and convincing evidence may be established by the testimony of a single witness"). We are persuaded that the trial court did not err or abuse its discretion in finding that Donaldson's account of appellant's statement was supported by clear and convincing evidence.

Moreover, as for appellant's claim that Donaldson's identification was not corroborated, the Court of Appeals has held that "[t]he testimony of a victim, unlike that of an accomplice, needs no corroboration." *Branch*, 305 Md. at 183 (citations omitted). Whereas Donaldson was arguably a victim of witness intimidation, *see generally*, Md. Code (2002, 2012 Repl. Vol., 2018 Supp.) §§ 9-302, 9-303 of the Criminal Law Article (Inducing False Testimony or Avoidance of Subpoena, Retaliation for Testimony), and clearly not an accomplice, we conclude that her identification did not need additional corroboration, beyond the clear and convincing prong, in order to be admissible under Rule 5-404(b).

Finally, we disagree that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. "[E]vidence is considered unfairly prejudicial when 'it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which [the defendant] is being charged.' The more probative the evidence, therefore, the less likely it is that the evidence will be unfairly

prejudicial." *Burris v. State*, 435 Md. 370, 392 (2013) (citations and quotations omitted). The fact that appellant threatened an eyewitness four days after the shooting was clearly probative in this case. Although this evidence no doubt was prejudicial, the court did not abuse its discretion in finding that it was not so unfair as to warrant exclusion.

IV.

Finally, appellant states that the commitment record and the docket entries must be corrected to reflect that the sentence imposed on Count 7 was to be consecutive to the sentence imposed on Count 1, not Count 5. The State agrees, as do we.

On February 22, 2018, in open court, the court sentenced appellant as follows:

> On the charge of attempted first degree murder, the sentence of this [c]ourt is the maximum – life. On the charge of breaking and entering crime of violence, the sentence of the [c]ourt is 20 years, concurrent to Count 1. The assault first degree will merge with Count 1, attempted first degree murder. [Count 5][8], use of a firearm in the commission of a felony, specifically burglary first degree, the sentence of the [c]ourt is 20 years, consecutive to Count 1, the attempted first degree murder. The first five of that is without parole. On the charge of use of a firearm in the commission of a crime of violence, the sentence of the [c]ourt is 20 years, concurrent to the previous use of a firearm in the commission of a felony, the first five without parole. On the final count, illegal possession of a firearm, the sentence of the [c]ourt is the maximum – 15 years, consecutive to the attempted first degree murder life sentence, first five without parole. He does have credit for 827 days. This is not a case in which the [c]ourt should suspend time hanging over Mr. Nordine's head and place him on probation.

[8] The court mistakenly referred to this count as "Count 4."

Pertinent to our discussion, the commitment record that was filed the same day, February 22, 2018, provides that appellant was sentenced on Count 7, for the illegal possession of a regulated firearm, to 15 years and that sentence was consecutive to Count 1. However, the docket entries provide that the sentence on Count 7 is 15 years, "[c]onsecutive to Ct 05." Additionally, that February 22, 2018 commitment record, as well as the corresponding docket entries, go on to state that the total time to be served is "Life + 20 years + 15 years."

On or around April 25, 2018, a commitment records specialist from the Western Regional Commitment Office for the Department of Public Safety and Correctional Services (DPSCS) sent a letter to the Clerk of Court for Harford County Circuit Court and, after noting that the sentence on Count 7 appeared to be "15 years cs to Ct. 1", asked for clarification based on the following: "The commitment reads that the above referenced offender is to serve a total term of confinement of Life plus 20 years plus 15 years. However after adding up the counts, our interpretation is that the offender should be serving a total term of confinement of Life plus 20 years." On May 18, 2018, an amended commitment record was filed and sent to DPSCS indicating that the sentence for Count 7 was 15 years and that "CT 07 is consecutive to CT 05."

Ordinarily, when the docket entries and the transcript conflict, the transcript of the proceedings controls. *Savoy v. State*, 336 Md. 355, 360 n.6 (1994); s*ee also Turner v. State*, 181 Md. App. 477, 491 (2008) ("When there is . . . a discrepancy between the transcript and the docket entries, absent any evidence that there is error in the transcript,

the transcript controls") (citing *Carey v. Chessie Computer Servs., Inc*., 369 Md. 741, 748 (2002)). The transcript from the sentencing hearing was unambiguous and reveals that Count 7 was to be consecutive to the attempted first degree murder sentence imposed on Count 1. Any subsequent ambiguity that may have resulted after the commitment record was amended, arguably resulting in an increased sentence, is to be resolved in appellant's favor. *See Robinson v. Lee*, 317 Md. 371, 379-80 (1989) (holding that any ambiguity in sentencing should be resolved in favor of lenity as "[t]he trial judge's obligation is to articulate the period of confinement with clarity so as to facilitate the prison authority's task"); *see also Twigg v. State*, 447 Md. 1, 30 (2016) ("[A] defendant's sentence will be considered to have increased under § 12–702(b) only if the total sentence imposed after retrial or on remand is greater than the originally imposed sentence"); *Mateen v. Saar*, 376 Md. 385, 397-99 (2003) (concluding that the order revising a fifty-year sentence for first degree murder to a life sentence with all but fifty years suspended was of no legal force or effect because no hearing was held on the record in open court, and no notice was given to Mateen or to the State).

REMANDED WITH INSTRUCTIONS TO CORRECT THE COMMITMENT RECORD AND DOCKET ENTRIES CONSISTENT WITH THIS OPINION. JUDGMENTS OTHERWISE AFFIRMED. COSTS TO BE PAID 2/3 BY APPELLANT AND 1/3 BY HARFORD COUNTY.