Circuit Court for Baltimore City
Case Nos. 114296017 & 114296018

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2736

September Term, 2015

NICHOLAS HEATH

v.

STATE OF MARYLAND

Arthur,
Reed,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: June 21, 2018

After a jury trial in the Circuit Court for Baltimore City, Nicholas Heath, Appellant, was found guilty of involuntary manslaughter and second degree assault. He was sentenced to ten years' imprisonment for involuntary manslaughter and a consecutive term of ten years for second degree assault. Appellant filed this timely appeal and presents two questions for our review which we have divided and rephrased:[1]

> I. Did the trial court err in admitting evidence of other bad acts in violation of Maryland Rules 5-404(b) and 5-403 regarding why Appellant was at Ottobar?
>
> II. Did the trial court err in admitting evidence of other bad acts in violation of Maryland Rules 5-404(b) and 5-403 regarding Appellant's education?
>
> III. Did the trial court err in instructing the jury on first and second degree assault?

For the reasons that follow, we shall answer and reverse on the first question.

FACTUAL AND PROCEDURAL BACKGROUND

On the night of September 25, 2014, Dustin Cunningham met Appellant at Ottobar, a bar and music venue in Baltimore City. Appellant was an acquaintance whom Cunningham met about six months earlier. While at the bar, Cunningham exchanged harsh words with another bar patron, Erica Davis. Ms. Davis demanded that Cunningham apologize and threatened to have him removed from the bar. After a second altercation,

[1] Appellant's original questions were as follows:

> I. Did the trial court err in admitting evidence of other bad acts in violation of Maryland Rules 5-404(b) and 5-403?
> II. Did the trial court err in instructing the jury on first and second degree assault?

Cunningham was removed by at least four Ottobar staff, including bouncers Tom Malenski and Martin Clay.[2]

Appellant and a large crowd of bar patrons followed behind as Cunningham was removed. Once outside, a physical altercation erupted, which resulted in Clay and Malenski chasing after Cunningham. After chasing him for some time, the two bouncers began to walk back toward Ottobar. Appellant and Clay have different accounts of what transpired next. Clay testified that he and Malenski were merely walking back to the bar when Appellant, unprovoked, attacked them. Appellant, on the other hand, maintains that he was acting in self-defense.[3] It is undisputed, however, that the incident resulted in Appellant cutting Clay's face and Malenski's throat. Malenski succumbed to his injuries.

Appellant was charged with first degree murder of Malenski and first degree attempted murder of Clay. He was acquitted of those charges, but found guilty of involuntary manslaughter and second degree assault. Appellant was also charged with

[2] At this time, Clay was off duty. He testified that he stuck around the bar to hang out with friends, including Malenski.

[3] By Appellant's account, three or four men, including Clay and Malenski, cornered and began arguing with him. Appellant told police that Malenski and another man produced knives, and Clay rushed him. In response, Appellant raised his hand to push Clay away, accidentally cutting him. He also tried to "disable" Malenski by cutting his deltoid muscle, believing that if he could do that, Malenski could no longer attack him because he would be unable to raise his arm. Appellant claimed Malenski lurched forward in such a way that he accidentally slashed Malenski's throat instead.

openly wearing and carrying a knife with the intent to injure, but was also acquitted of those charges. This appeal followed.

Additional facts are included in our discussion.

DISCUSSION

1. Prior Bad Acts

A. Additional Facts

On September 27, 2014, Appellant gave a recorded statement to the police. The statement, which was ultimately played for the jury,[4] included comments about Appellant's reason for going to Ottobar on the night in question. Appellant admits in his statement that he went to Ottobar intending to sell cocaine. Appellant stated:

> Nobody went in there starting trouble. I went in there to sit down to sell a got damn bit of white that they, [sic] I'm just trying to make a fucking living. And everybody around me is gotta act like an asshole. That's all I wanted to do.

In a motion in limine, Appellant sought to have the statement redacted. Initially, the prosecutor agreed to redact the reference to selling cocaine, but she changed her position after defense counsel's opening statement, in which counsel suggested that Appellant's

[4] Appellant did not testify at trial. Appellant's statement was video and audio recorded and was entered through Detective Sandra Forsythe who interviewed Appellant at the police station after the incident. Detective Forsythe testified that the interview happened downtown in the homicide department. Detective Forsythe identified the CD of Appellant's interview, presented by the State, in court. The recorded statement was transcribed and copies of the transcript were given to the jury when the recording was played at trial. The jury was instructed to follow the audio of the recording over the words of the transcript.

"goal" and "purpose" in going to the Ottobar was to get customers for his tattoo business. In opening, defense counsel stated:

> Ladies and gentlemen, the young man that sits here to Ms. Webb's and my left is Nicholas Heath. And just as the State described to you in regard to the decedent in this matter and Mr. Martin Clay, he too loved music, liked to hang out, had friends, was busy doing tattoos, that's one of his primary sources of income in order to pay a lawyer to get his wife from England to the United States. That was his goal and that was his purpose to stop by the Ottobar that night. His friend, Dustin Cunningham says lots of people there have tattoos or had tattoos, this is a good source.

The trial court agreed that the challenged portion of Appellant's statement could be played for the jury, stating:

> The difficulty, had I been asked whether or not there is greater probative value than prejudicial value, to the testimony, whether or not there are multiple reasons that Mr. Heath may have given for his being present there that evening, in fact one of them was illegal, certainly would be probative on potentially a number of issues, one of which is also the manner in which he is alleged to have conducted himself that evening. And I would not have stricken that testimony, although some of the things which have been read, not everything would appear to be fully admissible even under the probative greater than prejudicial value of standard.
>
> But I will permit the State to unredact the testimony with regard to his statement as to why he was there that night with regard to certain business operations.

B. Parties' Contentions

Appellant argues that his statement that he went to Ottobar to sell cocaine, constituted "other bad acts" evidence that did not fit any of the exceptions under Maryland

Rule 5-404(b),[5] and, therefore, was inadmissible under that Rule. Appellant also contends that the evidence was "far more prejudicial than probative," and inadmissible under Maryland Rule 5-403.[6] According to Appellant, admitting evidence of "other bad acts" could lead the jury to infer Appellant had a history of criminal behavior, and as such, could not be deemed "harmless" in a case where Appellant alleges he acted in self-defense. Therefore, Appellant claims the trial judge erred in admitting "other bad acts" evidence.

The State responds that the statement does not constitute "bad acts." The State argues that the attorney for Appellant "opened the door" to this evidence by stating that Appellant was there to solicit customers for his tattoo business.[7] The State further contends

[5] Maryland Rule 5-404(b) provides:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts including delinquent acts as defined by Code, Courts Article, § 3-8A-01 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.

Section 3-8A-01 defines a delinquent act as "an act which would be a crime if committed by an adult."

[6] Maryland Rule 5-403 provides:

> Although 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, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[7] At trial, the parties disputed whether Appellant's counsel used the word "solely" when stating that Appellant was at Ottobar solely to procure tattoo business. The State contends that regardless, Appellant attending Ottobar for tattoo business was the only

that admitting this statement was more probative than prejudicial, and the result of "harmless error."

For the reasons that follow, we find that the statement that Appellant was at Ottobar to sell cocaine constitutes "other bad acts" evidence that should have been stricken from the record.

C. Standard of Review

The purpose of Maryland Rule 5-404(b) is to prevent jurors from basing decisions of guilt on a defendant's reputation. *Hoes v. State*, 35 Md. App. 61, 70-71 (1977). "Evidence of other crimes may tend to confuse the jurors, predispose them to a belief in the defendant's guilt, or prejudice their minds against the defendant." *State v. Faulkner*, 314 Md. 630, 633 (1989). "Bad acts" has been defined as "'an activity or conduct, not necessarily criminal, that tends to impugn or reflect adversely upon one's character, taking into consideration the facts of the underlying lawsuit.'" *Gutierrez v. State*, 423 Md. 476, 489 (2011) (quoting *Klauenberg v. State*, 355 Md. 528, 547 (1999)). Evidence of prior bad acts is admissible only "if it is substantially relevant to some contested issue in the case and it is not offered to prove the defendant's guilt based on propensity to commit crime or his character as a criminal." *Faulkner*, 314 Md. at 634.

Although bad act evidence is inadmissible to prove propensity or criminal character, Maryland Rule 5-404(b) does allow bad act evidence that has "special relevance."

purpose Appellant's counsel mentioned and the context of counsel's statements suggested that it was Appellant's only purpose.

Stevenson v. State, 222 Md. App. 118, 149 (2015) (quoting *Wynn v. State*, 351 Md. 307, 317 (1998)). Bad act evidence has a "special relevance if it shows notice, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident." *Id.*; Md. Rule 5-404(b).[8] Whether bad act evidence demonstrates one of these alternate purposes is a legal determination we review *de novo*. *Wynn*, 351 Md. at 317 (quoting *Faulkner*, 314 Md. at 634). "If one or more of [these] applies, the next step is to decide whether the accused's involvement in the other crimes is established by clear and convincing evidence. [The appellate court] will review this decision to determine whether the evidence was sufficient to support the trial judge's finding." *Wynn*, 351 Md. at 317. Once that step is completed, then we must review the trial court's balancing of the probative value and need for the evidence against the likelihood of undue prejudice. *Stevenson v. State*, 222 Md. App. 118, 149, 112 A.3d 959, 977 (2015). We will only reverse a trial court's balancing determination if the court abused its discretion. *Id*.

D. Analysis

I. Appellant's Statement That He Was At Ottobar To Sell Cocaine

We focus on the threshold question of whether Appellant's statement was evidence of bad acts that trigger a *Faulkner* analysis and find that the trial court erroneously admitted evidence that Appellant was at Ottobar to sell cocaine. Such evidence was inadmissible

[8] The list of relevancy exceptions set forth in Md. Rule 5-404(b) is not exhaustive, and a trial court may base its decision on a rationale not listed. *See Allen v. State*, 192 Md. App. 625, 652 (2010).

because it constituted a prior bad act and none of the exceptions under Rule 5-404(b) apply. Moreover, the court's error was not harmless.

Prior bad act evidence is "evidence of other crimes, wrongs, or acts that is offered to 'prove character of a person in order to show action in conformity therewith.'" *Gutierrez*, 423 Md. at 489 (quoting Md. Rule 5-404(b)). The Court of Appeals has "defined prior bad acts evidence as "an activity or conduct, not necessarily criminal that tends to impugn or reflect adversely upon one's character" *Gutierrez*, 423 Md. at 489 (2011) (internal citations and quotations omitted). As articulated in *Faulkner*, such evidence is only admissible if it has "special relevance" and the value of the evidence is more probative than prejudicial. *Faulkner*, 314 Md. at 633-35; Md. Rule 5-403. The purpose of this evidentiary rule is to keep the jury from assuming that a defendant is a "bad person" and should be punished because of previous criminal conduct or wrongdoings. *Hurst v. State*, 400 Md. 397, 407 (2007).

The statement that Appellant went to Ottobar to "sell a got damn bit of white" does not meet the special relevance requirement articulated in *Faulkner.* The special relevance requirement assumes that the evidence "is substantially relevant to some contested issue" in the case. *Stevenson v. State*, 222 Md. 118, 149 (2013) (citing *Wynn v. State*, 351 Md. 307, 316 (1998) "Bad act evidence has a special relevance if it shows notice, intent, preparation, common scheme or plan, knowledge, identity or absence of mistake or accident." *Id.*; Md. Rule 5-404(b). We find that Appellant's statement failed to meet any of these special relevancy requirements. Rather, Appellant's statement was evidence of an

activity or conduct that reflects negatively on his character and as such constitutes inadmissible evidence of a prior bad act.

The trial court failed to conduct a Md. Rule 5-404(b) analysis to determine the admissibility of this prior bad acts evidence and additionally failed to consider whether Appellant's statement tended to reflect adversely upon his character despite his underlying charges of first degree murder and first degree attempted murder, perpetuating the perception that drugs and violence go hand-in-hand. In his police statement, Appellant stated that he was at Ottobar to sell drugs. However, the charges against Appellant were: first degree murder, first degree attempted murder, and openly wearing and carrying a knife with the intent to injure. Appellant was *not* on trial for drug possession nor for an intent to distribute. Not only was the statement irrelevant but it was also evidence of a prior bad act under Md. Rule 5-404(b) and did not meet any of the exceptions under the rule.

As articulated above, evidence that impugns or reflects adversely upon one's character is bad acts evidence. *Gutierrez v. State*, 423 Md. 476, 489 (2011). It is reasonable, and wholly plausible, that after hearing that Appellant was at Ottobar to sell drugs, thereby characterizing him as a drug dealer, that the jury labeled Appellant as a "troublemaker"—as one who has engaged in prior criminal behavior. This would have made it easier for the jury to view Appellant as a criminal, and less likely to believe his contention that he acted in self-defense, all for an act for which he was not on trial. The circumstances of this case advance this court's opinion that evidence that Appellant was at the bar to sell drugs, suggests illegal or illicit conduct, thereby impugning his character.

Had there been "special relevance," per *Faulkner*, our next step would be to "decide whether the accused's involvement in the other crimes is established by clear and convincing evidence," followed by our review of the circuit court's balancing of the probative value and need for the evidence against the likelihood of undue prejudice, as required under Md. Rule 5-403. *Wynn*, 351 Md. at 317. Though there was no special relevance, we briefly discuss Appellant's argument regarding the court's balancing under Rule 5-403 here.

The appellant contends the evidence was inadmissible under Maryland Rule 5-403, and that the trial judge erred in admitting "other bad acts" evidence. The only analysis conducted by the trial court was under Rule 5-403. Maryland Rule 5-403 provides:

> Although 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, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

This court reviews the trial court's balancing of the evidence for abuse of discretion. *Stevenson*, 222 Md. App. at 149. "There is an abuse of discretion where no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles. An abuse of discretion may also be found where the ruling under consideration is clearly against the logic and effect of facts and inferences before the court, or when the ruling is violative of fact and logic," *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997) (internal citations and quotations omitted). 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." *Stevenson*, 222 Md. App. at 142 (2015). Because a reasonable jury could also take the view of the trial court, that Appellant's statement was to explain why Appellant was at Ottobar, the trial court did not abuse its discretion. However, because we find that there was no special relevance in admitting evidence of Appellant's prior bad acts per our *de novo* review, such evidence should have been excluded. Also, there is no other basis under Maryland Rule 5-403 for admission of this evidence.

We address the State's argument that Appellant's counsel "opened the door" to permit Appellant's statement that he was at Ottobar intending to sell cocaine, when Appellant's counsel stated that Appellant was at Ottobar with the "goal" and "purpose" of getting tattoo business. The State sought to introduce Appellant's statement under the guise that it explained why Appellant was at Ottobar. The State initially agreed to redact the reference to selling cocaine, but later changed its position after hearing defense counsel's opening statement.

> [THE STATE:] Your Honor, may recall that defense counsel and defense counsel, and myself, along with I believe the defendant, discussed some redactions from the defendant's statement. Much of those redactions related to the defendant's statement in which he discussed selling drugs as his primary source of income. State, again, agreed to those redactions prior to hearing [Appellant's counsel's] opening statement in which she said that his primary source of income was Tattoo Me and that his reason for being at the Ottobar was essentially to generate more business…That is completely contradictory to the defendant's own statement…he basically says… "I went in there—nobody went in there to start trouble, I went in there to

> sit down to sell some God damn bit of white," meaning cocaine…
>
> [APPELLANT'S COUNSEL]: Well, first, opening statement is not evidence. Second… he is asked…do you have tattoos, his response, that's what I do for a living, yes, I'm covered…and that's my understanding…he had been invited there with Dustin about meeting some people about tattoos. Well it could have been tattoos and to deal cocaine.
>
> [THE COURT]: And you still argue that it is more prejudicial than probative because that is evidence of bad acts?
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> [APPELLANT'S COUNSEL]: Right, its highly prejudicial…this is not something [sic] being thrown out of the bar because of alleged drug involvement…
>
> [THE STATE]: She opened a door and specifically said that he was there with Dustin Cunningham solely to find clients for tattooing.
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> [APPELLANT'S COUNSEL]: I don't think I used the word solely.
>
> THE COURT]: I will permit the State to unredact the testimony with regard to his statement as to why he was there that night with regard to certain business operations.
>
> ***
>
> "It is well settled that [a]ny competent evidence which explains, or is a direct reply to, or a contradiction of, material evidence introduced by the accused may be produced by the prosecution in rebuttal. It is equally well settled that the State's case-in-chief may include "rebuttal" evidence to which the defense has "opened the door," either during opening statement, or through cross-examination of a State's witness."

Johnson v. State, 408 Md. 204, 226 (2009) (internal citations and quotations omitted).

"[O]pening the door is simply a way of saying: My opponent has injected an issue into the case, and I ought to be able to introduce evidence on that issue." *Clark v. State*, 332 Md. 77, 85 (1993). The "open door" doctrine is implicated when a party seeks to respond to the other party's evidence with either (1) evidence which is competent,[9] or (2) evidence which is similar to the adversary's evidence which was ruled competent *over objection.*" *Id*. at 87. "The "opening the door" doctrine is really a rule of expanded relevancy." *Clark v. State*, 332 Md. 77, 84 (1993). This doctrine of expanded relevance has its limits, however, as the remedy must be proportionate to the malady." *Martin v. State*, 364 Md. 692, 708 (2001) (internal citations and quotations omitted).

We find that Appellant's counsel did not "open the door" during her opening statement. Additionally, opening statements are not evidence and thus, the State seeking to admit the statement to counteract the opening statement was counteracting inadmissible evidence. Assuming *arguendo* that Appellant's counsel had "opened the door," the remedy—permitting the prior acts statement to come in—was not proportionate to the malady—impugning Appellant's character in the eyes of the jury.

Furthermore, it is our opinion that such evidence went beyond providing a reason for why Appellant was at Ottobar on the night of the incident. Instead, the State's use of this evidence sought to paint Appellant as a criminal, a drug dealer, again, presumably

[9] In a footnote, *Clark* stated, "We shall use the term "incompetent evidence" to refer to evidence that is inadmissible for reasons other than relevancy. Examples of such "incompetent evidence" would be evidence that is inadmissible because of the hearsay prohibition, for lack of authentication, or because of the best evidence rule."

insinuating that Appellant's resulting violent acts went hand-in-hand with Appellant being at Ottobar to sell drugs. The jury may have inferred that because Appellant was a particular type of person, specifically a drug dealer, he was prone to committing violent acts, which is exactly the kind of prejudice Md. Rule 5-404(b) prohibits.[10]

The trial court concluded that "selling a got damn bit of white" was more probative than prejudicial. However, selling drugs may obviously constitute a possession with intent to distribute offense in violation of MD. CODE ANN., CRIM. LAW § 5-602 (West 2017).[11] Accordingly, we find that Appellant's statement constitutes bad acts evidence and that the trial court failed to and should have, conducted an on-the-record *Faulkner* analysis to determine whether the evidence had special relevance and whether there was clear and convincing evidence that the act occurred before admitting it. *Faulkner*, 314 Md. at 633-35.

Lastly, the trial court's error in admitting evidence of Appellant's intent to sell drugs was not harmless. In some cases where prior bad act evidence has been erroneously admitted, the error is harmless, and does not warrant reversal. We take note of the rule that:

[10] "Evidence of other crimes may tend to confuse the jurors, predispose them to a belief in the defendant's guilt, or prejudice their minds against the defendant." *State v. Faulkner*, 314 Md. 630, 633 (1989).

[11] Except as otherwise provided in this title, a person may not:

(1) distribute or dispense a controlled dangerous substance; or

(2) possess a controlled dangerous substance in sufficient quantity reasonably to indicate under all circumstances an intent to distribute or dispense a controlled dangerous substance.

> When an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed "harmless" and a reversal is mandated. Such reviewing court must thus be 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.

Dorsey v. State, 276 Md. 638, 659 (1976).

Our review of the record convinces us that admission of Appellant's statement of his intent to sell drugs could have persuaded the jury to render a guilty verdict against him when without the statement, it would not have otherwise done so. The error here was not harmless. Judgment of the trial court should be reversed and the case remanded for a new trial.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED; COSTS TO BE PAID BY MAYOR AND CITY COUNCIL OF BALTIMORE.