Circuit Court for Montgomery County
Case No. 134227C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 148

September Term, 2019

LUDWIG JOSEPH

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Wells,

JJ.

Opinion by Leahy, J.

Filed: December 16, 2020

In the early morning hours of April 14, 2018, Maya Joseph[1] and Kevin Blackman were asleep when they were suddenly and violently attacked by a home invader. Both victims, as well as Ms. Joseph's ten-year-old child, identified the assailant as Ms. Joseph's ex-husband, Ludwig Joseph ("Appellant"). After a seven-day trial, a jury in the Circuit Court for Montgomery County convicted Appellant on two counts of first-degree assault, based upon "intentional serious physical injury"; one count of home invasion burglary; and one count of violating a protective order.[2] He was sentenced to concurrent terms of 25 years for each assault and burglary conviction, plus 90 days for violating the protective order that Ms. Joseph obtained against him.

In this timely appeal, Appellant contends that the trial court erred "in allowing the prosecution to introduce evidence that [he] had been convicted of assault against Ms. Joseph in 2016[.]" We disagree. The State was entitled to introduce evidence of Appellant's prior assault because it rebutted his introduction of character evidence suggesting that he would never hurt the mother of his children. Accordingly, we affirm Appellant's convictions.

[1] Ms. Joseph's first name is spelled differently throughout the trial transcripts. We shall use the spelling in the parties' briefs. To avoid confusion, we shall refer to Maya Joseph as Ms. Joseph and Ludwig Joseph as Appellant.

[2] The jury found Appellant not guilty of the following charges: 1) use of a handgun during the commission of a felony or crime of violence on Maya Joseph; 2) use of a handgun during the commission of a felony or crime of violence of Kevin Blackman; and 3) illegal possession of a regulated firearm.

BACKGROUND[3]

During Appellant's seven-day trial,[4] Ms. Joseph recounted Appellant's "volatile and abusive" history during their relationship and marriage. The couple separated in December 2016, after Appellant "battered" Ms. Joseph "in front of [their] kids and really didn't show any remorse about it[.]" She obtained a protective order, which remained in effect until 2019 and prohibited Appellant from being in the house or near Ms. Joseph.

The couple made several attempts at reconciliation, both before and after their divorce became final in December 2017. By the end of January 2018, however, their relationship was over. They continued to communicate concerning their two children, who lived with Ms. Joseph in the marital home that Appellant was ordered to "sign over" to her as part of their divorce. Appellant, who was renting a single room, had frequent visitation

[3] Because Appellant does not challenge the sufficiency of the evidence supporting his convictions, we shall summarize the underlying factual record and provide only those details necessary to frame our discussion of the issue addressed in this appeal. *See Washington v. State*, 180 Md. App. 458, 461-62 n.2 (2008) (explaining that a recitation of the full record is unnecessary when there is no challenge to the sufficiency of the evidence).

[4] Trial took place on February 4, 5, 6, 7, 8, 11, and 12, 2019. The State called the three victims of the April 14, 2018 home invasion: Maya Joseph and her ten-year-old daughter, and Kevin Blackman. The State also called Ms. Joseph's oldest son because he witnessed another home intrusion by Appellant on March 9, 2018. The State called the Montgomery County police officers who responded to the Joseph residence in response to the 911 calls, Officer David Crowley and Officer Drew Hilinski; as well as Detective Theresa Durham, who interviewed the victims and investigated the case. Finally, the State presented the testimony of a forensic specialist, Ms. Shardais Mills, who documented the crime scene and collected evidence.

Appellant testified in his own defense. He also called Mr. Louis Burgher, his supervisor at work, as well as Officer Crowley, Officer Helinski, and Detective Durham.

with and access to the children, but exchanges typically occurred at a nearby restaurant because Ms. Joseph did not want Appellant to come to the house.

The State's prosecution theory was that Appellant's anger and jealousy over the end of the relationship and the loss of the family home escalated during a series of incidents following the parties' December 2017 final divorce and their January 2018 final attempt at reconciliation, eventually building into the April 14 home invasion and assault.

On January 12, 2018, Appellant saw a car in Ms. Joseph's driveway and observed a man inside the house after he went to the door and rang the doorbell. As Appellant described it at trial, he "continued to ring the bell, profusely." After Ms. Joseph answered the door and refused to tell Appellant who the man was, Appellant went through the man's vehicle and "opened up the glove compartment, and pulled out the registration."

On March 9, 2018, Ms. Joseph accidentally sent Appellant a screenshot with a message and the address of a man she was planning to meet that night. Late that afternoon, Appellant entered Ms. Joseph's house without permission and came into her bathroom as she was getting out of the shower. According to Ms. Joseph, Appellant threatened her, saying, "look how easy it is for me to get in this house" and "I'm not the MF'er to play with[,]" while backing her against the wall and holding his hand around her throat. When the alarm system sounded, Appellant declared that he would never sign over the deed to the home and fled, briefly encountering Ms. Joseph's nineteen-year-old son, from her previous relationship, outside her room.

Although Appellant's account of what occurred on March 9, 2018 differed, he admitted that he came into the house uninvited and into the bathroom unannounced. Then,

according to Appellant, he took off his clothes and when Ms. Joseph came out of the shower, they engaged in consensual sexual intercourse. The romantic interlude quickly ended with an argument over the "text message indicating a rendezvous." Appellant believed Ms. Joseph was "playing" him in order to get him to sign over the deed to the marital home.

Appellant admitted that, by late March, he knew that Ms. Joseph was dating Mr. Blackman, and that, on March 26, he left Ms. Joseph an angry voicemail message about the relationship. The jury heard several angry voicemails that Appellant left about Mr. Blackman. Appellant also admitted that he and Ms. Joseph had more arguments in the ensuing days leading up to the April 14 home invasion.

On April 14, 2018, Ms. Joseph and the Josephs' two children were hosting Kevin Blackman and his two children who were visiting from New York. Mr. Blackman had his vehicle parked in Ms. Joseph's driveway. It had been nearly four months since Ms. Joseph and Appellant finalized their divorce.

Sometime after 4 a.m., Ms. Joseph and Mr. Blackman were asleep in bed when they were attacked by an assailant who repeatedly struck them in the head with a metal object and inflicted serious physical injuries. Ms. Joseph turned on the light and was able to identify the assailant as Appellant. She testified at trial that she was "150,000 percent sure" it was him. Ms. Joseph was bleeding heavily from a wound to her head, but managed to push the alarm buttons in her bedroom. After the alarm sounded, the intruder fled. The Josephs' 10-year-old daughter entered the bedroom and was "freaking out." The daughter testified that after being wakened by an alarm, she came upstairs from the basement and

saw her father climbing out a window in the kitchen. Later, Mr. Blackman's blood was found on that window.

Ms. Joseph and her ten-year-old child separately called 911 and identified Appellant as the intruder. Both also told responding police officers that Appellant was the assailant.

Appellant admitted at trial that he was angry that Ms. Joseph was seeing another man and also that he was "disappointed" and "hurt" that he had to sign over the deed to the marital home. He insisted, however, that he did not go to the house or attack Ms. Joseph and Mr. Blackman on April 14. At the close of trial, Appellant's counsel pointed to the lack of forensic evidence linking Appellant to the crime, and highlighted his lack of physical injuries. Appellant's counsel also implied that Appellant had no motive to commit the crimes because he had "moved on" after the divorce.

Appellant was arrested on April 16, 2018. He was eventually indicted by a Grand Jury sitting in the Circuit Court for Montgomery County of two counts of attempted first degree murder, two counts of first degree assault, one count of home invasion burglary, two counts of use of a handgun in the commission of a crime of violence, one count of illegal possession of a firearm, and one count of violation of a protective order.[5]

DISCUSSION

[5] On the sixth day of trial, Appellant's counsel moved for judgment of acquittal on the two attempted murder counts. After listening to arguments from both parties, the court granted Appellant's motion "as to the two counts of attempted first-degree murder," explaining that the evidence presented did not indicate a clear intent to kill.

Appellant contends that the trial court erred in allowing the State to elicit testimony on cross-examination that he was convicted of assaulting Ms. Joseph in 2016**.** In his view, the court misinterpreted and misapplied Maryland Rule 5-404, which provides:

> (a) **Character Evidence**. (1) Prohibited uses. Subject to subsections (a)(2) and (3) of this Rule, evidence of a person's character or character trait is not admissible to prove that the person acted in accordance with the character or trait on a particular occasion.
>
> (2) Criminal and delinquency cases. Subsection (a)(2) of this Rule applies in a criminal case and in a delinquency case. For purposes of subsection (a)(2), "accused" means a defendant in a criminal case and an individual alleged to be delinquent in an action in juvenile court, and "crime" includes a delinquent act as defined by Code, Courts Article, § 3-8A-01.
>
> (A) Character of accused. **An accused may offer evidence of the accused's pertinent trait of character. If the evidence is admitted, the prosecution may offer evidence to rebut it.**
>
> (B) Character of Victim. Subject to the limitations in Rule 5-412, an accused may offer evidence of an alleged crime victim's pertinent trait of character. If the evidence is admitted, the prosecutor may offer evidence to rebut it.
>
> (C) Homicide Case. In a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.
>
> (3) Character of witness. Evidence of the character of a witness with regard to credibility may be admitted under Rules 5-607, 5-608, and 5-609.
>
> (b) **Other Crimes, Wrongs, or Acts**. Evidence of other crimes, wrongs, or other 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 the 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, absence of mistake or accident, or in conformity with Rule 5-413.

(Emphasis added.)

The Record

Appellant's claim of error arises from the trial court's ruling that he opened the door to impeachment under Maryland Rule 5-404(a)(2)(A), when he testified as follows on direct examination:

> [DEFENSE COUNSEL]: All right, Mr. Joseph, I'd like you to tell this jury, did you at any time come anywhere near [] [Ms. Joseph's] home on April 14th?
>
> [APPELLANT]: Absolutely not. Absolutely not. There was no reason for me to go there. I would not go over there. It's over, I did not go over to that house, okay. I did not.
>
> **[DEFENSE COUNSEL]: Did you assault [Ms. Joseph] on April 14? Please tell this jury.**
>
> **[APPELLANT]: Absolutely not. Why would I do that? That is the mother of my children.**

(Emphasis added.)

The prosecutor objected, and the objection was overruled. After Appellant finished his direct testimony, the prosecutor asked the trial court, in a bench conference, to permit her to respond to the highlighted testimony by impeaching Appellant with his 2016 conviction for assaulting Ms. Joseph, as follows:

> [PROSECUTOR]: Just a couple lines across that I want to clear with the Court before I start, that I think it can open the door for. First of all, the defendant said when [defense counsel] asked did you do this, he said no I didn't. And then he said why would I do this, that's the mother of my children.
>
> THE COURT: Yes.
>
> [PROSECUTOR]: And he has beaten her on several prior occasions, that he has been convicted for. So, I think that that is now relevant because he has done it before and **he has put his peacefulness [at] issue, by saying he wouldn't beat the mother of his children.** So I'm going to ask the Court to let me ask about those incidents.

(Emphasis added.)

Over defense counsel's objection, the trial court resolved that Appellant had "opened the door" to questioning about his previous convictions. Defense counsel proffered that he had advised Appellant to refrain from such "conditional" testimony, and argued that allowing the jury to hear about Appellant's prior assault conviction would be unfairly prejudicial:

> THE COURT: …I do believe that [goes] to what he basically declared, that why would I harm the mother of my kids. Now we have [the incident on] March 9th, but I think he really opened it up by that he was gratuitous on his part. [Sic] **But it opened it up because basically, his thing is, this is the mother of my children and I would never harm the mother of my children.**
>
> [DEFENSE COUNSEL]: He didn't say that.
>
> THE COURT: What did he say?
>
> [DEFENSE COUNSEL]: He said, "Why would I do that?" Okay. So first of all, I must say –
>
> THE COURT: Why would I do that, this is the mother of my children.
>
> [DEFENSE COUNSEL]: Right. So, in other words, this horrific –
>
> **THE COURT: But the implication[] [is], I would never hurt the mother of my children.**
>
> [DEFENSE COUNSEL]: Well, certainly, Your Honor –
>
> **THE COURT: And if he has hurt the mother of the children, then it seems to me that that [2016 assault conviction] directly challenges that.**
>
> [DEFENSE COUNSEL]: Your Honor, the problem here is that, that's the first argument that I just made.
>
> THE COURT: Okay.

[DEFENSE COUNSEL]: The second argument is, Your Honor still need[s] to balance a 403 at all times. [Sic] And we'd ask you –

THE COURT: Okay, so –

[DEFENSE COUNSEL]: -- to do the balancing and then we would say that **it [is] so highly unfairly prejudicial as to almost shut down jurors thinking about the innocence in this case when they hear prior convictions for battery.** Number three, think about, I ask the Court, in generally [sic] of the public policy and implications of this. You know, people speak in the conditional all the time. Lawyers are trained not to speak in the conditional. **I will [proffer] that I told him repeatedly, not to speak in the conditional.** The reason I think he spoke in the conditional is because that's the way he speaks. And that's the way other people speak. And as much as I yell at him not to speak in the conditional, he just, that's the way he is. And for that reason, **it's so unfair, it was simply a gratuitous comment. He wasn't intending to assert, I have never, I have never assaulted my wife.** Court, remember –

THE COURT: Okay.

[DEFENSE COUNSEL]: -- that I did not object to the battery comment [during Ms. Joseph's testimony], even though there was an agreement that that would not be elicited earlier on in the trial. When [Ms. Joseph] said, "Battery." **So the jury already knows from [Ms. Joseph's] point of view that there is a battery in front of her kids that precipitated the separation and precipitated the protective order.** And as a general matter, I disagree, you know in terms of the general legal questioning issue as to whether or not he opened the door when the defendant testifies. I guess every defense attorney is going to need, sort of, high level intensive preparation for people who are not lawyers and who are not sophisticated to make sure they don't blurt a conditional.

THE COURT: Okay. Here's what I'm going to do. I'm going to excuse the jury. I'm going to go and listen to exactly what he said, and we can all do this. And I want to know what things you want introduced because I have no idea exactly what you're taught through that. [sic]

[PROSECUTOR]: Yes.

THE COURT: And **I think counsel[']s right, that I need to weigh it in some fashion.** Okay, so, let's do that. I'm going to send them back. I can listen, you can listen and we'll hear about what you want to introduce, okay.

(Emphasis added.)

After excusing the jury for the weekend and addressing other matters, the trial court returned to the issue of whether the State should be permitted to impeach Appellant with the 2016 assault conviction:

> THE COURT: I think what your argument here is, and I'm digging into this as much as I can, **I think what your argument is here is for some reason [Appellant] is now offering evidence of his character.**
>
> **[PROSECUTOR]: Yes.**
>
> **THE COURT: That he is a man who would never assault the mother of his children.**
>
> **[PROSECUTOR]: That's correct.**

After defense counsel argued that admitting the testimony would be highly prejudicial under 5-404(b), the trial court directed defense counsel to *Snyder v. State*, 361 Md. 580 (2000), in which the State was permitted to present evidence of a defendant's prior assault of his wife, pursuant to Md. Rule 5-404(b) governing the admission of evidence of "other crimes[.]" In *Snyder*, the Court of Appeals explained that, as an alternate ground for affirming the admission of evidence of other crimes, the trial court did not err in admitting evidence that the defendant hit his wife to rebut evidence that the defendant told police that his "relationship with his wife was great and getting better[,]" because that statement implied that "it was improbable that the petitioner murdered his wife." *Snyder*, 361 Md. at 611.

Defense counsel continued to argue that introducing the 2016 assault conviction based upon Appellant's "unintentional" testimony would be highly and unfairly prejudicial:

> [DEFENSE COUNSEL]: Right, but I . . . restate everything I said earlier incorporating 404B, . . . **it is very highly unfairly prejudicial especially in terms of the unfair prejudice at the end of the case regarding a similar act** and my argument as I said earlier, when the jury hears about this they're just going to close their eyes. **That's how unfairly prejudicial this is, game over**. . . . [H]ere is a guy who . . . came here when he was seven years old from Haiti. This is how he speaks and I proffer to the Court that in my preparation for him I said don't use the conditional, he didn't know what the word conditional meant and I explained what it meant. I said don't do that and it's just the way he speaks… **he should not be punished with something that is so incredibly prejudicial. . . . [A]t no time [] through cross or in my opening statement or in any of the witnesses that we present attempt purposely to put forward any character evidence like this and it just so happens he makes a dumb mistake reverting to his vernacular and he should not be punished for that especially in this key moment in trial, it's so highly prejudicial.**
>
> THE COURT: All right, State.
>
> [PROSECUTOR]: **Your Honor, he put this at issue.** He was instructed not to and the only result is, the only possible result is that the jury has before it, why would [I] hurt the mother of my children. And that is, and I would never hurt the mother of my children. So essentially what defense counsel is arguing is that he, the defendant because of [h]is unique position as a defendant is entitled to a windfall and not be thoroughly cross-examined because it is potentially prejudicial. **All evidence is prejudicial. The question is whether it is unfairly prejudicial. He made this an issue and therefore it is not unfairly prejudicial for me to be able to ask these questions. My job and my role as a State's Attorney is to make sure that the evidence is presented before the jury and right now the defendant has made his character an issue.** That was his choice to do it. He was instructed not to, he chose to do that, I mean, Your Honor heard him, he had an outburst where he kept proclaiming his innocence, he made this choice and now I get to cross-examine him about it.

(Emphasis added.)

Defense counsel, proffering that Appellant's 2016 conviction arose from an incident in which he elbowed Ms. Joseph in the head and broke her nose, next proposed that the trial court limit any cross-examination to that point. The trial court questioned whether

> there would be less prejudice . . . if the State just asked, well wait a minute you said you'd never assault, why would you assault the mother of your children when you in fact [] assaulted her on such and such a date when you broke her nose? Is that going to be less prejudicial to you, I mean right now I don't even hear that she's going to go into the details of it. I . . . think that would be even more prejudicial than you know just saying, you have an assault conviction don't you?

Defense counsel responded that "the problem is" that "it's more prejudicial" for the jury "[t]o hear the word[s] battery conviction." After clarifying that the 2016 conviction was for assault, the prosecutor proffered that she intended to ask Appellant only whether he had "been convicted of assault[ing]" Ms. Joseph.

The trial court weighed the prejudice that Appellant might experience if it did not "let the State go into the details," against "the right of the State to rebut character evidence," pointing out that "otherwise the State is left without" any way to rebut Appellant's claim that he would never hurt the mother of his children, "just leaving that out there[.]" In the court's view, and contrary to defense counsel's urging, the previously admitted evidence of the March 9, 2018 incident was not sufficient to rebut the claim because Appellant "describes it as being a sexual liaison" that would be consistent "with his theme of, this is the mother of my children, why would I hurt the mother of my children, I wouldn't hurt the mother of my children."

The court ruled that it would "allow the State to just ask the question, ... is it true you have a conviction for assault against your wife on such and such a date. And that's it."

The court reasoned that "all it does then is it just goes to rebut his evidence that he would not hurt the mother of [] his children." In the court's view, "the salient point" was not how Appellant "talks" but rather "the effect upon the jury" from "hear[ing] what he said[.]"

When trial resumed the following Monday, defense counsel reiterated his objection, arguing that Appellant's testimony "[did not] open-the-door" and that "assuming the door had been opened, . . . the proper mode [of impeachment] is to ask about the facts, not the conviction." In addition, defense counsel reasserted that under the "balancing" analysis required by Rules "404(b) and 403," impeachment with the prior assault conviction would be "unfairly prejudicial[.]"

After the trial court overruled Appellant's objection, the State began its cross-examination with the 2016 assault conviction:

> [PROSECUTOR]: Mr. Joseph, on Friday afternoon you told this jury that you would never hurt the mother of your children, correct?
>
> [APPELLANT]: Correct.
>
> **[PROSECUTOR]: Isn't it true that you've been convicted of assaulting [Ms. Joseph] previously?**
>
> [DEFENSE COUNSEL]: Objection.
>
> **[APPELLANT]: Yes.**
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: Could you repeat your answer?
>
> [APPELLANT]: Yes.
>
> [PROSECUTOR]: And that was in 2016, correct?
>
> [APPELLANT]: Yes.

> [PROSECUTOR]: And it's also – and that is the reason that the protective order was issued, correct?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: If he knows.
>
> [PROSECUTOR]: If you know.
>
> [APPELLANT]: Repeat the question.
>
> [**PROSECUTOR]: That's the reason that a protective order was issued, correct?**
>
> **[APPELLANT]: Because of an altercation that we had, yes.**

(Emphasis added.)

The prosecutor then asked, without further objection by the defense, whether Appellant "underst[oo]d fully" that the protective order "was an order of the court," and whether, in spite of this, Appellant "still chose to continually go to the house that this order told [him] not to go to" and "to contact [Ms. Joseph] quite regularly for the next year and a half." Appellant responded affirmatively and explained that he and Ms. Joseph still "communicated" and had "decided to . . . continue [their] relationship."

In its closing argument, the State pointed to Appellant's prior assault conviction in arguing that "the evidence in this case proves . . . that the defendant's testimony was false." The prosecutor asserted that, despite Appellant's denials, "[h]e absolutely was there. We know that he said things to you on the stand that were demonstrably false. He said he would never hurt the mother of his children, but he's been convicted of assaulting her."

Parties' Contentions

Appellant contends that the trial court incorrectly applied Maryland Rule 5-404 to find, not only that his statement—"Why would I do that. That is the mother of my children"—opened the door to his prior 2016 assault conviction, but that its probative nature substantially outweighed its prejudicial nature or the danger or unfair prejudice. In Appellant's view, this "was not a statement that he would never have hit or hurt the mother of his children," but instead, "a statement made in the conditional" – merely "a question challenging the hearer to consider why he would assault his children's mother."

Alternatively, he asserts that, even if he "did open the door to evidence that he did not have a character trait for peacefulness with his wife," the trial court abused its discretion because "it was unduly prejudicial to introduce a prior conviction from years before this incident that he assaulted his wife in New York[]." This undue prejudice, Appellant argues, is the same reason that other crimes evidence is precluded under Maryland Rule 5-404(b), to prevent it from being "offered to convince the jury that the accused committed the crime with which he stands accused because he is a bad man who has committed assaults in the past."

The State counters that the trial court did not err in concluding that Appellant's "testimony constituted evidence of a pertinent character trait under Rule 5-404(a)(2)(A), such that he opened the door to admission of the prior conviction." The State points out that Rule 5-404(a) applies when a defendant asserts his good character, and, quoting from *State v. Purvey*, distinguishes the "other crimes" exception, Rule 5-404(b), which applies "only when the State tries to use evidence of other crimes, wrongs or acts to show criminal propensity." 129 Md. App. 1, 22 (1999). The State contends that Appellant "does not

suggest on appeal, nor did he suggest at trial, that his prior conviction for assaulting [Ms. Joseph] does not fall within [Rule 5-404(a)]; rather, he argues that the court abused its discretion in concluding that he opened the door to its admission in the first place." The State refutes Appellant's claim that his statement was only "vernacular" and "conditional," and asserts that Appellant "has not explained . . . how his denial that he hurt [Ms. Joseph] followed immediately by the explanation that she was the mother of his children, could be construed as anything other than a statement that he would not hurt the mother of his children *at all.*"

In regard to balancing the probative value of the evidence against any unfair prejudice, the State quotes the court's reasoning that the jurors had the right to "a complete picture of [Appellant's] character [that] was not substantially outweighed by the danger of unfair prejudice" and points out that in response to defense counsel's concerns, the court limited the State's question to only whether the defendant had been convicted of an assault on Ms. Joseph. Finally, the State asks us to hold that even if the prior conviction was improperly admitted, "any error was harmless" because there was "a plethora of evidence" that "unequivocally established [Appellant's] guilt."

Standard of Review

Whether "an opening the door doctrine analysis has been triggered is a matter of relevancy, which [an appellate court] reviews *de novo*." *State v. Heath*, 464 Md. 445, 457 (2019); *see also Vigna v. State*, 470 Md. 418, 437 (2020) (instructing that *de novo* review is appropriate for a question of whether the character evidence proffered to the court for an evidentiary ruling under Rule 5-404(a)(2)(A) was relevant to the specific crimes with

which Vigna was charged). In turn, "[w]hether responsive evidence was properly admitted into evidence is reviewed for abuse of discretion." *Id*. at 458. Under that deferential standard, we review a decision to admit rebuttal evidence for proportionality, to determine whether the proffered rebuttal evidence was necessary to remove any unfair prejudice. *See State v. Robertson*, 463 Md. 342, 357-58 (2019). "[A]n 'abuse of discretion exists where no reasonable person would take the view adopted by the trial court, or when the court acts without reference to guiding rules or principles.'" *Heath*, 464 Md. at 458 (quoting *Robertson*, 463 Md. at 364).

Law Governing Rebuttal Evidence of One's Character

Under Maryland Rule 5-404(a)(2)(A), once a trial court admits evidence of a criminal defendant's "pertinent trait of character[,]" "the prosecution may offer evidence to rebut it." This rule embodies "the open door doctrine." *See, e.g., Robertson*, 463 Md. at 359, 360 n.4 (recognizing that the defense opened the door for the State to rebut evidence of the defendant's good character pursuant to Md. Rule 5-404(a)(2)(A)).

That doctrine "is based on principles of fairness and serves to 'balance any unfair prejudice one party may have suffered.'" *Id.* at 351-52 (citation omitted). It "authorizes parties to 'meet fire with fire,' as they introduce otherwise inadmissible evidence . . . in response to evidence put forth by the opposing side.'" *Id*. at 352. (citation omitted).

Two recent cases supply context for our review of Appellant's contentions. In *Robertson*, the Court of Appeals reviewed whether the trial court correctly applied the standards under Rule 5-404(a)(2)(A) to impeachment evidence admitted to rebut the defendant's testimony that he had never been involved in any "trouble." 463 Md. at 346,

349. Robertson, a college student, was on trial for a murder that occurred during an altercation between two groups regarding a counterfeit payment for a marijuana purchase. *Id.* at 347. After defense counsel elicited Robertson's testimony on direct that he had never been arrested or in "any trouble[,]" the State was permitted to cross-examine Robertson about a fight that took place a year earlier, in which a friend defended him, by brandishing a knife, as he was beaten by a group of students. *Id*. at 349-50, n.1.

The Court of Appeals held that the "general nature" of such questioning "opened the door" under Rule 5-404(a)(2)(A) for the State "to introduce evidence to rebut the image of Robertson as an upstanding individual who had never been in **any** trouble." *Id*. at 360 (emphasis in original). Nevertheless, the Court affirmed our decision to reverse the trial court because "the State used the evidence of Robertson's participation in the prior incident in a manner that exceeded the scope of the doctrine." *Id*. at 346–47. Citing our decision in *Khan v. State*, 213 Md. App. 554 (2013), the majority in *Robertson* held that although "[t]he State was permitted to rebut the evidence of Robertson's good character by citing the previous incident[,]" the trial court abused its discretion by allowing the State "to elicit details about the incident."[6] *Id*. at 363–64.

Less than three months later, in *Heath*, the Court of Appeals applied the open door doctrine in a case involving admission of non-character evidence. 464 Md. at 456-57. In that case, it was undisputed that a bar altercation ended with Heath cutting the throat of the

[6] Judge Hotten authored the majority opinion. In dissent, Judges McDonald and Watts distinguished *Khan* on the ground that Robertson failed to preserve his objection to such cross-examination. *See Robertson*, 463 Md. at 370-71 (McDonald, J., dissenting).

victim. *Id*. at 451. Before trial, the prosecutor and defense counsel agreed to redact, as irrelevant and prejudicial, Heath's statement to police that he went to the bar that night to sell "white" (*i.e.*, cocaine). *Id*. at 451-52. Nevertheless, in her opening statement, defense counsel told the jury that tattooing was one of Heath's "primary sources of income" and that "his goal and . . . his purpose [was] to stop by the Ottobar that night" because it was "a good source" for business income. *Id*. at 452. Rather than objecting, the State "sought to unredact" the redacted portion of Heath's recorded statement, on the ground that defense counsel's opening statement "opened the door to Mr. Heath's 'true' purpose for being at" the bar. *Id.* at 453.

Defense counsel objected "that opening statements are not evidence" and that the challenged statement "was inadmissible bad acts evidence" that "was 'highly prejudicial [with] no probative [value].'" *Id.* at 453. The trial court allowed the State to play Heath's statement to the jury, reasoning that Heath's "statement as to why he was there that night with regard to certain business operations" was relevant and not unfairly prejudicial evidence of "'the manner in which he is alleged to have conducted himself that evening.'" *Id*. at 453–54.

The Court of Appeals granted *certiorari* to decide "whether a comment made by defense counsel in an opening statement invited the State to present, as evidence, a statement made by [Heath] indicating his intention to sell cocaine[.]" *Id*. at 449. The Court held that, given defense counsel's opening remarks about Heath's livelihood and reasons for being at the bar, "the general principles of the opening the door doctrine that allow a party 'to meet fire with fire' permitted the trial judge to consider whether to admit into

evidence Mr. Heath's statement that he intended to sell 'white' at Ottobar." *Id*. at 456. The majority concluded that despite clearing that initial hurdle to admissibility, the trial court failed to navigate three other obstacles, requiring reversal.[7] *Id*. at 457.

The trial court's first error was in "fail[ing] to recognize that Mr. Heath's intention to sell drugs at Ottobar injected into the case evidence on a collateral issue" and the evidence offered on that issue had nothing to do with the underlying criminal charges and "exceeded one of the limitations to the introduction of responsive evidence under the 'opening the door' doctrine." *Id*. at 456. Next, the Court explained, admitting Heath's statement violated a second "limitation under the 'opening the door' doctrine," requiring that any remedy must be proportionate to the malady. *Id*. at 456-57. Specifically, "[t]he responsive evidence permitted by the trial judge was disproportionate because the jury would likely give more weight to a statement admitted into evidence than to a comment made in opening[,]" given that "the trial judge instructed the jury to make its decision solely on the evidence admitted and not on what was said in opening statements." *Id*. at 457. Finally, the Court held, "allowing the State to admit Mr. Heath's statement into evidence was substantially more prejudicial than probative" because "it associated Mr. Heath with drugs and likely undermined his credibility with the jury." *Id*.

[7] Judge Greene authored the majority opinion. Chief Judge Barbera and Judge McDonald dissented on two grounds: (1) that "the trial court appropriately exercised its discretion when it allowed a targeted response after defense counsel 'opened the door' as to Mr. Heath's purpose in going to Ottobar"; and (2) "even if that long and ambiguous reference to his drug dealing should also have been excised from the redacted recording, the error was harmless beyond a reasonable doubt." *Heath*, 464 Md. at 469-70 (McDonald, J., dissenting).

With these principles in mind, we turn to analyze the case before us.

Opening the Door to Prior Abuse

As mentioned above, we review *de novo* the trial court's ruling that Appellant opened the door when he responded to the question regarding whether he assaulted Ms. Joseph, by saying, "Why would I do that? She is the mother of my children." *See Robertson*, 463 Md. at 352-53. The court concluded that this testimony asserted a "pertinent trait of character" that the State was entitled to rebut with evidence of Appellant's prior conviction for assaulting Ms. Joseph. Md. Rule 5-404(a)(2)(A). We hold that the court did not err in its ruling.

"The scope of what constitutes a 'pertinent character trait' under Rule 5-404(a)(2)(A) is defined by the nature of the crimes alleged." *Vigna v. State*, 241 Md. App. 704, 717–718, *cert. granted*, 466 Md. 311 (2019). Evidence "opens the door" to rebuttal under this rule when it concerns "'an attribute or trait the existence or non-existence of which would be involved in the noncommission or commission of the particular crime charged.'" *Id*. at 718. (citation omitted). "In other words, pertinent character traits must . . . have some bearing on the likelihood that a person exhibiting that trait would (or would not) commit the crimes of which [the defendant] stands accused." *Id*.

As the Court of Appeals recognized in *Robertson*, when a defendant asserts his good character as a defense to an accusation that he committed the crime for which he is on trial, he opens the door to rebuttal evidence that is not collateral, disproportionate, or substantially more prejudicial than probative. 463 Md. at 360–61. Robertson's testimony on direct examination that he had always avoided trouble, in response to "general

questioning regarding" his law-abiding character, asserted an attribute that made it less likely he was involved in the drugs, counterfeiting, weapons, and violence that led to the murder charges against him. *Id*. By suggesting that he was "an upstanding individual who had never been in **any** trouble[,]" Robertson opened the door for the State to introduce evidence rebutting that image. *Id*. at 360 (emphasis in original).

The same "image bolstering" happened in this case. Indeed, we agree with the State that "[t]he issue is not as complicated as" Appellant seeks to make it. Appellant's use of a rhetorical question, "[w]hy would I do that?" in his testimony, does not negate the clear implication of his answer "[s]he's the mother of my children." That statement clearly amounts to image bolstering and implies that he would never "do that." Asserting his peacefulness and respect toward Ms. Joseph, Appellant sought to convince jurors that he was not the person who assaulted her. Because Appellant presented himself in such a favorable light on the central issue in the case, the trial court did not err in ruling that he opened the door for rebuttal evidence under Rule 5-404(a)(2)(A).

Proportionality and Prejudice

An assault or battery conviction "undoubtedly bears on an individual's character for non-violence" "because previously committing a battery directly pertains to an individual's peaceful nature[.]" *Williams v. State*, 457 Md. 551, 567, 572 (2018). Indeed, when an assailant's motive and identity are at issue, as in this case, courts have long recognized that evidence that the accused previously assaulted the victim may have special relevance. *See* Md. Rule 5-404(b). *See generally* 5 Lynn McLain, Maryland Evidence, State & Fed., § 404:11 (2020) (recognizing that evidence showing "a particular person has a motive to

commit an act also tends to identify that person as the perpetrator."); s*ee also Wilder v. State*, 191 Md. App. 319, 344 (2010) (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 establish the identity of the shooter in this case, and it is also relevant to Wilder's motive for revenge against" the victims); *Page v. State*, 222 Md. App. 648, 654 (2015) (holding that the circuit court did not err in admitting prior assault into evidence because of its heightened relevance in establishing the identity of appellant as the shooter by showing that Appellant had both the motive and intent to commit the crime). Based on that assessment of probative value, evidence of Appellant's prior assault conviction was submitted in direct response to his testimony that he would not be violent toward Ms. Joseph.[8]

Appellant does not expressly challenge the proportionality of allowing the State to present his prior assault conviction as rebuttal evidence under Maryland Rule 5-

[8] Although the prosecution disclaimed use of the prior assault as evidence for motive or identity purposes under Rule 5-404(b), our decisional law establishes that evidence of prior assaults is admissible to prove motive and identity and these cases add context to the probative value of such evidence. *See, e.g., Snyder v. State*, 361 Md. 580, 605 (2000) (recognizing that "[e]vidence of previous quarrels and difficulties between a victim and a defendant is generally admissible to show motive"); *Vaise v. State*, 246 Md. App. 188, 211-212 (2020)(holding that evidence of defendant's prior assault of victim was relevant to show motive and identity); *Jackson v. State*, 230 Md. App. 450, 461 (2016) (holding that prior incidents of domestic violence had special relevance to show "the exertion of control over the victim through the perpetration of a cycle of violence[]" that established a motive for murder); *Stevenson v. State*, 222 Md. App. 118, 150 (2015) (holding that evidence of recent "physically abusive acts" against the victim had special relevance in showing motive because such evidence "was probative of a continuing hostility and animosity" toward the victim, "not simply the propensity to commit murder") (quoting *Snyder*, 361 Md. at 608-09)).

404(a)(2)(A). Instead, he focuses on what he contends is unfair prejudice. Specifically, Appellant renews his argument that he should not be penalized by admission of such potentially outcome-determinative evidence simply because he failed to heed counsel's advice to avoid speaking in a particular "vernacular." In his view, "it was unduly prejudicial to introduce a prior conviction from years before this incident that he assaulted his wife in New York" because it was "offered to convince the jury that" he committed the assaults in this instance "because he is a bad man who has committed assaults in the past."

We are not persuaded that the prior conviction was *unfairly* prejudicial. "All evidence, by its nature, is prejudicial." *Williams*, 457 Md. at 572. Weighing the prejudicial nature of Appellant's prior conviction against its probative value, the trial court recognized that "previously committing a battery directly pertains to an individual's peaceful nature," which is the character trait at issue in this case. *Id.* at 572.

After expressly acknowledging that Appellant's prior conviction undercut his defense, the court pointed out that Appellant's testimony, mistaken or ill-advised as it may have been, resulted in jurors considering evidence that he was not violent toward Ms. Joseph, and invited them to conclude that she was mistaken in identifying Appellant as the person who attacked her. Refusing to just "leav[e] that out there," unrebutted, the trial court allowed the State to cross-examine Appellant about his prior assault conviction. After examining the careful consideration that the court gave this issue, we conclude that the court did not abuse its discretion in doing so.

After opening the door by rhetorically asking why he would assault the mother of his children, Appellant cannot complain that the trial court permitted the State to "fight fire

with fire" by eliciting his admission that he was previously convicted of assaulting the very same mother of his children. *See Heath*, 464 Md. at 456. This was a proportionate remedy that ensured the jury would have "a complete picture" of Appellant's character for violence toward Ms. Joseph. *Cf. Williams,* 457 Md. at 569 (trial court did not abuse discretion in admitting rebuttal evidence of prior assault conviction after jury arguably got "an incomplete impression of [the defendant's] character for peacefulness.").

Moreover, other factors reduced the prejudicial impact of Appellant's prior conviction. After counsel proffered that Appellant repeatedly struck Ms. Joseph, breaking her nose, the trial court prohibited the State from presenting those details to the jury. *Cf. Khan*, 213 Md. App. at 575 (holding that trial court did not abuse its discretion by preventing State from eliciting "details" of defendant's prior conviction). In addition, the court gave a limiting instruction that the jury "must not consider the conviction as evidence that the defendant committed the crime charged in this case."

Finally, although we find no error, we agree with the State's contentions in its harmless error argument. Here, the State introduced a plethora of evidence to establish Appellant's motive and identity as the assailant. Furthermore, the prejudice from the prior conviction was lessened by the previous admission, without defense objection, of Ms. Joseph's testimony that their "relationship had to end because at this point he battered me in front of our kids and really didn't show any remorse about it[.]" *Cf. Dove v. State*, 415 Md. 727, 744 (2010) (explaining that "cumulative evidence tends to prove the same point as other evidence presented during the trial").

Conclusion

Based on this record, we are satisfied that the trial court did not err or abuse its discretion in allowing the State to introduce evidence that Appellant assaulted Ms. Joseph in 2016 and was convicted of assault for that conduct.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.