Circuit Court for Prince George's County
Case No. CT191235X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 665

September Term, 2021

WILLIAM WAYLAND

v.

STATE OF MARYLAND

Nazarian,
Zic,
Meredith, Timothy E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: July 6, 2022

William Wayland was convicted in the Circuit Court for Prince George's County of theft of property by deception. He also was convicted of two counts under the Protection of Homeowners in Foreclosure Act ("PHIFA")—failure to provide a contract that specified service to be offered by acting as a foreclosure consultant and failure to provide services prior to receiving payments while acting as a foreclosure consultant. He raises five points of error on appeal: *first*, that the trial court erred in admitting evidence of his prior bad acts; *second*, that the State failed to prove that he acted as a foreclosure consultant under PHIFA; *third*, that the evidence was insufficient to convict him of theft of property by deception; *fourth*, that his sentences should have merged under the rule of lenity; and *fifth*, that the trial court erroneously calculated restitution. We hold that the evidence was sufficient to support a finding that he committed theft by deception. We agree with Mr. Wayland, however, that the court erred in admitting evidence of his prior bad acts and that the evidence was insufficient to support a finding that he acted as a foreclosure consultant. We reverse his PHIFA convictions and remand for further proceedings on the theft by deception count.

I. BACKGROUND

A. The Transactions Between Mr. Wayland And Ms. D.[1]

In March 2017, Ms. D, aware that her second part-time job was going to end, decided to modify her mortgage. Ms. D told her friend that she wanted to obtain a loan

[1] To protect their privacy, we refrain from using the complaining witnesses' names and will instead use initials.

modification and her friend called Mr. Wayland. On March 25, 2017, Mr. Wayland met with Ms. D at his office, where he told her that he was a lawyer and that he could help her refinance her mortgage:

> [THE STATE]: How much time did you spend with him?
>
> [MS. D]: We were in there for about half an hour to an hour.
>
> [THE STATE]: Okay. Did you get a good look at him?
>
> [MS. D]: Yes, sir.
>
> [THE STATE]: And did you converse with him about your mortgage refinancing?
>
> [MS. D]: Yes. Yes, I did.
>
> [THE STATE]: What sort of things—what did you say to him?
>
> [MS. D]: He sat me down and shook my hand again and told me, "I'm Mr. William Wayland. I'm good. I never lost a case. I'm going to do what I can do. You're going to be good."
>
> [THE STATE]: Did he tell you what profession he had?
>
> [MS. D]: Yes. He told me he was my lawyer, he was going to fight for me.
>
> [THE STATE]: He was your lawyer?
>
> [MS. D]: Yes.

Mr. Wayland then gave Ms. D a two-page document titled "Installment Plan Agreement" that listed Ms. D's balance as $1,995. Both pages of the document had a headline labeled "Tucker Law Group LLP, Charles Tucker Jr. Esq." Ms. D and Mr. Wayland signed the agreement.

At the meeting, Mr. Wayland also asked Ms. D for $1,000 as a down payment:

> [THE STATE]: And what was he asking you for, if anything?
>
> [MS. D]: He said he needed a down payment so that he can get started on my modification.
>
> [THE STATE]: Okay.

> [MS. D]: And this was my first down payment.
>
> [THE STATE]: You're pointing to it. How much was that?
>
> [MS. D]: $1,000. He said he needed 2,000, and I told him I only had 1,000 in the bank, and he—Mr. William Wayland told me where the bank was. And the friend that took me [to Mr. Wayland's office] took me down the street from his office to the Bank of America, and I drew that out of Bank of America and brought it back.
>
> [THE STATE]: How much did you draw out of Bank of America?
>
> [MS. D]: $1,000.

After the March 25, 2017 meeting, Mr. Wayland "kept coming back for different money" and told Ms. D "that he was having a hard time with [the] mortgage company . . . ." He told Ms. D that he needed more money for "mitigation" purposes. Ms. D paid Mr. Wayland on five additional occasions for loan modification services:

- On April 1, 2017, Ms. D paid Mr. Wayland $1,000, the remaining balance listed on the Installment Plan Agreement.
- On September 15, 2017, Ms. D paid Mr. Wayland $500 for "the resubmission of some paperwork" that Mr. Wayland "had waited too long" to file.
- On February 19, 2018, Ms. D paid Mr. Wayland $495 for loss mitigation.
- On August 2, 2018, Ms. D paid Mr. Wayland $1,000 for loss mitigation.
- On October 5, 2018, Ms. D paid Mr. Wayland $500 for "another loss mitigation . . . ."

On October 30, 2018, Ms. D received a letter from the lender notifying her that she

qualified for a trial loan modification.[2]

But Mr. Wayland told Ms. D that despite this good news, the "mortgage company continued to fight him[,]" and "there was a foreclosure" on Ms. D's home. Ms. D told Mr. Wayland, "I'm paying you all this money, and you can't seem to get it." Mr. Wayland assured her not to worry and suggested filing for protection under Chapters 13 and 7 of the United States Bankruptcy Code. Between December 2018 and February 2019, Ms. D paid Mr. Wayland $695 to file a Chapter 13 bankruptcy petition on her behalf. But on April 15, 2019, Ms. D texted Mr. Wayland that she received notice from the court that "a foreclosure [was] on the way" and her case was dismissed due to "failure to complete required filings [and] automatic stay is terminated . . . ."

Because the Chapter 13 bankruptcy "didn't work[,]" Ms. D started paying Mr. Wayland for his help preparing a Chapter 7 bankruptcy.[3] After Mr. Wayland filled out the Chapter 7 paperwork for Ms. D, they traveled to the courthouse to file. But because "it was too late when we got there," Mr. Wayland "stamped it and put it in the night box" and informed Ms. D that they would "be hearing from the courts." But the Chapter 7 bankruptcy failed as well, and at some point, Ms. D's home went into foreclosure. She moved out of

[2] The contents of this letter are contested by the parties. The State argues that this letter indicated that Ms. D's "home was subject to foreclosure." Mr. Wayland refutes this characterization, noting that the letter "mentions nothing about whether an 'order to docket' or a 'petition to foreclosure' had been filed." We agree with Mr. Wayland, which is important for the reasons discussed below.

[3] Ms. D estimated that in total, she paid Mr. Wayland "8,000 or more" for loan modification services and bankruptcy filings.

her home in November 2019. More on this below.

On December 3, 2019, Mr. Wayland was indicted on several charges arising from his dealings with Ms. D: (1) theft scheme: $1,500 to under $25,000; (2) practicing law without admission to the State bar; (3) "act[ing] as a foreclosure consultant without providing a dated and signed contract that fully or accurately specified the services to be provided"; (4) "act[ing] as a foreclosure consu[l]tant and receiv[ing] payments prior to fully providing the services promised"; and (5) "fail[ing] to exercise the duty of care he was required to provide to those to whom he provided products and services . . . ." Counts 3, 4, and 5 were brought under PHIFA, a law "enacted . . . in order to protect financially distressed homeowners from con artists who would convince the owners to transfer title to their property to 'investors' and enable the scammer to take the equity in the home or the value of the house less the money owed on it." *Julian v. Buonassissi*, 414 Md. 641, 673 (2010). All counts charged Mr. Wayland with committing these offenses between March 1, 2017 and August 31, 2019.

B. Prior Bad Acts Evidence.

On July 22, 2020, the State filed a pretrial motion pursuant to Maryland Rule 5-404(b) seeking to introduce evidence of Mr. Wayland's prior bad acts. Rule 5-404(b) provides that "[e]vidence of other crimes, wrongs, or other acts . . . is not admissible to prove the character of a person in order to show action in the conformity therewith." There are, however, several exceptions to this rule. Evidence "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 addressing sex offense cases]." Md. Rule 5-404(b).

The State contended that it "plan[ned] to introduce evidence of prior bad acts to establish at least five exceptions to Rule 5-404[:] opportunity, intent, common scheme or plan, knowledge and identity." Because Mr. Wayland's conduct towards Ms. D was not new behavior, the argument went, the Rule 5-404(b) exceptions applied:

> [Mr. Wayland] has posed as an attorney and has taken money from various victims in the Washington D.C., Maryland, and Virginia Metropolitan area. In this case [Mr. Wayland] is charged with posing as an attorney, theft over $1500.00 from the victim [Ms. D], and three counts of violating [PHIFA] in Prince George's County Maryland. Ms. [D] lost her home as a direct result of Mr. Wayland's actions. [Mr. Wayland] is not new to this behavior. A civil Cease and Desist Order was issued against him in Baltimore County [] in 2014 precluding him from providing foreclosure advice to others in violation of PHIFA. In 2017 the Maryland Attorney General's Office indicted [Mr. Wayland] for providing foreclosure advice in violation of State Law. [Mr. Wayland] pleaded guilty in 2019 to eight of the nine counts in the Attorney Generals' indictment. Recently [Mr. Wayland] has been charged with felony theft (two counts) in Virginia for taking money from a victim and offering to provide foreclosure advice. [Mr. Wayland] has also posed as an attorney and taken money from [Mr. M] who lost his home, [Ms. P], and [Ms. L][4] in Maryland. He has not returned any of the victims' money at this time. Each time, he has followed an identical, signature pattern of activity.

The State cited *State v. Faulkner*, which established a three-part test to determine whether evidence of other bad acts is admissible. 314 Md. 630 (1989). *First*, a trial court

[4] Since this witness's initial is already in use, we have chosen this initial at random.

must "determine[] whether the evidence fits within one or more of the [] exceptions" enumerated in Rule 5-404(b). *Id.* at 634. If so, the *second* step involves "decid[ing] whether the accused's involvement in the other crimes is established by clear and convincing evidence." *Id.* (citations omitted). "If this requirement is met," then the court proceeds to the *third* step—balancing the probative value of the other crimes "against any undue prejudice likely to result from its admission." *Id.* at 635 (citation omitted).

The State argued that the first step of the *Faulkner* test was satisfied because several exceptions to Rule 5-404(b)'s prohibition on prior bad acts evidence applied to Mr. Wayland's case:

> The State will introduce testimony and evidence that [Mr. Wayland] was unemployed, had no recognizable income and had made statements that there was a lot of money in providing advice to stop foreclosures of property and to renegotiate loan payments. This evidence is admissible to show [Mr. Wayland's] motive, intent and knowledge, preparation, modus operandi, opportunity and identity.
>
> Opportunity is established by the fact that [Mr. Wayland] has committed nearly identical crimes . . . in the recent and distant past. The past crimes demonstrate his intent to commit this specific form of crime . . . . This is not a generalized *mens rea* element showing a propensity towards illicit behavior. This is a very narrow *mens rea* element establishing his intent to commit these specific patterns of acts in the past, and his continuing intention to carry out acts fitting closely into this mold. The crimes fit into a common scheme or plan that he has carried out . . . . Evidence of the prior crimes points to his identity as the person who is performing these illicit acts, and would help to eliminate other possible suspects. This evidence also establishes his knowledge . . . . These five factors, each of them presenting a classic exception to Rule 5-404, clearly establish the first element of the *Faulkner* test.

Under the second step of the *Faulkner* test, the State emphasized that because Mr.

Wayland had "been convicted of similar crimes in the past[,]" the State exceeded the burden of proving Mr. Wayland's involvement in the other crimes by clear and convincing evidence and proved it beyond a reasonable doubt. Finally, the State argued that evidence of Mr. Wayland's prior bad acts did not prejudice him, they "simply outline[d] the clear, unmistakable connection between" Mr. Wayland's past criminal activities and the current allegations involving Ms. D.

Shortly before trial, defense counsel for Mr. Wayland filed an opposition to the State's motion to introduce evidence of prior bad acts under Rule 5-404(b). Defense counsel argued that the evidence the State sought to introduce "includes testimony from witnesses unrelated to the case as well as a criminal conviction against Mr. Wayland." Mr. Wayland's criminal conviction was from 2018, "after the course of conduct in this criminal case started." The defense also argued that the evidence was irrelevant to "the case at hand" because "[t]he issue in this case is did Mr. Wayland provide[] agreed upon services to the complaining witness." Therefore, the defense concluded that "no probative value is gained from the admission of the evidence sought by the State."

At the pretrial hearing on the State's Rule 5-404(b) motion, the State informed the court that it wanted to offer the testimony of three individuals (Mr. M, Ms. P, and Ms. L) both as evidence of other bad acts under Rule 5-404(b) and as "part of the substantive testimony under Counts 2 through 5." Additionally, the State wished to introduce the

testimony of Mr. C[5] "solely under the 404(b) exception" and not for substantive purposes.

The defense objected "to the introduction of the other crime evidence in this matter." Defense counsel stressed that the allegations of the present case related solely to acts committed against Ms. D and did not involve any of the exceptions to Rule 5-404(b):

> In this case, none of that is relevant. The allegations of this case are that for Ms. [D], she paid my client for services, and that the State is alleging that through scheme, that he stole money from her for these services. So, the issue at trial is whether these services were provided or not.
>
> The issues for Counts 2, 3, 4 and 5 are whether they were in compliance with certain rules under PHIFA, and whether my client actually attempted to practice law without being admitted by the state Bar. My client's identity is not at issue, there's no alleged allegation of mistake. Now, these issues may become relevant possibly as rebuttal witnesses depending on what evidence is put forth by the Defense, and at that time we can have a conversation on whether some of these witnesses may be relevant as rebuttal witnesses. But at this point in time, it's pretty clear. Did my client comply with certain rules and regulations for individuals as working foreclosure consultants, and was there an agreement to provide services, and, if so, were those services provided? That's the issue at hand here.

The court allowed the State to call the four witnesses and noted it would decide whether the evidence satisfied the *Faulkner* test after it heard the testimony.

The State first called Mr. M. He testified that in 2018, he "requested services to have a modification done to my home," explaining that he wanted to modify his mortgage payments. Mr. M saw a billboard ad on the turnpike that offered help for modifications and listed Mr. Wayland's number. He contacted Mr. Wayland "to see what everything was

[5] We have randomly chosen an initial for this person to avoid any confusion with Mr. Wayland.

about and his law firm or whatever." Mr. Wayland met Mr. M at Mr. M's home:

> Once I called the telephone number, Mr. Wayland decided he would meet with me and stated that he could help me to get the modification. And so we eventually met at my home . . . and he came inside and we discussed all the details, and he asked me for a down payment at that particular time. At that time, I didn't have a whole lot of cash on me, so I gave him $150 right then and there.

At that point, Mr. Wayland had not performed any services for Mr. M, but did tell Mr. M that "he was an attorney, and he had another attorney that could work on my case and that he could guarantee me the modification." Mr. Wayland provided Mr. M with a contract that said "Radice, LLC, Law Office of Alex Radice" at the top of the page. At the bottom of the page was Mr. Wayland's signature.

Between May 2018 and November 2018, Mr. M paid Mr. Wayland for mortgage foreclosure advice a total of over $2,000 on six separate occasions. But Mr. M testified that Mr. Wayland never rendered any advice:

> Every time I kept calling him to ask him what was going on, he said he was working on it, but just keep sending me the payments, and that's exactly what I did; but I got concerned because I didn't see any results of any of the documents from Mr. Wayland.

At some point, Mr. Wayland told Mr. M that the mortgage company had approved the modification and asked him to send over the final payment. Two days after Mr. M made the final payment, Mr. M received an eviction notice. Mr. M was eventually evicted from his home without ever receiving any filings from the mortgage company.

The State next called Ms. P. She testified that she contacted Mr. Wayland in 2017 because her childcare provider "told me he was an attorney and that he worked on

modifications, and that he could help me lower—get my mortgage lowered." Mr. Wayland visited Ms. P at her home and they talked about Ms. P's finances and lowering her mortgage:

> He introduced himself to me as an attorney. He showed me his credentials. He had a big white binder and showed me awards. He showed me his degree. He showed me letters where people had given him compliments and thank you letters, and he explained to me that he had worked in my community with people that were in the same situation as myself.

Mr. Wayland told Ms. P that he could get her mortgage lowered by $500 or $600. Emails from Mr. Wayland to Ms. P were signed "Friendly Mortgage and Financial Solutions, LLC; The Law Offices of Charles Tucker, Jr."

Ms. P testified that she gave Mr. Wayland $3,500 through "three or four payments[,]" but Mr. Wayland never helped her obtain a mortgage modification:

> Towards the end of my relationship with him when I realized that—when I started receiving these letters from Wells Fargo indicating that my house was in foreclosure he told me, at that point, that "You're going to be okay," you know, "Just send me the documentation." I said, "Send you the documentation? They said that I'm going into foreclosure." He said, "Well, do you have some money?" I said, "What do you mean do I have some money?" I said, "Haven't I given you enough money?" And then he told me, he said, "Well, I can represent you in a bankruptcy case to save your home," and I said, "Well, to save my home? Why can't you take the money that I've already given you and use it towards whatever fees you need to do to file, to represent me in this bankruptcy hearing?" . . . So, I told him, no, I wouldn't be using him to represent me with my bankruptcy.

Ms. P refinanced her mortgage after she "hire[d] somebody else to do the job[.]"

Ms. L testified next. In June 2018, Ms. L contacted Mr. Wayland after seeing a yard

sign advertising help for homeowners wanting to reduce their mortgages. Ms. L met with Mr. Wayland in an office and he told her "that he could get my note down to about 1,800." Ms. L agreed and gave Mr. Wayland a down payment that day. Mr. Wayland never told Ms. L that he was an attorney, but did say that he worked with an attorney, whose name was on the paperwork that Ms. L received. Ms. L testified that Mr. Wayland "started" the mortgage modification but "didn't complete it." In total, Ms. L gave Mr. Wayland $1,500.

Mr. C testified last. In 2013, he saw a sign advertising help with mortgage reduction and called the number listed. Mr. Wayland answered the phone and told Mr. C that "he was a mortgage person, he does refinancing." Mr. C gave Mr. Wayland three separate checks, but Mr. Wayland failed to perform any services for Mr. C:

> [THE STATE]: Okay. And what was [Mr. Wayland] to do for you when you gave him these checks?
>
> [MR. C]: Well, he was supposed to have been getting me a remodification on my home to have my mortgage lowered. And after the third time—I mean, after the third check, nothing was working out, and I kept asking him. He said he was working on it, and him not getting in contact with me, then I just stopped and took my own initiative to find out what was going on with my mortgage company. They said he has not gotten in contact with them or anything . . . .

Mr. C obtained a loan modification on his own. He also sued Mr. Wayland in the Circuit Court for Montgomery County and obtained a judgment "between $1,600 and $1,800[.]"

After the witnesses testified, the court clarified what testimony the State was seeking to introduce as other bad acts evidence under Rule 5-404(b):

> [THE STATE]: Your Honor, we called four witnesses. We would like three of the four to be both substantive and 404(b) witnesses. That's [Ms. P]—

[THE COURT]: Isn't 404(b) evidence substantive evidence?

[THE STATE]: Yes, Your Honor. I guess what I'm saying is, [Mr. M] and [Ms. L] can testify to what happened to them, that in some cases he held himself out as an attorney, Mr. William Wayland. And in the three substantive, Counts 3, 4 and 5, that they didn't get contracts as required by Maryland Real Property 7-306; that he took money from them before he did anything for them, Maryland Real property 7-307; and that he did not have the care and conduct that is required under Maryland Real Property 7-309, Your Honor. And, at this point, I think it would be appropriate—

[THE COURT]: Let me ask a question—I don't mean to interrupt you—while you're looking for what you're looking for.

With respect to Ms. [P], [Ms. L] and [Mr. M], they are victims in Counts 3—the, quote/unquote, alleged victims in Counts 3, 4 and 5, is that correct?

[THE STATE]: Along with [Ms. D].

[THE COURT]: So, what other bad acts are you seeking to introduce? If the testimony they've provided today goes to Counts 3, 4, and 5, what other testimony are you requesting that you believe is other bad acts?

[THE STATE]: The only other would be Mr. [C], and since he's in Montgomery County and those occurred outside the timeframes of Counts 1 through 5—3, 4 and 5, so I'd be bringing Mr. [C's] testimony in as other crimes of evidence, Your Honor, under what we call the MIMIC exception. . . . I was just, out of an abundance of caution, adding to the argument for the others if for any reason there was a finding that substantively their testimony—[Ms. P], [Ms. L], and [Mr. M]—were not found to be substantive for that purpose, I'd bring them in under 404(b). I understand the Court's question, and it's probably—

[THE COURT]: Okay. I was a little confused. I just wanted to make sure that those three witnesses are Counts 3, 4, and 5.

* * *

So, the only other crimes evidence that you're seeking to introduce is the testimony of Mr. [C], who just testified?

[THE STATE]: Correct.

But the State also argued that the testimony should be admitted as evidence because the State was "not convicting him for the other bad acts or crimes" against Mr. M, Ms. P, Ms. L, and Mr. C.[6] Rather, the State said, the testimony demonstrated that Mr. Wayland had "intent, motive, opportunity, it's a common plan or scheme." The testimony showed that Mr. Wayland's conduct towards Ms. D was "not out of the ordinary." And the State argued also that the "probativeness is helpful in this case and would outweigh any prejudice."

The defense argued conversely that it was not "proper" to introduce evidence of other bad acts. Defense counsel distinguished *Faulkner* and argued that "the charges in this case are pretty simple":

> Either my client was doing the unauthorized practice of law or he wasn't; my client either provided goods and services based upon an oral or written contract or didn't; and then my client either complied with the rules of Real Property Article 7-306 through 7-309 or didn't. So, there's no issue of identity, or there's no issue of saying—you can't make an argument that, oh, actually there is a contract, but in a different area. It's either

[6] At oral argument in this Court, the State acknowledged that the trial prosecutor shifted theories during trial. Before the witnesses testified, the State posited that it was offering the testimony of Mr. M, Ms. P, and Ms. L both as evidence of other bad acts under Rule 5-404(b) and as "part of the substantive testimony under Counts 2 through 5." Then, after the witnesses testified, the State argued that it wasn't offering the evidence to convict Mr. Wayland of the PHIFA counts, but rather only as evidence of other bad acts under Rule 5-404(b), to "show[] that he has intent, motive, opportunity, it's a common plan or scheme." And during closing arguments, the State reminded the court it previously ruled "that the testimony of four other individuals would come in to prove" exceptions to Rule 5-404(b), "opportunity, motive, intent, common plan or scheme." We agree that the State switched its position, multiple times, on the purpose of admitting the testimony. But despite this confusion, we reach the same conclusion that the trial court erred in admitting the testimony of the four witnesses, for the reasons we discuss below.

> the contract exists or not, and it's actually specified what's required in the statute or not. So, in those circumstances, I don't think it's actually proper to actually introduce 404(b) other crimes evidence.

And because the indictment named only Ms. D (not any of the other witnesses) as a victim, defense counsel argued that "if the Court were to introduce these other witnesses that were presented here during a 404(b) other crimes motion, . . . they can only testify as other crime witnesses and not as actually to Counts 2, 3, 4 and 5 proving the matters at hand."

The court agreed with the State, applied the *Faulkner* test, and concluded that the testimony of the four witnesses (Mr. M, Ms. P, Ms. L, and Mr. C) was admissible. Under the *first* step, the court found an exception to Rule 5-404(b)'s exclusion of other bad acts—that Mr. Wayland's conduct towards the four testifying witnesses went "to motive and common scheme as to the activities that Mr. Wayland is charged with." At the *second* step of the *Faulkner* analysis, the court concluded that Mr. Wayland's involvement in the other crimes, as provided through the testimony, "has been proven by clear and convincing evidence." The court found Mr. C's testimony that he received a judgment against Mr. Wayland particularly instructive. And with respect to the *third* step, the court concluded that "the probative value of the testimony of all four witnesses . . . is more valuable than any unfair prejudice to" Mr. Wayland.

C. The Trial And Conviction.

Mr. Wayland elected to proceed by way of bench trial, which occurred on May 10 and May 12, 2021. Mr. C, Ms. L, Ms. P, and Mr. M all testified at trial. So did Ms. D. The State asked Ms. D about what happened after her last communications with Mr. Wayland,

two months before she had to vacate her home:

> [THE STATE]: What happened with the Chapter 7 bankruptcy? Were you able to get that?
>
> [MS. D]: No, I was not.
>
> [THE STATE]: What, if anything, happened with your home at this point?
>
> [MS. D]: My home was foreclosed on.
>
> [THE STATE]: And when was that, ma'am?
>
> [MS. D]: I had to be out of my home by November.
>
> [THE STATE]: What year, ma'am?
>
> [MS. D]: 2019.
>
> [THE STATE]: I'm sorry. And did you vacate your home?
>
> [MS. D]: Yes.

At the end of the State's case, defense counsel argued that the PHIFA charges should've been dismissed for unconstitutional vagueness because the indictment failed to name complaining witnesses for those counts specifically:

> Well, this is what's important and going to the specific crimes, specific person, the State in July filed a motion, July of 2020, identifying these 404(b) witnesses as other crime witnesses. Then just on Monday this week when the trial started, May 10th, 2021, said, actually, they're the victims in Counts 3 through 4 and also 404(b) witnesses. The fact that they could be other crime witnesses but then also be the alleged victims in this matter, demonstrates that it's unconstitutionally vague and doesn't put my client on notice of what he's being charged with, and doesn't protect him from double jeopardy concerns. Because is it the 404(b) witnesses that he's being charged for under that conduct? Is it [Ms. D]?

The State responded that Ms. D was the only complaining witness listed in the indictment, but still mentioned the four witnesses as part of its argument that the indictment was not unconstitutionally vague:

> Your Honor, the lead count clearly names the date, March 1st, 2017, through August 31st, 2019; it names William Wayland as the perpetrator; it names the victim, [Ms. D]; it names Prince George's County; it names the theft scheme over $1,500.
>
> Now we get to subsidiary counts—the lesser counts of Counts 2 through 5; the second count being holding himself out as a lawyer, Your Honor; same dates, same county. The victim in this case is [Ms. D]. The unity of the whole indictment should be read as a whole. [Mr. Wayland's] on notice that it's [Ms. D]. . . .
>
> The third count, the other way of doing the deception here is not giving and complying with Real Property 7-306 with the contract with 12-point type with a rescission. We have evidence from the other crimes evidence, but also Ms. [D] today, that at most Mr. William Wayland gave a two-pager that does not comply with that; same dates, March 1st, 2017, through August 31st, 2019.
>
> Counts 4 and 5. Count 4 is taking the money upfront. We've heard from Ms. [D], took the money upfront. He's not allowed under PHIFA and that provision under Count 4 to take any money upfront. He's got to complete and do his work, and then he can collect for it. He's collecting throughout for Ms. [D] and all the other crimes evidence.

The court ruled that since Count 1 of the indictment named Ms. D as the complaining witness, Counts 2 through 5 could be read to incorporate the same complaining witness. Therefore, the indictment was not unconstitutionally vague. The court did conclude, however, "that the victim in this case is [Ms. D]."

Defense counsel also moved for judgment of acquittal on all counts. The court dismissed Count 2, practicing law without a State bar license, on statute of limitation grounds. The court also dismissed Count 5, failure to exercise duty of care under PHIFA, because of a "defective charging document[.]" Mr. Wayland chose not to testify in his own defense and the defense rested, and counsel renewed the motion for judgment of acquittal

on Counts 1, 3, and 4. The trial court denied the motion and found Mr. Wayland guilty on the remaining three counts. In explaining to Mr. Wayland why it was finding him guilty, the court noted that it found the testimony of Ms. D "extremely credible" because "[s]he was very forthright" and because the court "had the opportunity to observe her, see how she testified, in addition to the documents that were provided in evidence."

Mr. Wayland was sentenced to eight years imprisonment—five years for Count 1, three years for Count 3, and a suspended three-year sentence for Count 4. The court also placed Mr. Wayland on five years of supervised probation and ordered Mr. Wayland to pay $6,000 in restitution.

II. DISCUSSION

Mr. Wayland raises five questions on appeal that we rephrase and reorder.[7] He

[7] Mr. Wayland phrased his Questions Presented as follows:

1. Was the evidence sufficient to convict Mr. Wayland of theft?
2. Was Mr. Wayland a "foreclosure consultant" under the Protection of Homeowners in Foreclosure Act ("PHIFA")?
3. Did the trial court err by applying the wrong legal standard to admit evidence of prior acts by Mr. Wayland?
4. Did the trial court err by failing to merge Mr. Wayland's sentences?
5. Did the trial court erroneously calculate the restitution amount?

The State phrased its Questions Presented as follows:

1. Was the evidence sufficient to support the trial judge's verdict of guilty of theft?
2. Was the evidence sufficient to support the trial judge's conclusion that Wayland's behavior was governed by the

argues *first* that the trial court erred in admitting evidence of Mr. Wayland's prior bad acts under Rule 5-404(b). *Second*, Mr. Wayland contends that because the State failed to prove he was a foreclosure consultant within the scope of PHIFA, he should not have been convicted of PHIFA offenses. *Third*, he argues that the evidence was insufficient to convict him of theft by deception. Mr. Wayland argues *fourth* that his sentences should have merged under the rule of lenity. And *fifth*, Mr. Wayland asserts that the trial court committed reversible error in imposing an erroneous restitution amount. Because we resolve the first two issues in Mr. Wayland's favor, we need not address the last two issues. We do, however, address Mr. Wayland's sufficiency argument.

A. The Trial Court Erred In Admitting Evidence Of Mr. Wayland's Prior Bad Acts.

First, Mr. Wayland argues that "the trial court considered the wrong standard when it weighed the unfair prejudice against the purportedly special relevance of Mr. Wayland's prior alleged conduct."[8] He asserts that if "the court properly compared the unfair prejudice

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3. Did the trial judge properly admit evidence of Wayland's prior behavior?
4. Did the trial judge correctly decline to merge Wayland's sentences?
5. Did the trial judge act within her lawful discretion in awarding $6,000 restitution?

[8] To support his argument that the court applied the wrong legal standard, Mr. Wayland relies on the trial court's statement that "if this were a jury trial," the analysis of whether to admit prior bad acts evidence "would be quite different" than the analysis in a bench trial. In its analysis, the trial court cited *Solomon v. State*, 101 Md. App. 331 (1994), which "discusse[d] the difference between a bench trial and a jury trial, and that the weighing is more strictly viewed when it's a jury trial." In *Solomon*, we

to the relevance of the prior alleged conduct, it would have excluded the evidence" from the four testifying witnesses. The State argues that the trial court didn't err in admitting evidence of Mr. Wayland's prior bad acts because that evidence "was probative of" Mr. Wayland's intent to deprive and deceive Ms. D of her money and demonstrated an absence of mistake.

"[E]vidence of other bad acts is generally not admissible . . . ." *Harris v. State*, 324 Md. 490, 500 (1991). "Evidence of other bad acts may, however, be admissible if it is relevant to the offense charged on some basis other than mere propensity to commit crime, and if it passes muster under the ever-present test of balancing relevance against unfair prejudice." *Id.* at 496–97. "Although bad act evidence is inadmissible to prove a

"compartmentalize[d] the procedural issue of joinder/severance from the evidentiary issue of the admissibility of 'other crimes' evidence[,]" separating the two legal principles and concluding that "[t]he applicability of one to the question at hand does not imply the applicability of the other." 101 Md. App. at 335 (citation omitted). Indeed, we noted that "the weighing of competing factors spelled out by *Faulkner* for an evidentiary ruling is not appropriate for a joinder/severance determination." *Id.* at 347; *see also id.* ("Once again, a weighing of probative value versus potential prejudice, taken from *Faulkner*, is no significant part of joinder/severance law.").

We agree with Mr. Wayland that the court's first statement, referencing *Solomon*—"if this were a jury trial, it would be quite different, the analysis"—is incorrect. The analysis remains the same for bench trials and jury trials, "carefully" weighing the other bad acts evidence "against any undue prejudice likely to result from its admission." *Faulkner*, 314 Md. at 635. But at the next step, the court defined the analysis correctly, concluding that "nonetheless, the Court must weigh whether or not the evidence outweighs any unfair prejudice . . . ." Ultimately, then, we agree with the State that "[t]he trial [court's] stray comment that 'bench trials are different' did not indicate that the [court] applied the wrong standard."

defendant's criminal character, Rule 5-404(b) does allow bad act evidence that has special relevance—that it is substantially relevant to some contested issue." *Stevenson v. State*, 222 Md. App. 118, 149 (2015) (cleaned up). And prior bad acts "[e]vidence has special relevance if it shows notice, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident." *Wynn v. State*, 351 Md. 307, 316 (1998).

As discussed above, in deciding whether to admit evidence of prior bad acts, trial courts must (1) "determine whether the evidence fits within one or more of the [] exceptions" enumerated in Rule 5-404(b); (2) "decide whether the accused's involvement in the other crimes is established by clear and convincing evidence"; and (3) weigh "the necessity for and probative value of the 'other crimes' evidence . . . against any undue prejudice likely to result from its admission." *Faulkner*, 314 Md. at 634–35 (cleaned up). We'll refer to this as the *Faulkner* test.

On appeal, we review the first step of the *Faulkner* test—whether there is an exception to Rule 5-404(b)'s presumptive exclusion of prior bad acts evidence—*de novo*. *Stevenson*, 222 Md. App. at 149 (citations omitted). And should "we determine that the 'bad act' evidence in question has special relevance, then we balance the probative value of and need for the evidence against the likelihood of undue prejudice[,]" the third step of the *Faulkner* test. *Id.* This balancing "implicates the exercise of the trial court's discretion, and we will only reverse the court's balancing determination if the court abused its discretion." *Id.* (cleaned up).

The State relied on several exceptions to the prior bad acts evidence in the trial court.

In its pretrial motion to introduce evidence of Mr. Wayland's prior bad acts, the State, citing to *Faulkner*, told the court that it "plan[ned] to introduce evidence of prior bad acts to establish at least five exceptions to Rule 5-404[:] opportunity, intent, common scheme or plan, knowledge and identity." After the witnesses testified at the motions hearing, the State again urged the court to admit the evidence because the testimony demonstrated that Mr. Wayland had "intent, motive, opportunity, [] a common plan or scheme" to deprive and deceive Ms. D of her property. As an aside, the State did mention the absence of mistake exception, but qualified that it would apply only if Mr. Wayland "were to testify . . . ."

On appeal, the State argues that the absence of mistake and intent exceptions to Rule 5-404(b)'s prohibition apply to show that Mr. Wayland intended to deceive and deprive Ms. D of her property. But on appellate review, we "will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court . . . ." Md. Rule 8-131(a). Because the State mentioned that the absence of mistake exception would apply only if Mr. Wayland testified, for purposes of this appeal we are concerned solely with intent as a possible exception to the presumptive exclusion of prior bad acts evidence. And we're not persuaded that admitting the testimony of Mr. M, Ms. P, Ms. L, and Mr. C had special relevance in demonstrating that Mr. Wayland intended to deprive and deceive *Ms. D* of her property. Mr. Wayland is right that "[t]he allegations of this case are that for Ms. [D], she paid [Mr. Wayland] for services, and the State is alleging that through scheme, that he stole money from her for these services." This left the issue at trial as "whether these services were provided or not[,]" an issue not relevant to Mr. Wayland's prior bad acts toward the

testifying witnesses other than Ms. D.

Ms. D testified at trial, and as we discuss below, her testimony was sufficient for the trial court to find beyond a reasonable doubt that Mr. Wayland was guilty of theft by deception. Admitting the four witnesses' testimony into evidence didn't add anything substantive to the State's case—it only acted to "suggest that because [Mr. Wayland] is a person of criminal character, it is more probable that he committed the crime for which he is on trial." *Behrel v. State*, 151 Md. App. 64, 123 (2003) (cleaned up). And that sort of suggestion or inference is the very reason why Rule 5-404(b) prohibits evidence of prior bad acts presumptively.

Because there was some confusion at the trial level of whether the witness's testimony was being offered for evidence of the crimes listed in the indictment or solely as Rule 5-404(b) evidence, we acknowledge that our analysis would look different if Mr. M, Ms. P, and Ms. L were indeed fact witnesses. If they had been complaining witnesses whose testimony supported the charges themselves, their testimony could have been offered as "part of the substantive testimony under Counts 2 through 5" and the court would have been correct to admit their testimony as part of the State's case. But that isn't what happened. The court found specifically that Ms. D was the only complaining witness in the case. Once it made this finding, the testimony of the other witnesses (Mr. M, Ms. P, Ms. L, and Mr. C) could only be admitted as evidence of other bad acts if all three steps of the *Faulkner* test were satisfied. And as we determined above, the court erred in finding that the State satisfied the first step of the *Faulkner* test because there were no applicable exceptions to Rule

5-404(b)'s prohibition.[9] We therefore hold that the trial court erred in admitting the testimony of Mr. M, Ms. P, Ms. L, and Mr. C as evidence of Mr. Wayland's prior bad acts.

B. Mr. Wayland's PHIFA Convictions Must Be Reversed Because The Onset Of His Liability Under PHIFA Is Too Indeterminate Based On The Record Before Us.

Mr. Wayland argues *second* that he was not a "foreclosure consultant," an element that the State had to prove beyond a reasonable doubt to sustain his convictions under PHIFA. His argument revolves around the statute's definition of "homeowner"—he could not have acted as a foreclosure consultant, he contends, because "he did not solicit or contact a 'homeowner[,]'" specifically Ms. D, "to offer services." Under Maryland Code (1974, 2015 Repl. Vol., 2021 Cum. Supp.), section 7-301(i) of the Real Property Article ("RP"), homeowner is defined as "the record owner of a residence in default or a residence in foreclosure . . . ." As such, Mr. Wayland asserts, he wasn't a foreclosure consultant until he offered services to someone whose home was in foreclosure already. And because Mr. Wayland's offers to Ms. D began *before* her home was in foreclosure, he argues that his conduct fell outside the scope of PHIFA and that "[t]he evidence at trial was insufficient to show that [he] was a foreclosure consultant as a matter of law . . . ." The State characterizes his argument as lacking common sense, that because Mr. Wayland's actions (which followed contact initiated by him) ultimately drove Ms. D into foreclosure, he

[9] Even though we don't need to address the other two steps of *Faulkner* since we found the first step unsatisfied, we observe that the probative value of the witnesses' testimony, as pure prior bad acts evidence, also outweighed any unfair prejudice towards Mr. Wayland.

"should not be heard to carve out an exception that would allow him . . . to have some privilege against prosecution for some of the attendant crimes because she was solvent when they met."

Mr. Wayland was convicted of violating RP § 7-306 for acting as a foreclosure consultant without providing Ms. D with a foreclosure consulting contract. RP § 7-306(a)(3) requires a foreclosure consultant to provide a homeowner with a signed and dated foreclosure consulting contract that "[f]ully disclose[s] the exact nature of the foreclosure consulting services to be provided . . . ."[10] He also was convicted of violating RP § 7-307 for acting as a foreclosure consultant and receiving payment from Ms. D before performing fully the services he promised. Under RP § 7-307(2), a foreclosure consultant is prohibited from "receiv[ing] any compensation until after the foreclosure consultant has fully performed each and every service the foreclosure consultant contracted to perform . . . ."

To convict Mr. Wayland under these two PHIFA offenses, then, the State was required to prove that he did indeed act as a foreclosure consultant. Under RP§ 7-301(c)(1)–(2), there are eleven different definitions of foreclosure consultant. For example, a person can be a foreclosure consultant if they "solicit[] or contact[] a homeowner in writing, in person, or through any electronic or telecommunications medium and directly or indirectly makes a representation or offer to

[10] Foreclosure consulting contract is defined as "a written, oral, or equitable agreement between a foreclosure consultant and a homeowner for the provision of any foreclosure consulting service." RP § 7-301(d).

perform any service that the person represents will [s]top, enjoin, delay, void, set aside, . . . or postpone a foreclosure sale[.]" *Id.* § 7-301(c)(1)(i). A person also is considered a foreclosure consultant if they contact a homeowner and make a representation that they will "[o]btain forbearance from any servicer, beneficiary or mortgagee[.]" *Id.* § 7-301(c)(1)(ii). But the timing matters: the victim's status as a homeowner is an element of the charge, and to violate these statutes, the alleged services must have been provided (or not) to someone who met that definition.

Here, the evidence was insufficient to support these convictions because the record doesn't allow a finding as to when Ms. D met that definition. Ms. D did testify that she was forced to move out of her home in November 2019 because her home went into foreclosure. From that, the court could have inferred, and we can infer, that she became a homeowner within the meaning of PHIFA and became entitled to the statutory provisions that protect an individual in foreclosure at some point. The problem, on this record, is that neither the trial court nor this Court knows *when* Ms. D became a homeowner.

Again, a person becomes a statutory homeowner, "the record owner of a residence in default or a residence in foreclosure[,]" RP § 7-301(i), in one of two ways. *First*, someone can become a homeowner (and thus be entitled to PHIFA protections) if their residence is in default, meaning that they have failed to pay their mortgage for at least 60 days. *Id*. § 7-301(j). *Second*, someone can become a homeowner if their residence is in foreclosure, meaning that "an order to docket or a petition to foreclose has been filed." *Id.* § 7-301(k). In this case, the State failed to prove either. The record contains no evidence

that Ms. D failed to pay her mortgage for at least sixty days, nor that an actual order to docket was filed, either of the events that would trigger Ms. D's status as a homeowner whose residence was in foreclosure.

This leaves us with a record that doesn't answer this threshold question. At best, the record is rife with confusion in this regard. Ms. D testified at trial that Mr. Wayland told her that her home was in foreclosure at some point between the time she received the October 30, 2018 loan modification letter and December 2018, when Ms. D began paying Mr. Wayland for his help filing bankruptcy on her behalf. But then on April 15, 2019, Ms. D texted Mr. Wayland that she received notice from the court that "a foreclosure [was] on the way" without any documentation of an order to docket. And the October 30, 2018 loan modification letter itself mentioned nothing about an order to docket or petition to foreclose.

And the absence of timing evidence matters. To convict Mr. Wayland of the PHIFA offenses, the State had to prove that he acted as a foreclosure consultant. But we can't know when he became a foreclosure consultant because we don't know when Ms. D became a homeowner under the statute. In other words, the onset of Mr. Wayland's PHIFA liability is too indeterminate on this record before us. And because we don't know which of the several transactions between Mr. Wayland and Ms. D, if any, would qualify Mr. Wayland as a foreclosure consultant, the evidence was insufficient to convict him of violating PHIFA and we reverse his PHIFA convictions.

C. The Evidence Was Sufficient To Convict Mr. Wayland Of Theft By Deception.

"In cases where this Court reverses a conviction, and a criminal defendant raises the sufficiency of the evidence on appeal, we must address that issue, because a retrial may not occur if the evidence was insufficient to sustain the conviction in the first place." *Benton v. State*, 224 Md. App. 612, 629 (2015) (citations omitted). So although we resolve the case in Mr. Wayland's favor on the grounds discussed above, we must address his argument that the evidence was insufficient to convict him of theft by deception.

"In assessing the sufficiency of the evidence to sustain a criminal conviction," we "determine whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Manion*, 442 Md. 419, 430 (2015) (cleaned up). "Because the fact-finder possesses the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence." *Smith v. State*, 415 Md. 174, 185 (2010) (citations omitted). So "'when evaluating the sufficiency of the evidence in a non-jury trial, the judgment of the trial court will not be set aside on the evidence unless clearly erroneous[.]'" *Manion*, 442 Md. at 431 (*quoting State v. Raines*, 326 Md. 582, 589 (1992)). This standard of review "applies to all criminal cases, regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone." *Smith*, 415 Md. at 185 (citation omitted).

Maryland Code (2002, 2021 Repl. Vol.), section 7-104(b)(1) of the Criminal Law Article ("CR") prohibits a person from "obtain[ing] control over property by willfully or knowingly using deception, if the person intends to deprive the owner of the property[.]" Under the theft statute, "an offender's intention or knowledge that a promise would not be performed may not be established by or inferred solely from the fact that the promise was not performed." *Id.* § 7-104(f). This doesn't mean, though, "that a conviction for theft by deception may never be based, in part, upon the defendant's failure to perform, so long as other evidence sufficient to permit the trier of fact to ascertain the defendant's intent exists." *Manion*, 442 Md. at 434–35. And because intent is subjective, the factfinder determines intent "by a consideration of the accused's acts, conduct and words." *Raines*, 326 Md. at 591 (citation omitted).

"[T]heft by deception is a specific intent crime requiring both an intent to deceive and an intent to deprive." *Manion*, 442 Md. at 433–34 (citations omitted); *see also State v. Coleman*, 423 Md. 666, 674 n.5 (2011) ("Thus, irrespective of whether [a defendant] intended to deceive[,] . . . a conviction for theft cannot stand without the intent to deprive."). Mr. Wayland argues that the State failed to prove both an intent to deprive and an intent to deceive, that he "could not have intended to deprive Ms. [D] of her money[,]" because he provided the services that she paid for. In other words, he argues that he "had a right to Ms. [D's] money because he planned to and did provide services." The State rejects this argument, asserting that the evidence at trial was sufficient to convict Mr. Wayland of theft by deception.

1. *The evidence was sufficient for the trial court to find that Mr. Wayland intended to deprive Ms. D.*

We start with intent to deprive. "'Deprive' means to withhold property of another":

> (1) permanently;
>
> (2) for a period that results in the appropriation of a part of the property's value;
>
> (3) with the purpose to restore it only on payment of a reward or other compensation; or
>
> (4) to dispose of the property or use or deal with the property in a manner that makes it unlikely that the owner will recover it.

CR § 7-101(c)(1)–(4). And "property of another" is "property in which a person other than the offender has an interest that the offender does not have the authority to defeat or impair, even though the offender also may have an interest in the property." *Id.* § 7-101(j). Therefore, when an offender "has a right to receive money or property, he cannot be guilty of stealing it." *Coleman*, 423 Md. at 675 (citation omitted). Moreover, "even an honest belief in the right to receive money or property negates the mens rea element of theft . . . ." *Id.* at 676.

Mr. Wayland compares *Coleman* and distinguishes *Manion* to argue that he didn't intend to deprive Ms. D of her property. In *Coleman*, the Court of Appeals "consider[ed] the State's effort to criminalize the breach of residential construction contracts." 423 Md. at 669. Mr. Coleman, a home builder, contracted with buyers to build their homes. *Id.* at 670. He used initial advances from the buyers to purchase the lots. *Id.* at 671. He hired one company to obtain permits, but that company failed to do so by the deadline. *Id.* So he retained another company and notified the buyers of the change. *Id.* at 672. "He also

consulted a builder about the project and retained two individuals to process permits and provide real estate consulting." *Id.* at 671. Unfortunately, Mr. Coleman "ran out of money before he was able to obtain the required permits[,]" and "construction never went forward." *Id.*

Mr. Coleman was convicted of eight separate counts of theft by deception. *Id.* at 669. But the Court of Appeals rejected the State's argument that Mr. Coleman "stole the money that he took in exchange for the promise to build, because he never intended to complete construction." *Id.* at 677. Quite the opposite—in the Court's view, Mr. Coleman's actions of "work[ing] with several companies to draft architectural drawings and floor plans[,]" and retaining different companies to obtain permits "manifested his intent to perform." *Id.* The Court found the evidence insufficient to convict Mr. Coleman of theft because "no rational jury could conclude that [Mr.] Coleman intentionally deprived the buyers of their money by overcharging for their lots and keeping the excess money with no intent to perform the rest of the contracts." *Id.*

The Court came to the opposite conclusion in *Manion*. There, the Court considered, as it had in *Coleman*, "the circumstances under which the breach of a residential construction or remodeling contract rises to the level of criminal conduct." 442 Md. at 423. Mr. Manion entered into several construction contracts with various homeowners. *Id.* For example, Mr. Manion entered into a contract with the Murphys to perform siding work on their home. *Id.* The Murphys paid Mr. Manion $10,000, but "no work was performed and no materials were delivered." *Id.* at 424. Mr. Manion offered several excuses for his failure

to perform, *id.*, and the same pattern repeated itself with three other customers. *Id.* at 425–26. Mr. Manion also entered into a contract with another family, the Russells, to perform home renovations for them. *Id.* at 426. Although Mr. Manion did perform a significant amount of work on the Russell home, "roughly $150,000 of the more than $350,000 paid by the time of termination [was] work not performed and materials not delivered." *Id.* at 429.

Mr. Manion was convicted of five counts of theft by deception. *Id.* We reversed in an unreported opinion, "concluding that 'there [was] insufficient evidence to support a reasonable inference that [Mr. Manion] had the specific intent to commit theft at the time he obtained monies.'" *Id.* at 430. But the Court of Appeals disagreed, holding that there was "sufficient circumstantial evidence upon which the trier of fact could infer reasonably that [Mr.] Manion intended to deprive each homeowner of their property by deception . . . ." *Id.* The Court agreed with the State that the evidence in the case went "beyond mere non-performance, and instead exhibit[ed] an intent to deprive." *Id.* at 436. The Court reasoned that there was plenty of evidence demonstrating Mr. Manion's intent to deprive:

> With respect to the contracts [Mr.] Manion entered into . . . the State presented evidence that [Mr.] Manion failed to begin, much less complete, the projects he contracted to perform or deliver construction materials, despite having been paid. . . . After failing to perform, [Mr.] Manion provides each of the homeowners with numerous representations which the trial court, after considering the evidence before it and weighing the credibility of the witnesses, found to be false or incredulous . . . . After failing to perform, the homeowners made several attempts to obtain a refund, and ultimately stopped hearing from [Mr.] Manion.

Id. at 437–38. And "viewed collectively in the context of this case," the Court concluded that the evidence was sufficient to "support a reasonable inference that [Mr.] Manion entered into the construction contracts with the intent to deprive each of the homeowners of their property." *Id.* at 439.

The Court emphasized that its opinion in *Manion* didn't "contradict[] the results reached in *Coleman*," noting that although both Mr. Coleman and Mr. Manion "failed to complete construction contracts, the similarity between the two ends there." *Id.* at 440, 441. Mr. Coleman, the Court reasoned, "provided buyers with title to land in exchange for an initial payment and requested no additional money for construction . . . ." *Id.* at 441. Not so with Mr. Manion, who "provided no services or materials in exchange for money he received." *Id.* And the Court noted that even though Mr. Manion did perform projects for the Russells, his efforts did not "parallel the efforts" of Mr. Coleman because in Mr. Coleman's case, "there was simply no evidence bearing on [his] intent apart from the fact that he failed to perform and that he received more money for the unimproved lots than he actually paid." *Id.* at 442 (*citing Coleman*, 423 Md. at 676–77). Again, not so with Mr. Manion.

Mr. Wayland asserts that he "acted similarly" to Mr. Coleman "because he performed services, demonstrating his lack of intent to deprive[,]" and distinguishes his case from *Manion* because, contrary to Mr. Manion, he "performed on his obligations" after receiving payment from Ms. D. The State disagrees, asserting that unlike the circumstances in *Coleman*, "the negotiations between [Mr.] Wayland and [Ms. D] were

suffused with fraud from the very start." Mr. Coleman, the State argues, was irresponsible with his money, but still made efforts to comply with the contracts. Mr. Wayland, however, "was *from the beginning* engaged in a pattern of deception and lawbreaking" and therefore the trial court "had before [it] sufficient evidence to infer that [Mr.] Wayland intended to permanently deprive [Ms. D] of the money he tricked her into paying him." (Emphasis in original.) The State also argues that Mr. Wayland's conduct was similar to Mr. Manion's—"offer[ing] a string of falsehoods to his clients, to keep them from cutting off his pay."

We agree with the State. The evidence adduced at trial supported a finding that at their first meeting, Mr. Wayland lied to Ms. D and told her he was a lawyer. After giving Mr. Wayland $1,000 as a down payment, Mr. Wayland "kept coming back for different money[,]" each time telling Ms. D that he needed more money for mitigation purposes. It's true that Ms. D was approved for a trial loan modification on October 30, 2018. But the trial court found that once Ms. D received this letter, Mr. Wayland's services were no longer needed. And yet, "Mr. Wayland continued to take money from her[,]" telling her that her home was in foreclosure and offering to help her file for two different types of bankruptcy in exchange for compensation. Indeed, unlike Mr. Coleman, Mr. Wayland requested additional money from Ms. D on at least ten different occasions. On this record, the evidence was sufficient for the trial court to find that Mr. Wayland intended to deprive Ms. D of her property and money.

2. The evidence was sufficient for the trial court to find that Mr. Wayland intended to deceive Ms. D.

Mr. Wayland argues as well that he "intended to perform and did perform," and

therefore "did not intend to deceive by promising performance he knew he would not provide." The definition of deception is "knowingly to":

> (i) create or confirm in another a false impression that the offender does not believe to be true;
>
> (ii) fail to correct a false impression that the offender previously has created or confirmed;
>
> * * *
>
> (vii) promise performance that the offender does not intend to perform or knows will not be performed[.]

CR § 7-101(b)(1). Deception doesn't, however, "include puffing or false statements of immaterial facts and exaggerated representations that are unlikely to deceive an ordinary individual." *Id.* § 7-101(b)(2).

Mr. Wayland claims that although he "allegedly represented that he was a lawyer" to Ms. D, he didn't use that representation to obtain payment from her. He characterizes his statement that he would fight for her as her lawyer as "an example of immaterial puffery" and his statements to Ms. D that he would be successful as mere predictions, not misrepresentations. The State acknowledges that puffery falls outside the scope of what constitutes deception, but disputes Mr. Wayland's characterization of the statements. The State argues that Mr. Wayland made specific claims and knew at the time he made them that those claims were false, so his statements were not puffery.

Again, we agree with the State. The trial court concluded that once Ms. D received word that she was accepted for a trial loan modification on October 30, 2018, Mr. Wayland had no business in continuing to receive money from her, but nevertheless continued to receive money from Ms. D through July 2019. What's more, the original "Installment Plan

Agreement" listed Ms. D's balance as $1,995 for Mr. Wayland's services, yet the court found that Ms. D paid Mr. Wayland an additional "$6,000 above and beyond what she should have paid." The evidence was sufficient to support a finding that Mr. Wayland promised performance to Ms. D that he never intended to perform or knew he would not perform, CR § 7-101(b)(1)(vii), and thus that he intended to deceive Ms. D.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. APPELLEE TO PAY COSTS.