Circuit Court for Caroline County
Case No. C-05-CR-18-326

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 836

September Term, 2019

BRUCE WAYNE CARLISLE

v.

STATE OF MARYLAND

Friedman,
Gould,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Gould, J.

Filed: September 10, 2020

Bruce Carlisle was charged, in the Circuit Court for Caroline County, with multiple sexual offenses. After Mr. Carlisle waived his right to a jury trial and pleaded not guilty pursuant to an agreed statement of facts, the court found him guilty of one count of second-degree sex offense and sentenced him to a term of 20 years' imprisonment. In this appeal, Mr. Carlisle presents a single question which we have rephrased as follows:

> Did the circuit court err in permitting the State to introduce evidence of other sexually assaultive behavior to rebut a defense of fabrication under § 10-923 of the Courts and Judicial Proceedings Article of the Maryland Code ("CJP")?

We answer Mr. Carlisle's question in the negative and affirm the judgment of the circuit court.

BACKGROUND

In April 2013, Mr. Carlisle began regularly sexually abusing his girlfriend's 11-year-old granddaughter, M.W. The abuse, which involved M.W. performing fellatio[1] on Mr. Carlisle at his home, occurred on multiple occasions over the course of two years. During that time, Mr. Carlisle also performed similar sex acts with M.W.'s half-sister, T.W., who was two years younger. Several years later, M.W. reported the abuse to her high school guidance counselor, and Mr. Carlisle was arrested and charged with 12 separate offenses, including ten counts of second-degree sex offense against M.W. and one count of second-degree sex offense against T.W.

[1] We are mindful that the use of the word "perform" to describe a victim's conduct in a sexual assault case can be problematic. Specifically, it may unintentionally suggest that certain conduct was voluntary or pleasurable when it was decidedly neither. We use this term because, in the absence of an evidentiary record, we are constrained to describe the crime using the same terminology employed by the parties in the stipulation.

Prior to trial, the State filed a motion seeking to introduce evidence of "past bad acts of sexually assaultive behavior" committed by Mr. Carlisle. That motion was filed pursuant to CJP § 10-923, which provides, in pertinent part, that, in a criminal trial for certain enumerated sexual offenses, "evidence of other sexually assaultive behavior by the defendant occurring before or after the offense for which the defendant is on trial may be admissible[.]" Md. Code Ann., CJP § 10-923(b) (1974, 2013 Repl. Vol.).[2]

[2] CJP § 10-923 provides:

(a) In this section, "sexually assaultive behavior" means an act that would constitute:

(1) A sexual crime under Title 3, Subtitle 3 of the Criminal Law Article;
(2) Sexual abuse of a minor under § 3-602 of the Criminal Law Article;
(3) Sexual abuse of a vulnerable adult under § 3-604 of the Criminal Law Article;
(4) A violation of 18 U.S.C. Chapter 109A; or
(5) A violation of a law of another state, the United States, or a foreign country that is equivalent to an offense under item (1), (2), (3), or (4) of this subsection.

(b) In a criminal trial for a sexual offense listed in subsection (a)(1), (2), or (3) of this section, evidence of other sexually assaultive behavior by the defendant occurring before or after the offense for which the defendant is on trial may be admissible, in accordance with this section.

(c) (1) The State shall file a motion of intent to introduce evidence of sexually assaultive behavior at least 90 days before trial or at a later time if authorized by the court for good cause.
(2) A motion filed under paragraph (1) of this subsection shall include a description of the evidence.
(3) The State shall provide a copy of a motion filed under paragraph (1) of this subsection to the defendant and include any other

(Continued…)

The statute also provides that a court may admit such evidence if, following a hearing, the court found and stated on the record that: (1) the evidence was being offered to either prove lack of consent or rebut an allegation that a minor victim fabricated the sexual offense; (2) the defendant had an opportunity to cross-examine the witness who was testifying to the sexually assaultive behavior; (3) the sexually assaultive behavior had been proven by clear and convincing evidence; and (4) the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. CJP § 10-923(d) and (e).

The "sexually assaultive behavior" at issue here related to a prior criminal case in which Mr. Carlisle had pleaded guilty to one count of fourth-degree sex offense involving a 12-year-old female victim, A.W. The State disclosed its intention to call A.W. as a witness at Mr. Carlisle's upcoming trial to rebut any contention that the victims in that case, M.W. and T.W., were fabricating their allegations.

> information required to be disclosed under Maryland Rule 4-262 or 4-263.
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> (d) The court shall hold a hearing outside the presence of a jury to determine the admissibility of evidence of sexually assaultive behavior.
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> (e) The court may admit evidence of sexually assaultive behavior if the court finds and states on the record that:
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> (1) The evidence is being offered to:
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> (i) Prove lack of consent; or
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> (ii) Rebut an express or implied allegation that a minor victim fabricated the sexual offense;
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> (2) The defendant had an opportunity to confront and cross-examine the witness or witnesses testifying to the sexually assaultive behavior;
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> (3) The sexually assaultive behavior was proven by clear and convincing evidence; and
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> (4) The probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

At the hearing that followed, the State reiterated the arguments that it made in its motion and added that evidence of Mr. Carlisle's prior sexually assaultive behavior was "incredibly probative" because the State was "not going to have scientific evidence in this case" but instead would be relying solely on the testimony of the victims. The State also argued that the evidence was probative because Mr. Carlisle's likely defense would be that "the victims in this case are fabricating their story."

In response, defense counsel argued that the evidence should not be admitted because CJP § 10-923 was unconstitutional and violated his due process right to a fair trial. Defense counsel also argued that the evidence's probative value was "substantially outweighed by the prejudicial effect."

Following those arguments, the circuit court requested more detail as to what the prior victim, A.W., would testify. The State then provided the court with a copy of the police report from that prior case, in which A.W. reported that, in April 2007, she was at a residence with Mr. Carlisle watching a movie; that Mr. Carlisle "kept tickling" and "messing with" her; and that he "fingered" and "licked" her. A.W. also stated that M.W., then five years old, was there as well and that Mr. Carlisle also "tickl[ed]" her. A.W. ultimately told her mother about the incident, which resulted in Mr. Carlisle being charged and later pleading guilty to one count of fourth-degree sex offense.

After reviewing A.W.'s statement, the circuit court stated that it was "pretty clear" that there was "a prejudicial effect to this being introduced" but that "it's just a question of whether the probative value is substantially outweighed by the danger of unfair prejudice."

Ultimately, the court decided to hold the matter under consideration and allowed the parties to present additional argument at a second hearing a week later.

In advance of the second hearing, Mr. Carlisle filed a supplemental motion in which he additionally argued that CJP § 10-923 violated "the principle of separation of powers." Mr. Carlisle argued that the Maryland Constitution authorized the judicial branch to establish the rules of evidence and that, in making those rules, the judicial branch had already determined the circumstances under which "propensity evidence" could be admitted at trial. Mr. Carlisle maintained that CJP § 10-923 was in "direct contravention" to those rules.

The circuit court ultimately rejected Mr. Carlisle's constitutional arguments, finding that CJP § 10-923 afforded the court "some degree of discretion" in determining whether to admit evidence under the statute. The court also found that, although the statute had "a tinge of vagueness," it nevertheless incorporated some exceptions so that not "every sex offender has their record introduced as part of the case."

As for the evidence in Mr. Carlisle's case, the circuit court found, pursuant to CJP § 10-923, that there was an express allegation by Mr. Carlisle that the victims had fabricated the offense; that Mr. Carlisle had an opportunity during his prior criminal case to cross-examine A.W. regarding the "sexually assaultive behavior"; that Mr. Carlisle would have the opportunity to cross-examine A.W. should she testify in the current case; and that the sexually assaultive behavior had been proven by clear and convincing evidence. The court then stated:

> [S]o that really just leaves the last question which is whether the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. Obviously, that's a loaded and somewhat subjective statement and . . . there certainly could be a situation that was so remotely connected to what the instant charges are that it would . . . not have any particular probative value and would only be, have a purpose of laying unfair prejudice on the Defendant. So . . . maybe if it was . . . some [fourth-degree] sex offense that took place in a bar 25 years ago between two otherwise adult individuals and then it was just being basically thrown in for no real apparent reason other than to show a predilection for acting in such a fashion, then . . . I would think those would be the type[s] of cases where there wouldn't be any particular probative value with regard to this. In this case, again, I don't know the exact overlap, but it's certainly in and around the same time frame, the same household, the same, . . . or at least seems as if it's going to be a similar description of behavior or, . . . maybe that makes it that much more prejudicial, but it certainly amps up the probative value when it comes again directly towards the point of the statute, which is to determine whether there was a need to rebut an expressed allegation that the minor victim fabricated the sexual offense. So . . . that is my, my best interpretation of the statute, decline to, to invalidate it on unconstitutional grounds at this point for the arguments previously made and discussed and so I'm, again, my preliminary ruling is that the testimony consistent with what was presented would be admissible in some form with regard to the Defendant in this case. Now, one thing that was bandied around before and again this is just my best attempt at, at determining what is fair and appropriate, I think the testimony is allowed in, and what form that's going to take, we can discuss the niceties of that in a minute.

Defense counsel then asked for clarification as to whether the court was allowing A.W. to testify but prohibiting her from mentioning Mr. Carlisle's conviction, and the court responded that it was "still formulating [its] thoughts on that."

After expressing his concern about the logistics of permitting A.W. to testify but prohibiting any mention of Mr. Carlisle's conviction, defense counsel proposed that the parties submit a true test copy of Mr. Carlisle's prior conviction with an agreed statement of facts as to the content of A.W.'s testimony. In so doing, defense counsel stated that he

was "not waiving any of the objection[s]" he "raised to the admissibility of the evidence." Following that comment, the circuit court declared, "that's a continuing objection."

The circuit court ultimately agreed that defense counsel's suggestion was "the least fraught with danger" but that the parties would have to "figure out how [they] want[ed] to do that." The court then stated:

> [S]o I guess my suggestion at this point is going to be, understanding that any agree[ment] of statements is not a waiver [of] the objection to the admission and although you probably would need to . . . remember to . . .
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> [r]enew that [objection] at the appropriate time at trial, . . . I think I'm just going to trust the two of you to figure out how you would like to do that. Again, I think just based on the ruling today and the current posture is that I would allow the State to call [A.W.] But, if there is some cleaner way to do that, I can tell you, I would certainly think that would be in everyone's interest to have, you know, what would otherwise potentially be a sort of a wild card testimony, which is always the case, I guess, but you know, probably more so under this set of circumstances.
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> * * *
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> I mean at the end of the day, again, based on the ruling right now, she can testify as a live witness and if there's some things she should be limited from, you can try to do that just as you would with any witness, but, . . . everyone sort of take your chances, or if you can come to some agreement, then that's fine too. I'm open to whichever option.

At that point, the proceedings concluded.

When the parties returned to court for the scheduled trial, counsel informed the court that Mr. Carlisle would be entering a plea of not guilty with an agreed statement of facts[3]

[3] Because the parties described the statement as an "agreed statement of facts," we will also refer to it as such in our opinion. However, as discussed in more detail below, the statement is more accurately characterized as a stipulation on the evidence.

on a single count of second-degree sex offense and that the State would nolle pros the remaining counts. After the court engaged in a colloquy with Mr. Carlisle and determined that he was entering the plea knowingly and voluntarily, the State read the following statement of facts into the record:

> [O]n May 3rd, 2018 . . . [M.W.] disclosed being sexually abused by a member of her household from ages 11 to age 13. . . . [M.W.] identified her abuser as [Mr. Carlisle]. . . . In June of 2013 [M.W.] was told by her sister[, T.W.,] . . . about [Mr. Carlisle] touching her. [M.W.] said she couldn't help [T.W.] because he was doing the same thing to her. . . . [M.W.] would testify that she would sleep in the living room on the couch. She would be the only child in the living room over at [Mr. Carlisle's] house. [Mr. Carlisle] would walk out from his bedroom on the first floor of the house and have her, as she says, suck [his] penis, which would be fellatio, which would be a sex act. [M.W.] said [Mr. Carlisle] would have both her and [T.W.] perform the same sex act at his Greensboro residence and he would ejaculate in different locations. . . . [M.W.] was asked how many times this occurred with [Mr. Carlisle]. She said a lot. She was asked if it occurred more than ten times and she stated yes. [T.W.] was interviewed in California, where she resides. She was asked about things happening between her and [Mr. Carlisle]. The State would expect her to testify that . . . it happened at . . . the same residence[.] . . . [T.W.] was asked to describe one occasion that it happened at that residence. Said [Mr. Carlisle] woke her up and said they had to go feed the dogs and the same sex act occurred at that point.

The State then read the following statement regarding the prior sexually assaultive behavior involving A.W.:

> The State would expect [A.W.] to testify consistent with her voluntary written statement given at the time to the Greensboro police on the 9th of April, 2007, stating that she was with [Mr. Carlisle] and first we watched Happy Feet, then we watched A Stranger Calls. It was bedtime and [Mr. Carlisle] kept tickling me and [M.W.] and then [M.W.] was awake some of the time, but she fell asleep and [Mr. Carlisle] keeps messing with me. He fingered me, licked me, but I was acting like I was asleep and had covers on my face so he wouldn't know I was awake, but he stopped and then he did it again. Then I fell asleep and I was like not [sic]. When I fell asleep, then I came home, but before I came home [Mr. Carlisle] said are you going to tell

> Mom and [J.]? I said no, I was lying to him. Then he said, are you going to come back? I said yes. Then I was lying to him. Then I told my mom and [J.], but [J.] walked out. I think he was mad. The State would then produce a certified copy of [Mr. Carlisle's] plea of guilty to [fourth-degree] Sex Offense involving that case.

When the State finished its proffer, the court asked defense counsel if there was anything he wanted to "add, correct, or clarify." Defense counsel responded that he wanted to make sure that the record was clear regarding his objection "to the admissibility of [A.W.'s] statement under Courts and Judicial Proceedings 10-923." The court then referenced the prior motions hearing and stated that its "ruling today is the same as what was placed on the record the other day." The court added that defense counsel's objection was overruled and "therefore I think preserved for any appellate review on both the constitutional grounds, as well as the rest."

The circuit court then found Mr. Carlisle guilty of one count of second-degree sex offense. This timely appeal followed.

DISCUSSION

Mr. Carlisle contends that evidence of his prior sexually assaultive behavior involving A.W. should have been excluded because the statute under which it was admitted, CJP § 10-923, violates the separation of powers doctrine and thus is unconstitutional. Mr. Carlisle further argues that, even if the statute is constitutional, the circuit court erred in admitting the evidence because the court did not make the requisite findings under the statute and because the evidence's probative value was substantially outweighed by the danger of unfair prejudice. We disagree.

I.
Preservation

Before we can address the merits of Mr. Carlisle's appeal, we must first determine whether, as the State contends, Mr. Carlisle failed to preserve the issues for appeal. The State argues that the court's pretrial ruling was preliminary and that the court made clear "that any dispositive ruling would be made at trial once it was clear what, precisely, the State was going to introduce." According to the State, to preserve the issue for appeal, Mr. Carlisle was required to object when the evidence was introduced at trial. The State argues that because there was never a trial, "[the court's] preliminary ruling never became crystallized in a way that drew an objection to the admissibility of specific evidence." The State additionally contends that by agreeing to proceed on an agreed statement of facts, Mr. Carlisle "expressly agreed to the facts underlying A.W.'s sexual assault without demanding evidence of it–which had the practical effect of obviating any objection."

We disagree with the State's position. To be sure, the court characterized its ruling as preliminary, but only in the sense that neither the court nor the parties had settled on the form in which the evidence would be admitted. As to threshold issues—whether CJP § 10-923 is constitutional and whether the elements of the statute were satisfied with respect to the prior assaultive behavior at issue—the court did not waffle.

The State's contention that Mr. Carlisle's decision to proceed by way of an agreed statement of facts "obviated" his objection to the admissibility of A.W.'s testimony is more complicated. The State likens the court's ruling on the CJP § 10-923 issue to the sort of pretrial evidentiary ruling that is not preserved unless the objection is renewed when the

evidence is offered at trial. See, e.g., Reed v. State, 353 Md. 628, 638 (1999) ("When the evidence, the admissibility of which has been contested previously in a motion in limine, is offered at trial, a contemporaneous objection generally must be made pursuant to Maryland Rule 4-323(a) in order for that issue of admissibility to be preserved for the purpose of appeal."); Md. Rule 4-323(a) ("An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived. . . .").

On this narrow issue as framed by the State, we disagree. In Bishop v. State, 417 Md. 1, 20 (2010), the Court of Appeals confirmed that a defendant does not lose the right to appeal an adverse ruling by proceeding on a not guilty plea with an agreed statement of facts or on stipulated evidence:

> Amidst the spectrum between not guilty pleas and guilty pleas, there exists the hybrid plea, one in which an individual retains the right to appellate review of evidence subject to a suppression motion but avoids going through the time and expense of a full trial. By pleading not guilty and agreeing to the proffer of stipulated evidence or an agreed statement of facts, an individual, like with a guilty plea, waives a jury trial and the right to confront witnesses but retains appellate review of the suppression decision.

To retain the right to appellate review, the defendant must preserve the challenge by including the disputed evidence in the agreed statement. Id. at 23-24; see also Linkey v. State, 46 Md. App. 312, 316 (1980). We conclude that Mr. Carlisle complied with Bishop's preservation requirement by including the subject evidence in the stipulated statement, and he clearly asserted and maintained his objection through to the completion of the State's recitation of the stipulation.

II.
Separation of Powers

Mr. Carlisle contends that CJP § 10-923 violates the separation of powers doctrine. Mr. Carlisle argues that the Maryland Constitution grants the authority to promulgate rules of evidence to the Court of Appeals, and that pursuant to that authority, the Court of Appeals adopted Maryland Rule 5-404, which codified the long-standing ban on the introduction of propensity evidence—that is, evidence designed to show that because the accused committed the act before, he must have done so again. Mr. Carlisle asserts that CJP § 10-923 is directly contrary to Rule 5-404 because it "creates an evidentiary presumption that evidence of prior sexually assaultive behavior is admissible in sexual assault cases." Mr. Carlisle contends, therefore, that CJP § 10-923 "was enacted in violation of the separation of powers doctrine." We disagree.

Our review of whether a statute is constitutional is, like the interpretation of the Maryland Constitution, a question of law for which we apply a non-deferential standard of review. Martinez ex rel. Fielding v. The John Hopkins Hosp., 212 Md. App. 634, 656 (2013).

Our analysis begins with Article 8 of the Maryland Declaration of Rights, which states:

> That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.

The Court of Appeals has emphasized that the separation of powers doctrine should be applied with a degree of "elasticity," although not so much that it is "stretched to a point where, in effect, there no longer exists a separation of governmental power." State v. Falcon, 451 Md. 138, 161 (2017) (quotation omitted). The issue here, of course, is which of the three branches of government has the responsibility to determine the rules of evidence that apply in Maryland courts. It turns out that such authority has been vested in two branches of government: the judicial and the legislative. In that regard, Article IV, Section 18 of the Maryland Constitution provides, in relevant part:

> The Court of Appeals from time to time shall adopt rules and regulations concerning the practice and procedure in and the administration of the appellate courts and in the other courts of this State, which shall have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law. The power of courts other than the Court of Appeals to make rules of practice and procedure, or administrative rules, shall be subject to the rules and regulations adopted by the Court of Appeals or otherwise by law.

"Under this section, the legislature may rescind, change, or modify a rule promulgated by the Court of Appeals." Johnson v. Swann, 314 Md. 285, 289 (1988). Thus, "[t]he Maryland Rules of Procedure generally apply despite a prior statute to the contrary *and until a subsequent statute would repeal or modify the rule.*" Id. (emphasis added). As this Court has stated:

> Indeed, there can be no question of the power of the Legislature to change the common law rules of evidence, or to prescribe new rules, altogether different from those known to the common law; and it may declare what proof shall be deemed, or taken as Prima facie sufficient to establish any particular fact, even in criminal cases.

Gregory v. State, 40 Md. App. 297, 312 (1978) (quotation omitted). As the State correctly notes, the Courts and Judicial Proceedings Article is replete with examples in which the General Assembly has exercised this authority to alter the rules of evidence.[4]

Applying these principles here, we discern no violation of Article 8 of the Declaration of Rights. In 1994, the Court of Appeals adopted Maryland Rule 5-404 which, among other things, barred evidence of prior acts to show the accused acted "in conformity therewith." Md. Rule 5-404(b) (effective July 1, 1994). In 2018, the General Assembly enacted CJP § 10-923 to allow for the admission of "sexually assaultive behavior" under certain specific conditions. One year later, the Court of Appeals adopted Maryland Rule 5-413, which states that, "[i]n prosecutions for sexually assaultive behavior as defined in [CJP] § 10-923(a), evidence of other sexually assaultive behavior by the defendant occurring before or after the offense for which the defendant is on trial may be admitted in accordance with § 10-923." And, for good measure, the Court also revised Rule 5-404(b), which now reads, in pertinent part, that "[e]vidence of other crimes, wrongs, or other acts. . . . may be admissible for other purposes . . . or in conformity with Rule 5-413." Md. Rule 5-404(b). Thus, to the extent CJP § 10-923 contradicted Rule 5-404, the Court of Appeals

[4] See, e.g., CJP § 3-8A-23(b) (barring the admission of a delinquency adjudication); CJP § 10-405(a) (barring the admission of certain wiretapped communications); CJP § 10-912(a) (disallowing the exclusion of a confession "solely because the defendant was not taken before a judicial officer after arrest within any time period specified by Title 4 of the Maryland Rules"); CJP § 10-915 (allowing for the admission of a DNA profile); CJP § 10-916 (indicating the circumstances under which a court may admit evidence of "Battered Woman's Syndrome").

(Continued…)

reconciled any perceived contradiction with its adoption of Rule 5-413 and its revision of Rule 5-404. We therefore hold that CJP § 10-923 does not violate the separation of powers doctrine.[5]

III.
Probative Value vs. Prejudice

Mr. Carlisle also contends that, even if CJP § 10-923 is constitutional, the circuit court nevertheless erred because it did not "find and state on the record . . . that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." CJP § 10-923(e)(4). Mr. Carlisle asserts that, in fact, the evidence's probative value was substantially outweighed by the danger of unfair prejudice.

We review decisions weighing probative value against the danger of unfair prejudice for an abuse of discretion. See Stevenson v. State, 222 Md. App. 118, 149 (2015). "[T]he concern with prior bad acts evidence is not avoiding any and all prejudice, but avoiding 'untoward prejudice' or 'unfair prejudice' that creates the risk that the [fact-finder] will convict the defendant for reasons unrelated to his commission of the crimes

[5] Mr. Carlisle rests his argument on a single out-of-state case, State v. Gresham, 269 P.3d 207 (Wash. 2012), which we find inapposite. In Gresham, the Supreme Court of Washington determined that a statute similar to CJP § 10-923 conflicted with Washington's own Rule 5-404, and under the separation of powers doctrine, the evidentiary rule (which the court deemed to be a procedural rule) prevailed over the inconsistent statute. Graham provides no guidance here. Under Washington's state constitution, both the court and the legislature are permitted to adopt or enact provisions governing court procedures. In the event of a conflict, the court's rules prevail on procedural matters and the legislature prevails on substantive matters. Id. at 217-19. Here, there is no conflict between the rules adopted by the Court of Appeals and CJP § 10-923 because, as stated above, the Court of Appeals updated the rules to recognize and incorporate CJP § 10-923.

charged." Vigna v. State, 241 Md. App. 704, 728-29 (2019), aff'd, No. 55, Sept. Term, 2019, 2020 WL 4760334 (Md. Aug. 18, 2020).

Here, the court made the requisite finding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. At the second motions hearing, after the circuit court analyzed other requirements of CJP § 10-923, it stated "that really just leaves the last question which is whether the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." The court discussed several hypothetical situations in which such evidence may lack probative value and be unfairly prejudicial, such as "some [fourth-degree] sex offense that took place in a bar 25 years ago between two otherwise adult individuals and then it was just being basically thrown in for no real apparent reason other than to show a predilection for acting in such a fashion." The court contrasted its hypotheticals with the circumstances of Mr. Carlisle's case, observing that here, Mr. Carlisle's prior sexually assaultive behavior occurred "in and around the same time frame" and involved "the same household" and "a similar description of behavior." The court noted that, although those circumstances possibly rendered the evidence "that much more prejudicial," they also "amp[ed] up the probative value." Following those remarks, the court stated that A.W.'s testimony regarding Mr. Carlisle's prior sexually assaultive behavior "would be admissible in some form."

The record reflects that not only did the court acknowledge and apply the correct legal standard, but it was appropriately sensitive to the danger of unfair prejudice and made its ruling only after concluding that any prejudice did not substantially outweigh the

probative value of the evidence. See Streater v. State, 352 Md. 800, 810 (1999) ("[S]hould the trial court allow the admission of other crimes evidence, it should state its reasons for doing so in the record so as to enable a reviewing court to assess whether Md. Rule 5-404(b), as interpreted through the case law, has been applied correctly."). We perceive no abuse of discretion in the court's assessment of the danger of unfair prejudice and the probative value.

Although there is no reported opinion on the application of the balancing test to CJP § 10-923, Maryland appellate courts have addressed the same balancing test in the context of Rule 5-609, which addresses the admission of prior convictions. This rule states:

> (a) For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness, but only if (1) the crime was an infamous crime or other crime relevant to the witness's credibility and (2) the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness or the objecting party.
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> (b) Evidence of a conviction is not admissible under this Rule if a period of more than 15 years has elapsed since the date of the conviction, except as to a conviction for perjury for which no time limit applies.
>
> (c) Evidence of a conviction otherwise admissible under section (a) of this Rule shall be excluded if:
>
> (1) the conviction has been reversed or vacated;
> (2) the conviction has been the subject of a pardon; or
> (3) an appeal or application for leave to appeal from the judgment of conviction is pending, or the time for noting an appeal or filing an application for leave to appeal has not expired.
>
> (d) For purposes of this Rule, "conviction" includes a plea of nolo contendere followed by a sentence, whether or not the sentence is suspended.

Md. Rule 5-609.

When weighing the probative value of evidence against the danger of its unfair prejudice as required under Rule 5-609(a)(2), courts consider the following factors (the "Mahone factors"):

> (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the defendant's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the defendant's credibility.

Jackson v. State, 340 Md. 705, 717 (1995) (citing United States v. Mahone, 537 F.2d 922, 929 (7th Cir. 1976)).[6]

Application of those factors here supports the court's decision. The prior sexual assault was close in time with the instant offense, occurring a mere six years before the offense at issue here. The assaults were also extremely similar: committed in the same household, under similar circumstances (i.e., after the children had fallen asleep or had pretended to fall asleep), and with children of similar age. And Mr. Carlisle's credibility was crucial to the outcome of the trial: the State's case rested entirely upon the victims' allegations, and Mr. Carlisle's defense to those allegations was that the victims' accounts were fabrications. Therefore, although the admission of A.W.'s statement almost certainly

[6] These factors either mimic or closely resemble the factors used by federal courts in evaluating the admissibility of evidence under Federal Rule of Evidence 414, which is similar to CJP § 10-923. Those factors are: "(i) the similarity between the previous offense and the charged crime, (ii) the temporal proximity between the two crimes, (iii) the frequency of the prior acts, (iv) the presence or absence of any intervening acts, and (v) the reliability of the evidence of the past offense." United States v. Kelly, 510 F.3d 433, 437 (4th Cir. 2007).

(Continued…)

resulted in some prejudice to Mr. Carlisle, we cannot say the evidence's clear probative value was substantially outweighed by the danger of unfair prejudice.[7]

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

[7] Even if the court had erred in its pretrial ruling on the admissibility of the evidence of the prior sexual offense, that error would be harmless. We explain.

Proceeding with trial based on either an agreed statement of facts or stipulated evidence are two ways to avoid the time and expense of an evidentiary trial. But they differ in a key respect. When the accused pleads not guilty with an agreed statement of facts, he is admitting to the underlying facts, waiving his right to a jury trial and his right to confront witnesses, and asking the court to determine whether he's guilty by applying the facts to the law. Bishop, 417 Md. at 20-21. But when the accused enters a plea of not guilty on stipulated evidence, the parties are merely agreeing to what the evidence would have been, not to the underlying facts. Id. at 21. Here, even though the parties called it an agreed statement of facts, in substance it was a stipulation on the evidence. Both have traps for the unwary.

Here, when he agreed to proceed by way of the stipulation, Mr. Carlisle clearly intended to test the court's prior ruling on the admissibility of evidence under CJP § 10-923(e)(1)(ii). However, as discussed above, to preserve an evidentiary issue when proceeding in this manner, the accused must make sure that the evidence sought to be *excluded* at trial is *included* in the stipulation. Bishop, 417 Md. at 23-24. Mr. Carlisle did that here, which is why we reject the State's preservation argument. But under Bishop, the inclusion in a stipulation of the challenged evidence could potentially be harmless if the remaining evidence in the stipulation is sufficient to support the conviction. See id. at 25. That puts defendants in Mr. Carlisle's position in a difficult situation: to avoid a harmless error problem, the defendant must make sure that the stipulation—shorn of the challenged evidence—lacks sufficient evidence for the State to carry its burden of proof. That's not the case here.

Even if the evidence of Mr. Carlisle's prior conduct had been excluded from the stipulation, the remaining evidence proffered in the stipulation was more than sufficient to sustain his conviction. Any error in the inclusion of the challenged evidence was, therefore, harmless.