Circuit Court for Wicomico County
Case No. C-22-CR-22-000164

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 877

September Term, 2023

KENNY ALLEN VANSANT

v.

STATE OF MARYLAND

Wells, C.J.
Tang,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Tang, J.

Filed: November 18, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Kenny Allen Vansant, the appellant, was charged with various counts of sex crimes committed against a minor, K.N., who refers to the appellant as her uncle.[1] Following a jury trial in the Circuit Court for Wicomico County, the appellant was convicted of sexual abuse of a minor by a family member, sexual abuse of a minor by someone with temporary responsibility of the minor, second-degree sexual offense with a special finding that the minor was a "physically helpless individual," third-degree sexual offense, fourth-degree sexual offense, and second-degree assault. On appeal, the appellant presents the following questions:

I. Regarding the special finding that the victim was a "physically helpless individual" for the charge of sex offense in the second degree, was the evidence adduced at trial legally sufficient for the jury to find the appellant guilty beyond a reasonable doubt, or, in the alternative, were the jury instructions inadequate?

II. Did the trial court err in admitting testimony from the appellant's ex-wife that the appellant told her "that if he didn't get sex from me, he'd make sure that he got it from my daughter or one of my nieces," in violation of Maryland Rule 5-404(b)?

III. Did the trial court err in admitting evidence of the appellant's prior sexually assaultive behavior pursuant to Md. Code, Courts & Judicial Proceedings ("CJP") § 10-923?

IV. Did the trial court err in failing to dismiss all charges where the State failed to state the date and time of the offense with "reasonable particularity" as required by Maryland Rule 4-202(a)?

Nearly all the issues are not preserved. For the reasons that follow, we shall affirm the judgments of the circuit court.

[1] The appellant is K.N.'s first cousin once removed.

BACKGROUND

Around June 25, 2016, K.N., who was eight years old, went to the appellant's house for a birthday party. The birthday party was for the appellant's then-wife's daughter. At the time, K.N. had been living with the appellant's brother and his wife just a few blocks away from the appellant's home.[2]

After the party, K.N. asked if she could spend the night at the appellant's house; the appellant and his then-wife agreed. K.N. slept on a couch in the living room. She was lying on her stomach when she woke up to the appellant, who was also on the couch, touching her buttocks with his hands and "his private part." She testified that her pants were "halfway down," leaving her rear exposed. She testified that the appellant was on top of her for "like a couple of minutes" and indicated that his "penis [was] inside [her] butt" for "part of the time" until the appellant eventually stopped.

K.N. did not immediately report the sexual assault but later told her grandmother about it, who then notified K.N.'s parents. After speaking to her parents, K.N. initially declined to report the assault, and her parents did not press the issue. Early in 2022, however, K.N. decided to report the assault to police. After investigating, police arrested the appellant and charged him with six offenses related to this incident.

As mentioned, the jury found the appellant guilty of all six counts after trial. The court sentenced the appellant to twenty-five years of incarceration for sexual abuse of a

[2] K.N. was not living with her parents during that time, partly because the parents were getting divorced. In addition, K.N.'s mother was struggling with drug addiction and was in and out of rehab.

minor by a family member, and to a consecutive term of life imprisonment without the possibility of parole for the first fifteen years for sexual offense in the second degree on a physically helpless individual. The remaining counts were merged for purposes of sentencing.

This appeal followed. We supply additional facts below as necessary.

DISCUSSION

I.

Physically Helpless Individual

The appellant challenges the jury's finding under the count for second-degree sex offense with a special finding that the minor was a "physically helpless individual" under Md. Code, Criminal Law ("CR") § 3-306(a), in effect at the time of the offense.[3] In relevant part, the statute prohibits a person from engaging in "a sexual act" with another: "(1) by force, or the threat of force, without the consent of the other; (2) *if the victim is . . . a physically helpless individual*, and the person performing the *sexual act* knows or reasonably should know that the victim is . . . a physically helpless individual; or (3) if the victim is under the age of 14 years, and the person performing the sexual act is at least 4 years older than the victim." CR § 3-306(a) (2013) (emphases added).

[3] At the time of the offense in 2016, the crime was classified as a second-degree sex offense. In 2017, the General Assembly repealed and recodified the offense under CR § 3-304(a) and reclassified the offense as second-degree rape. The recodification does not impact the analysis.

In pertinent part, "sexual act" is defined as "anal intercourse, including penetration, however slight, of the anus;" or "an act: 1. in which an object or part of an individual's body penetrates, however slightly, into another individual's genital opening or anus; and 2. that can reasonably be construed to be for sexual arousal or gratification, or for the abuse of either party." CR § 3-301(e)(1)(iv), (v) (2011).[4]

"Physically helpless individual" is defined as an individual who is unconscious; or does not consent to vaginal intercourse, a sexual act, or sexual contact, and is physically unable to resist, or communicate unwillingness to submit to, vaginal intercourse, a sexual act, or sexual contact. CR § 3-301(d)(1), (2) (2011).[5]

Upon conviction for sex offense in the second degree, the maximum sentence is twenty years' imprisonment. *See* CR § 3-306(c)(1) (2013).[6] But, if the State can prove that the offense was committed against a minor under the age of thirteen and that minor was found to be a "physically helpless individual," then the maximum sentence is life imprisonment, with a fifteen-year minimum. *See* CR § 3-306(b), (c)(2) (2013).

The appellant concedes that the evidence was sufficient to convict him of a second-degree sex offense, for which the maximum sentence is twenty years' imprisonment, in that he engaged in anal intercourse with K.N. while she was under the age of fourteen and that

[4] We cite to the subsection in effect at the time of the offense. The language currently appears under subsection (d) of CR § 3-301.

[5] The language currently appears under subsection (c) of CR § 3-301.

[6] The penalty for second-degree sex offense, now classified as second-degree rape (*see supra* n.3), currently appears under subsection (c) of CR § 3-304.

he was more than four years older than her. However, he challenges the jury's finding that K.N. was a "physically helpless individual," for which the maximum sentence is life imprisonment and the minimum sentence is fifteen years.

The appellant contends that the evidence adduced at trial was legally insufficient for the jury to find that K.N. was a "physically helpless individual." Alternatively, the appellant argues that the trial court's jury instruction regarding the "physically helpless individual" finding was erroneous. He concedes that he did not raise either issue below, and he seeks plain error review.

Maryland Rule 8-131(a) provides that, "[o]rdinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal."

Although this Court has discretion to review unpreserved errors pursuant to Maryland Rule 8-131(a), the Supreme Court of Maryland has emphasized that appellate courts should "rarely exercise" that discretion because "considerations of both fairness and judicial efficiency ordinarily require that all challenges that a party desires to make to a trial court's ruling, action, or conduct be presented in the first instance to the trial court[.]" *Ray v. State*, 435 Md. 1, 23 (2013) (citation omitted). Therefore, "[p]lain error review 'is reserved for those errors that are compelling, extraordinary, exceptional or fundamental to assure the defendant of [a] fair trial.'" *Savoy v. State*, 218 Md. App. 130, 145 (2014) (citation omitted).

> Before we can exercise our discretion to find plain error, four conditions must be met: (1) there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant; (2) the legal error must be clear or obvious, rather than subject to reasonable dispute; (3) the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the [trial] court proceedings; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings.

Newton v. State, 455 Md. 341, 364 (2017) (cleaned up) (citing *State v. Rich*, 415 Md. 567, 578 (2010)).

As we explain below, plain error review is not warranted for either issue.

A.

Jury Instruction

The appellant argues that the trial court's jury instruction relating to the "physically helpless individual" finding was inadequate. In pertinent part, the proposed instruction, which was ultimately read to the jury, provided as follows:

> [I]n order to convict the [appellant] of second degree sexual offense, the State must prove: One, that the [appellant] committed anal intercourse with [K.N.]; two, [K.N.] was a physically helpless individual; and, three, that the act was committed without the consent of [K.N.].
>
> * * *
>
> Physically helpless individual is an individual who is; unconscious or; two, does not consent to the intercourse, the vaginal intercourse, a sexual act, or sexual contact; and two [sic], is physically unable to resist or communicate an unwillingness to submit to vaginal intercourse, a sexual act, or sexual contact.

The appellant argues that, to find him guilty under this offense, the State had to prove that he had anal intercourse with K.N. *while* she was physically helpless (i.e., asleep).

He contends that the instruction was therefore erroneous because it permitted the jury to make a "physically helpless" finding without necessarily finding that K.N. was asleep during the intercourse.

The appellant acknowledges that his challenge was not preserved. *See* Md. Rule 4-325(f) ("No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection."). Instead, he asks this Court to engage in plain error review. The State responds that the appellant affirmatively waived his right to plain error review of the alleged error during the proceedings below. We agree.

In *Booth v. State*, 327 Md. 142 (1992), during a bench conference, the State asked the court for a supplemental instruction on allocution. *Id.* at 178. The court then "specifically asked defense counsel if he had 'any objection to [the instruction],' to which defense counsel replied: 'Actually, no. We would not have any objection to that.'" *Id.* The court then gave that instruction to the jury, without any objection from defense counsel. *Id.* at 178–79. On appeal, the defendant argued that the trial court's allocution instruction, "coupled with part of the prosecutor's rebuttal argument, unfairly denigrated [the defendant]'s allocution." *Id.* at 177. The Supreme Court of Maryland held that the defendant's argument on the allocution instructions "does not require even a plain error analysis." *Id.* at 180. The Court explained:

> This is because there is more here than the simple lack of an objection to the instruction as given. Here defense counsel *affirmatively advised the court*

> *that there was no objection to the instruction* which the court immediately thereafter gave to the jury. *Error, if any, has been waived*.

Id. (citations omitted) (emphasis added).

In *State v. Rich*, 415 Md. 567 (2010), the jury instructions included a pattern jury instruction on voluntary manslaughter that defense counsel specifically requested and to which defense counsel did not note any exceptions. *Id.* at 572–73. After he was convicted, the defendant appealed, arguing that the court erred by giving a voluntary manslaughter instruction in the absence of any evidence of a hot-blooded response to legally adequate provocation. *Id.* at 569–70. After this Court exercised its discretion to conduct plain error review and vacated his convictions, the Supreme Court granted certiorari and reversed, holding that the argument should have been rejected. *Id.* at 574–75. Because defense counsel had argued that the evidence generated the issue of voluntary manslaughter and the defendant specifically requested a voluntary manslaughter instruction, "that action constituted an intentional waiver of the right to argue on appeal that the evidence was insufficient to support the voluntary manslaughter conviction." *Id.* at 581.

In so holding, the Court explained that "[f]orfeited rights are reviewable for plain error, while waived rights are not." *Id.* at 580. The Court described the difference between forfeiture and waiver: "Forfeiture is the failure to make a timely assertion of a right, whereas waiver is the 'intentional relinquishment or abandonment of a known right[.]'" *Id.* (citation omitted). "What we are concerned with is evidence in the record that the defendant was aware of, i.e., knew of, the relinquished or abandoned right." *Id.*

Following *Rich*, this Court in *Yates v. State*, 202 Md. App. 700 (2012), revisited the distinction between forfeited and waived rights for purposes of plain error review. *Id.* at 722. In that case, a jury found the defendant guilty of, among other crimes, second-degree felony murder. *Id.* at 706. The trial court instructed the jury, including an instruction on second-degree felony murder, and, after concluding the instructions, asked whether counsel had any objections. *Id.* at 719. Counsel replied, "None." *Id.* On appeal to this Court, the defendant argued that the court plainly erred in giving the second-degree felony murder instruction because it "failed to instruct the jury that 'the act resulting in the death occurred during the commission or attempted commission or escape from the immediate scene of the distribution,'" which he contended was an "essential element of felony murder." *Id.* at 718–19. In determining whether plain error review was available to the defendant, we first considered whether he affirmatively waived his right to challenge the felony-murder jury instruction specifically. *Id.* at 720–21.

In rejecting the State's argument that the defendant affirmatively waived plain error review of the complained-of jury instruction, this Court reasoned that, unlike in *Rich*, the defendant "did not request specifically the instruction that the court gave on felony murder[,]" but only acquiesced to the instruction. *Id.* at 722. We concluded that, although the appellant's "failure to object constituted a forfeiture of his right to raise the issue on appeal, . . . it did not preclude this [C]ourt from deciding whether to exercise its discretion to engage in plain error review." *Id.*

Returning to the instant case, the appellant did not merely acquiesce to the "physically helpless" jury instruction; he waived the right for purposes of plain error review. At the close of the defense's case, the court excused the jury for lunch while the parties met in chambers to discuss the jury instructions. The parties reconvened in the courtroom, at which point the transcript reflects that the "final packet" of jury instructions was being printed out. The court confirmed that both parties had agreed to the inclusion of a "physically helpless" jury instruction:

> COURT: I understand that you—Counsel, I have the second degree sex offense as the age-based, but *I understand that you have agreed that it's physically helpless and to give that instruction as well; is that right?*
>
> [DEFENSE COUNSEL]: *Yes.*

(emphases added). The transcript reflects that the law clerk passed out the proposed jury instructions, upon which the court asked the parties to review them:

> COURT: Counsel, take a moment and just look at those and make sure we didn't miss anything.
>
> [DEFENSE COUNSEL]: *Looks okay to the Defense, Your Honor.*

(emphasis added). A moment later, the court addressed the defense's renewed motion for judgment, which it denied. The court again confirmed that both parties agreed with the proposed instructions:

> COURT: All right. *So everyone is in agreement on the jury instructions* and verdict sheet?
>
> [DEFENSE COUNSEL]: *Yes, Your Honor.*

(emphases added).

The court brought the jury in. Before reading the jury instructions to the jury, the court once again asked whether the parties wished to raise any issues:

> COURT: Okay. We have all of our jurors back. Thank you ladies and gentlemen, for being so timely. *Is there anything before instructions, Counsel?*
>
> [PROSECUTOR]: No, Your Honor.
>
> [DEFENSE COUNSEL]: *Not from the Defense.*

(emphases added).

The court proceeded to read the instructions to the jury, including the "physically helpless" instruction recounted above. After instructing the jury, the court asked, yet again, "Is the Defense satisfied?" Defense counsel answered, "The Defense is satisfied."

The jury was excused to begin deliberations. The court placed on the record the parties' earlier chambers discussion about the "physically helpless" instruction as written:

> COURT: All right. The jurors are back in the room. I just want to put one thing on the record now that the jury is out that we discussed. *We discussed jury instructions in chambers. I just want to make it clear for the record, Counsel agreed on the instruction as it relates to physically helpless*, and Counsel also was not requesting any further instruction related to th[e] prior conviction . . . . Is that all accurate, counsel?
>
> [DEFENSE COUNSEL]: *Correct.*

(emphases added).

Unlike the circumstances in *Yates*, where the court asked whether the parties had *any* objections at the conclusion of the instructions to the jury, here, the court specifically referenced the "physically helpless" instruction on more than one occasion. The defense confirmed that it agreed to the court giving the specific instruction. *See Yates*, 202 Md. App. at 722. Accordingly, "there is more here than the simple lack of an objection to the

instruction as given." *Booth*, 327 Md. at 180. Consequently, the appellant affirmatively waived any right to plain error review of the challenged jury instruction. *Id.*

B.

Sufficiency of the Evidence

As a corollary to the jury instruction argument, the appellant contends that there was insufficient evidence for the jury to have found that K.N. was a "physically helpless" individual because there was no evidence that she was asleep *during* the intercourse. He points out that K.N. did not testify that when she woke up, the appellant was already engaging in anal intercourse. Rather, the appellant interprets K.N.'s testimony to mean that she was awake the whole time that intercourse was occurring. Thus, according to the appellant, the evidence did not show that K.N. was asleep when the intercourse occurred, and therefore, she was not "physically helpless."

The appellant acknowledges that he failed to preserve the issue of sufficiency of the evidence for appellate review. Again, he asks us to review an unpreserved issue for plain error. As the appellant acknowledges, however, "no Maryland case has utilized the plain error doctrine to reverse a trial judge's denial of a motion for judgment of acquittal when the ground raised on appeal was never advanced before the trial court at the time the motion for judgment of acquittal was being considered." *Claybourne v. State*, 209 Md. App. 706, 750 (2013) (quoting *McIntyre v. State*, 168 Md. App. 504, 528 (2006)). We perceive no reason to deviate from that precedent in this matter, and we therefore decline the appellant's invitation to review his unpreserved sufficiency challenge for plain error.

II.

Appellant's Statement to Ex-Wife

The appellant argues that the trial court erred in admitting testimony from his ex-wife that "if he doesn't get sex from me, he'd make sure that he got it from my daughter or one of my nieces." He argues that it was inadmissible propensity evidence under Maryland Rule 5-404(b). That Rule states:

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

Md. Rule 5-404(b).

In other words, evidence of other crimes or prior bad acts is not admissible to "prove the defendant's guilt based on propensity to commit crime or his character as a criminal." *State v. Faulkner*, 314 Md. 630, 634 (1989). The Rule "is designed to protect the person who committed the 'other crimes, wrongs, or acts' from an unfair inference that he or she is guilty not because of the evidence in the case, but because of a propensity for wrongful conduct." *Winston v. State*, 235 Md. App. 540, 563 (2018).

Evidence of other crimes or prior bad acts may be admissible, however, where "the evidence is 'specially relevant' to a contested issue, beside[s] an accused's propensity to commit crime, 'such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.'" *Burris v. State*, 435 Md. 370, 386 (2013) (quoting Rule 5-404(b)). The "admissibility of evidence of other bad acts

is not confined to this finite list of exceptions," however. *Harris v. State*, 324 Md. 490, 497 (1991). To the contrary, *all* evidence with "sufficient relevance, other than merely by showing criminal character, may be admissible." *Id.* "The 'so-called exceptions' identified in the Rule are thus merely examples, honed over the course of centuries of development of this common law evidentiary principle, 'of those areas where evidence has most often been found admissible even though it discloses other bad conduct.'" *Browne v. State*, 486 Md. 169, 189 (2023) (citation omitted).

> Under Maryland's exclusionary approach to other bad acts evidence, the proponent of such evidence must satisfy three requirements before it may be admitted: (1) the evidence must be specially relevant; (2) the defendant's involvement must be proved by clear and convincing evidence; and (3) the necessity for and probative value of the evidence must not be substantially outweighed by the risk of unfair prejudice. [citations omitted]. These requirements were first set forth in [the] Court's decision in *Faulkner*, 314 Md. 630, 634–35 (1989).

Id. at 190.

A.

Additional Background

At trial, the State called the appellant's ex-wife as its second witness (K.N.'s mother was the State's first witness). The prosecutor asked the ex-wife if the appellant had "ever said anything" about her daughter, to which the ex-wife responded in the affirmative. Defense counsel objected on the basis that the question would elicit irrelevant, propensity evidence under Maryland Rule 5-404(b). The prosecutor responded that the proffered testimony was relevant to "state of mind and intent." Specifically, the prosecutor explained that "part of the charged crimes the State has to prove beyond a reasonable doubt sexual

gratification—that the act was done for sexual gratification," and that the appellant's statement to his ex-wife was "direct evidence of the [appellant's] sexual interest in underaged girls."

The trial court overruled the objection. It explained that the statement concerned "state of mind evidence." While acknowledging that the statement was highly prejudicial, the court also considered it probative, particularly since the jury had to make a credibility determination. The court explained:

> It seems to me that it's state of mind evidence, but I still think I have to—am I still required to do a probative versus prejudicial analysis? It's, obviously, highly prejudicial. But the fact is, it appears that this is a credibility determination. The first witness [K.N.'s mother] was already pretty well, I would say, battered up by Defense Counsel.[7] And I'm not saying that I'm holding that against you. I'm saying this is a credibility determination. So I do believe that it is more probative th[a]n prejudicial.

After the court overruled the objection, the prosecutor re-asked the ex-wife if the appellant had "ever said anything kind of weird regarding your own daughter?" The ex-wife stated that the appellant said that "if he didn't get sex from me, he'd make sure that he got it from my daughter or one of my nieces." The ex-wife further confirmed that her daughter and nieces were underage at the time the appellant made the statement.

Before the defense's cross-examination, the court then gave the following cautionary instruction to the jury: "[Y]ou are not to consider that previous statement if you

[7] K.N.'s mother testified about K.N.'s disclosure of the assault to her, that K.N. initially did not want to report the assault, and that K.N.'s delayed reporting to authorities occurred nearly seven years after the incident.

elect to credit that as a truthful statement. You are not to take that as propensity. That was merely provided for a state of mind."

B.

Analysis

The appellant contends, as he did below, that his statement was inadmissible under Maryland Rule 5-404(b). Specifically, he argues that the trial court did not conduct the first two parts of the three-part analysis under *Faulkner*. *See Faulkner*, 314 Md. at 634–35. He also argues that the court abused its discretion in weighing the probative value of the evidence under the third *Faulkner* factor. In the alternative, he argues that the statement was inadmissible under the marital communication privilege because he and his ex-wife were married at the time he made the statement. *See* CJP § 9-105(b) ("[O]ne spouse is not competent to disclose any confidential communication between the spouses occurring during their marriage."). Finally, he argues that the error in admitting the statement was not harmless beyond a reasonable doubt.

The State responds that a statement is not an "act" within the meaning of Rule 5-404(b) and therefore the ex-wife's testimony recounting the appellant's statement is not subject to the Rule at all. Even if the statement is subject to the Rule, the State argues that the statement was admissible because it was relevant to show motive and intent, which the court characterized as state-of-mind evidence. Regarding the appellant's alternative argument, the State maintains that his assertion of the marital communication privilege is not preserved.

1. The Appellant's Statement Was a Prior Bad Act Under Rule 5-404(b).

The State argues that Rule 5-404(b) does not apply to the appellant's statement because the statement is not an "other act." As a general proposition, the State contends that treating a statement as an "act" is inconsistent with the plain reading of the Rule. It cites *United States v. Alqahtani*, 523 F. Supp. 3d 1304 (D.N.M. 2021), for support. There, the U.S. District Court for the District of New Mexico held that statements made by the defendant that he would like to have guns for self-protection and might attempt to obtain a small handgun from a gun store were not evidence of "other acts" by the defendant under the federal counterpart to Rule 5-404(b). *Id.* at 1310–11. The State argues that here, too, the appellant's statement was not an "other act' within the meaning of the Rule. We disagree.

The *Alqahtani* court's narrow reading of Rule 404(b) of the Federal Rules of Evidence is inconsistent with Maryland's broad interpretation of Rule 5-404(b). The Supreme Court of Maryland has held that the phrase "wrongs or acts," often referred to by courts as "bad acts," covers "activity or conduct, not necessarily criminal, that tends to impugn or reflect adversely upon one's character, taking into consideration the facts of the underlying lawsuit." *Klauenberg v. State*, 355 Md. 528, 549 (1999). The Court did not exclude statements made by a defendant. *Id.* at 550–51. In fact, surveying cases in other jurisdictions, it recognized that threats made to the victim were considered bad acts and relevant to motive. *Id.* at 548 (citing *Pye v. State*, 505 S.E.2d 4, 11 (Ga. 1998), and *Wall v. State*, 500 S.E.2d 904, 907 (Ga. 1998)).

In this case, the appellant's statement "that if he d[id]n't get sex from [his then-wife], he'd make sure that he got it from [her] daughter or one of [her] nieces," all of whom were underage, surely is a bad act that "tends to impugn [his] character." Thus, the appellant's statement was a prior bad act under Rule 5-404(b).

2. The Circuit Court Did Not Err in Admitting the Appellant's Statement.

We evaluate the trial court's determination with respect to each of the three *Faulkner* requirements using a different standard. The determination of special relevance—whether evidence is substantially relevant to a contested issue other than propensity—is a legal determination that we review without deference to the trial court. *Faulkner*, 314 Md. at 634. We review the trial court's finding of clear and convincing evidence of the accused's involvement in other bad acts for sufficiency of the evidence. *Id.* at 634–35. Finally, we review the trial court's "balancing of probative value against the danger of unfair prejudice for an abuse of discretion." *Id.* at 635, 641 (citation omitted).

As noted, under Rule 5-404(b), evidence of a defendant's prior bad act has special relevance if it shows, for example, "motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, [or] absence of mistake or accident . . . ." That list is not exhaustive, but it serves as a useful tool for classifying "those areas where evidence has most often been found admissible." *Solomon v. State*, 101 Md. App. 331, 353 (1994) (citation omitted). The ultimate question, therefore, is not whether the evidence fits one of the aforementioned "exceptions," but instead whether the evidence is "substantially relevant for reasons other than criminal character." *Id.* at 356. In other words, "[t]he label

we put on an exception . . . is not that important, just so long as the evidence of 'other crimes' possesses a special or heightened relevance and has the inculpatory potential to prove something other than that the defendant was a 'bad man.'" *Oesby v. State*, 142 Md. App. 144, 162 (2002).

The trial judge is "not required to spread upon the face of the record the burden of persuasion he employs on this issue when he determines to admit 'other crimes' evidence." *Emory v. State*, 101 Md. App. 585, 623–24 (1994); *Darling v. State*, 232 Md. App. 430, 463 (2017) (stating courts need not articulate the relevant balancing test on the record). Judges are presumed to know the law and apply it correctly. *State v. Chaney*, 375 Md. 168, 181–85 (2003). Here, the record reflects that the court knew the law and applied it correctly.

First, the court found the evidence relevant to the appellant's "state of mind." We understand the court to mean that the statement was relevant to show the appellant's intent.[8] The record indicates, based on the prosecutor's argument, that the statement was relevant to both the appellant's "state of mind and intent," and that the evidence went to proving the "intentional" element of "sexual contact" under the third- and fourth-degree sexual offenses.

Under third-degree sexual offense, the State had to prove, in pertinent part, that the appellant had "sexual contact" with K.N., that she was under fourteen years of age at the

[8] Rule 5-404(b) does not specifically refer to "state of mind" as a permissible purpose for admitting bad acts evidence. In comparison, Rule 5-803(b)(3) does specifically refer to "state of mind" as an exception to the hearsay rule. We note that Rule 5-803(b)(3) defines "state of mind" to include intent, plan, and motive—three of the permissible purposes listed under Rule 5-404(b).

time of the act, and that the appellant was at least four years older than her. *See* CR § 3-307(a)(3). Under fourth-degree sexual offense, the State had to prove, in pertinent part, that the appellant had "sexual contact" with K.N. and that the sexual contact was made without her consent. *See* CR § 3-308(b)(1). As mentioned, "[s]exual contact" means the "*intentional* touching of the victim's . . . genital, anal, or other intimate area *for sexual arousal or gratification*, or for the abuse of either party." CR § 3-301(e)(1) (2011) (emphasis added).

"It is well settled in Maryland that where intent is at issue, proof of a defendant's prior conduct may be admissible to prove the defendant's intent." *Johnson v. State*, 332 Md. 456, 470 (1993). "Such evidence is admissible, even if not directly concurrent, *when the subject acts* 'are committed within such time, or *show such relation to the main charge*, as to make connection obvious,' that is to say, they are 'so linked in point of time or circumstances as to show intent or motive.'" *Id.* (emphasis added) (citations omitted); *accord Howard v. State*, 324 Md. 505, 514 (1991) ("Under some circumstances, where intent is legitimately an issue in the case, and *where by reason of similarity of conduct* or temporal proximity, or both, evidence of other bad acts may possess a probative value that outweighs the potential for unfair prejudice, the evidence may be admissible.") (emphasis added).

The appellant's prior "bad act" (the expression of his desire to have sex with underage family members) had an obvious connection to the sexual offenses against K.N. because it demonstrated his desire to sexually abuse underage family members, of which

K.N. was one. Therefore, the statement was highly probative of his intent to touch K.N.'s genital or anal area for the purpose of sexual arousal or gratification.

The appellant contends that intent was not a contested issue at trial; therefore, the statement lacked probative value. However, as the State pointed out, while the appellant did not explicitly challenge his intent, he also did not concede it. In other words, the State was still required to satisfy its burden to prove beyond a reasonable doubt that the appellant intentionally touched K.N.'s genital, anal, or other intimate area for the purpose of sexual arousal or gratification. *See* CR § 3-301(f)(1) (2011). Thus, the statement had probative value.

Regarding the second factor, the appellant argues that the court never established on the record that the appellant made the statement by clear and convincing evidence. However, there was no dispute over the authenticity or accuracy of his own statement. Therefore, there was no issue concerning the "clear and convincing" evidentiary standard.

Regarding the third factor, the appellant acknowledges that the court did address undue prejudice. However, he argues that the court abused its discretion by concluding that the probative value outweighed the undue prejudice. He reiterates that the statement had no probative value because the issue of intent was not genuinely contested at trial. We are not persuaded for the reasons explained under the first factor. Furthermore, the court indicated that the statement was more probative than prejudicial, particularly in light of credibility determinations that the jury needed to make. The court did not abuse its discretion in admitting the appellant's statement.

Alternatively, the appellant argues that his statement should have been excluded under the marital communications privilege. However, the appellant did not assert the privilege at trial; therefore, it is not preserved. *See Wong-Wing v. State*, 156 Md. App. 597, 606 (2004) (concluding that defendant failed to preserve the spousal privilege question for our review because, despite articulating several grounds to support his objection, he never asserted the privilege at trial). Accordingly, we decline to address the issue.

III.

Evidence of Prior Sexually Assaultive Behavior

The appellant argues that the circuit court erred in admitting evidence of his prior conviction for a third-degree sex offense at trial under CJP § 10-923. In relevant part, the statute provides that the court may admit evidence of sexually assaultive behavior if the court finds and states on the record that the evidence is being offered to rebut an express or implied allegation that a minor victim fabricated the sexual offense. CJP § 10-923(e)(1)(ii).

A.

Additional Background

Before trial, the State filed a motion seeking to introduce evidence that the appellant had been previously convicted of sexually assaultive behavior. At a pre-trial hearing on June 1, 2022, the State presented evidence from the lead detective, who testified that he had listened to a recorded jail call made by the appellant months earlier while incarcerated pending trial on these offenses. The detective testified that the appellant denied sexually

assaulting K.N. and that the appellant had stated that "this was all happening because of lies." At the conclusion of the hearing, defense counsel did not dispute the appellant's position that K.N. fabricated the sexual offense. Indeed, defense counsel confirmed that the appellant disputed the allegations as untrue and that, in denying such allegations, a defendant "essentially indicat[es] that the child has made something up."

After the hearing, the court granted the State's motion. In a written opinion dated June 30, 2022, the court found that the detective testified that the appellant denied the allegations and claimed they were fabricated. This "creat[ed] an express allegation of fabrication[,] which the requested evidence can rebut."[9] The court noted that the defense "elected not to argue whether such an express or implied allegation existed, instead generally referring to the potentially superfluous nature of such a requirement given that most pleas of not guilty in sex offense cases carry with them an implicit allegation of fabrication." The court found that, "[g]iven the explicit and direct nature of the [appellant's] allegation," the evidence of the prior conviction for a third-degree sex offense was being offered to rebut an express allegation that a minor victim fabricated the sexual offense under CJP § 10-923(e)(1)(ii).

The jury trial commenced in February 2023. After the jury was selected, defense counsel made a continuing objection to the court's earlier ruling that granted the State's motion to admit evidence of the appellant's prior conviction for a third-degree sex offense

[9] As the appellant notes in his brief, the court's written opinion incorrectly referred to a "video recording of the interrogation," which the court apparently confused with the recorded jail call that the detective said he had listened to.

under CJP § 10-923. The State sought to admit the transcript of the plea hearing and a copy of the prior conviction. Other than suggesting that the victim's name be redacted from these documents, the defense did not raise any other reason for challenging the admission of evidence of his prior conviction. The court admitted the redacted documents into evidence over defense counsel's continuing objection.

B.

Analysis

The appellant contests the trial court's admission of evidence of the prior conviction during the trial. Specifically, he argues that, at the motions hearing, there was no evidence that the appellant would engage a trial strategy of asserting that K.N. fabricated the sexual offense. Therefore, he contends that the motions court should not have been able to make a definitive ruling on the State's motion. Based on this rationale, he contends that the trial court erred in admitting evidence of his prior conviction without finding that he "actually" took a position at trial claiming that K.N. fabricated her story. He argues that, if he had known the motions court was admitting evidence of his prior conviction based on an anticipated defense of fabrication, he would have adjusted his trial strategy to avoid suggesting that the allegations were fabricated, thereby rendering the evidence inadmissible.

The appellant's argument was not preserved. At no point before the motions court or the trial court did the appellant challenge the admission of the evidence on the grounds he now raises on appeal. Accordingly, we shall not address it.

IV.

Charging Document

The appellant's final argument is that the State did not specify the date and time of the offense in the charging document with reasonable particularity, as required by Maryland Rule 4-202(a) ("A charging document . . . shall contain a concise and definite statement of the essential facts of the offense with which the defendant is charged and, with reasonable particularity, the time and place the offense occurred.").

A.

Additional Background

After the appellant was arrested, the State charged him with sex crimes that were alleged in the charging document to have occurred between February 11, 2015, and February 11, 2017. The appellant filed a motion to dismiss all charges for failing to state the date and time of the offense with "reasonable particularity" as required by Rule 4-202(a).

On July 1, 2022, the court held a hearing on the motion to dismiss. Defense counsel acknowledged that discovery indicated that the sexual assault occurred "during a summer at a birthday party" when K.N. was living with the appellant's brother. Defense counsel argued that the date range specified in the charging document was too broad and "could be narrowed down to the summer of 2016," or even the "summer months of 2015 or 2016." The concern raised by defense counsel was not so much that the appellant lacked notice of when the incident occurred, but rather about the challenge posed by the need to present

evidence of his whereabouts during such an extensive time frame, especially since it may not have been necessary to do so.

The State opposed the motion, stating that it had not been able to determine the exact date of the incident. During interviews with K.N., her mother, and her grandmother, they provided conflicting dates for the birthday party. In addition, at that time, the police had not yet located or spoken with the appellant's ex-wife to determine the exact date of her daughter's birthday party. Furthermore, the appellant's brother and his wife had also been uncooperative.

At the conclusion of the hearing, the court denied the motion to dismiss, concluding that there was enough reasonable particularity regarding the date range in the charging document.

B.

Analysis

The appellant does not challenge the motions court's decision to deny the motion to dismiss. Instead, he argues that after this denial, the State should have narrowed the date range of the alleged offenses. Specifically, he asserts that the State should have specified June 26, 2016 as the date of the charged offenses once it located his ex-wife and added her to the witness list just days before the trial began.

The appellant did not preserve the argument that the State was required to narrow the timeframe of the allegations after the motions court denied the motion to dismiss. Nor did the trial court address this issue. During trial, the appellant merely noted a continuing

objection to the motions court's denial of the motion to dismiss. After trial, the appellant moved for a new trial, reiterating a similar argument made during the motions hearing regarding the motion to dismiss. He contended that the date range in the charging document "forced the defense to waste valuable preparation time." In both instances, the appellant did not present the additional argument, which he now raises on appeal, that the State should have independently amended the charging document to narrow the date range once it located the ex-wife. As this issue was neither "raised in or decided by the trial court," the argument is not preserved. Md. Rule 8-131(a).

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