Circuit Court for Frederick County
Case No. 10-K-16-058892

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 893

September Term, 2017

LLOSVANI ALEJANDRO GALVEZ

v.

STATE OF MARYLAND

Berger,
Arthur,
Eyler, James R.,
(Senior Judge, Specially Assigned),
JJ.

Opinion by Berger, J.

Filed: May 23, 2018

Following a jury trial in the Circuit Court for Frederick County, Llosvani Alejandro Galvez, appellant, was convicted of second-degree rape. The court sentenced appellant to twenty years in prison, with all but twelve years suspended, and three years' probation. Appellant noted this appeal and raises two issues, which we have rephrased:

1. Whether the trial court erred in admitting other crimes evidence.

2. Whether the trial court erred in admitting hearsay evidence.

For the reasons that follow, we shall answer appellant's first question in the negative. We do not reach appellant's second question because he has waived this issue. Accordingly, we affirm the judgments of the circuit court.

BACKGROUND

This case emanates from appellant's August 25, 2016 rape of Ms. W., his romantic partner, in her home in Frederick. Appellant had been involved in a year-long relationship with the victim, and although he did not live with Ms. W. and her children from a previous marriage, he had a key to her home, kept personal items there, and often spent the night. The night before the assault, appellant approached Ms. W. for sexual intercourse, and when she declined, he told her "you're going to be mad if I just take it and start raping you." His demands for sexual intercourse persisted the following morning, and appellant became upset and angry when Ms. W. refused because she needed to get her children ready for school. Ms. W. dropped appellant off at work at 7:00 a.m. Thereafter, appellant called her shortly after she had left to tell her that he had quit his job.

Ms. W. left appellant at her house while she drove one of her children to a medical appointment and then to school. When she returned, appellant approached her for intercourse again, and when she told him that she needed to get ready for work, he pushed her up the stairs by her rear end. Once they were in the bedroom, appellant began behaving more aggressively toward Ms. W., and knocked fruit out of her hands, unzipped her jacket, and pulled down her pants and underwear as he forcefully told her that she was going to give him sex. Ms. W., who testified that she felt scared, told appellant "no" and then asked him "are you really going to do this right now? Are you really going to take sex?" Appellant stopped and told Ms. W. that he was going to buy cigarettes. Ms. W. hurried to the bathroom after he left, thinking that appellant would stop pressuring her for intercourse when he saw her dressed for work. Although Ms. W. had locked the bathroom door, when appellant returned he began to bang on the door and twist the knob, and he was able to force his way inside.

When Ms. W. told appellant that she did not want to have sex and that she was going to be late for work, he pulled her out of the bathroom by the back of her neck and pushed her face-down onto the bed. Then, as Ms. W. struggled to get away, appellant held her down by her lower back and forced her to engage in vaginal intercourse. Ms. W., crying and in shock, went into the bathroom after the assault ended. Appellant followed her and took her cell phone, then told her that she could not leave for work until she talked to him about continuing their relationship. Ms. W. was unable to recover her phone, but did back away toward the door, and managed to get past appellant and down the stairs to her car. She arrived to work late, went to her office, and sat at her desk with

her head down. Paige Austin, Ms. W.'s supervisor, noticed that she was distraught and asked her what was wrong. Ms. W. told Ms. Austin that she needed to obtain a restraining order and that appellant had sexually assaulted her.

Ms. W. left work, picked up her oldest child, and used his phone to contact appellant to arrange the return of her house key and cell phone. After retrieving her belongings, Ms. W. entered her home to discover that appellant had smashed glassware, thrown food, and flipped over furniture throughout the house. Ms. W. reported the incident to the police and was taken by ambulance to Frederick Memorial Hospital for a sexual assault nurse examination (SANE). SANE nurse Pamela Holtzinger testified that Ms. W. complained of lower back pain and that her vaginal opening was sore. Nurse Holtzinger testified that she had photographed Ms. W.'s injuries during the examination, and that lacerations consistent with blunt force impact were apparent on either side of the opening of Ms. W.'s vagina. Nurse Holtzinger also observed a bruise and linear scratches on Ms. W.'s neck often seen with strangulation injuries caused by the victim struggling to release pressure on the airway.

Ms. W. was interviewed at the hospital by Corporal Joseph McCallion. During the interview she showed Corporal McCallion appellant's text messages apologizing to her in response to her accusations that he forced her to have intercourse. After the SANE exam ended, Corporal McCallion drove Ms. W. from the hospital to the sheriff's office to record a controlled call with appellant, during which he repeatedly apologized and told her "I was wrong" when Ms. W. asked him why he had raped her.

Ms. W. continued to receive telephone calls and text messages from appellant after sheriff's deputies dropped her off at home that night, and she decided to speak with him. Ms. W. testified that appellant spoke to her in a "[v]ery gentle, caring" manner" and "sounded like he was genuinely sorry." He also asked her if he could clean up the mess he had made in her house because he did not want her children to see it. Consequently, she agreed to pick him up from the train station and brought him back to her home, where they spent the night. She explained "I still cared about him. I still loved him … he said he wanted to make things right and I felt that he would make things right…. he kept saying he was going to get help." Ms. W. allowed appellant to stay in her home for several days, and during that time she had consensual sexual intercourse with him on one occasion.

Ms. W. testified that on August 30, 2016, while she was driving to work, she and appellant began to argue about her desire to end the relationship and because he was supposed to gather his belongings from her house and had not done so. Appellant told Ms. W. that he was not leaving and demanded that she drive him to the train station, and he threatened that "it's going to be a problem" when she left work if she did not comply. The argument attracted the attention of a passing police officer, who pulled the patrol car alongside Ms. W.'s vehicle for a short while. When appellant exited her car, he told Ms. W. that "[y]ou liked it because you let me come back every time." Ms. W. testified that this statement "set off a light bulb, like part of that statement was true. I let him come back every time after his apologies, after he would make up things, you know, saying that he was going to get counseling, but I didn't like it." Ms. W. returned to her

office and told Ms. Austin about the argument that had just occurred, and she then called the police.

We shall set forth additional facts as necessitated by our discussion of the issues on appeal.

DISCUSSION

I. Admission of Other Crimes Evidence

Appellant contends that the trial court erred in admitting testimony that he had pled guilty in May 2016 to second-degree assault of Ms. W. because the evidence was inadmissible other crimes or bad acts under Md. Rule 5-404. First, he argues that the previous assault was not substantially relevant to whether Ms. W. consented to intercourse, especially since the evidence was introduced by the State to illuminate Ms. W.'s state of mind, rather than for one of the exceptions enumerated in Md. Rule 5-404(b), which all relate to the defendant. Second, he asserts that, if testimony about the prior assault had some relevance to the rape allegation, its evidentiary value was far outweighed by its unfair prejudice. Third, and lastly, he claims that the scope of Ms. W.'s testimony was impermissibly broad, and the trial court's curative instruction could not diffuse the risk of undue prejudice.

The State responds that because the foundation of appellant's defense was that Ms. W. consented to sexual intercourse, and that her reconciliation with appellant was inconsistent with her claim that she had been raped, then evidence of the May 2016 assault was necessary to rebut his defense of consent. The State maintains that the trial

court properly exercised its discretion to admit relevant evidence of his prior crime to establish Ms. W.'s state of mind and to rehabilitate her credibility after it was attacked.

The standard of review for evidentiary rulings of a trial court has been summarized by the Court of Appeals as follows:

> [T]he admission of evidence is committed to the considerable and sound discretion of the trial court. In that regard, all relevant evidence is generally admissible. A corollary to that rule is that irrelevant evidence is not admissible. To be relevant, evidence must tend to establish or refute a fact at issue in the case. Once a finding of relevancy has been made, we are generally loath to reverse a trial court unless the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion.

Merzbacher v. State, 346 Md. 391, 404-05 (1997) (citations omitted). We find an abuse of discretion "'where no reasonable person would take the view adopted by the [trial] court,' or when the court acts 'without reference to any guiding rules or principles.'" *Nash v. State*, 439 Md. 53, 67 (quoting *North v. North*, 102 Md. App. 1, 13-14 (1994), *cert. denied*, 135 S. Ct. 284 (2014)).

Evidence of other crimes or bad acts is generally not admissible at trial "to prove that [the defendant] is guilty of the offense for which he is on trial." *State v. Faulkner*, 314 Md. 630, 633 (1989) (quotation marks and citations omitted). "The primary concern underlying the Rule is a 'fear that jurors will conclude from evidence of other bad acts that the defendant is a 'bad person' and should therefore be convicted, or deserves punishment for other bad conduct and so may be convicted even though the evidence is lacking.'" *Hurst v. State*, 400 Md. 397, 407 (2007) (quoting *Harris v. State*, 324 Md.

490, 496 (1991)). Other crimes evidence may be admissible, however, "if the evidence is substantially relevant to some contested issue in the case and is not offered to prove guilt based on propensity to commit crimes." *Id.* (citing *Harris v. State*, 324 Md. 490, 496-97 (1991)). Md. Rule 5-404(b) provides a list of some of the recognized exceptions of the other crimes evidence rule:

> 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.

"Other crimes evidence does not have to fall neatly into one particular exception and be admitted for one purpose." *Page v. State*, 222 Md. App. 648, 663, *cert. denied*, 445 Md. 6 (2015) (quotation marks omitted). The label of the 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.'" *Id.* (quoting *Oesby v. State*, 142 Md. App. 144, 162 (2002)).

For other crimes evidence to be admissible, the trial court must engage in a threefold determination. *Id. at* 661. "First, the court must find that the evidence is 'relevant to the offense charged on some basis other than mere propensity to commit crime.'" *Id.* (citing *Skrivanek v. State*, 356 Md. 270, 291 (1999)). This determination is a legal question that does not involve any exercise of discretion. *Id*. (citing *Oesby, supra*, 142 Md. App. at 159). Second, the trial court must determine that the accused's involvement in other crimes is established by clear and convincing evidence. We review

the trial court's determination applying the clearly erroneous standard. *Faulkner*, 314 Md. at 634-35 (citations omitted). Third, the trial court must carefully weigh the necessity for and probative value of the other crimes evidence against the likelihood of any undue prejudice that may result from its admission. *Id.* "'These substantive and procedural protections are necessary to guard against the potential misuse of other crimes or bad acts evidence and avoid the risk that the evidence will be used improperly by the jury against a defendant.'" *Id.* at 662 (quoting *Streater v. State*, 352 Md. 800, 807 (1999))

During his opening statement, appellant's counsel argued that Ms. W.'s "actions do not match her accusations," and urged further that

> the prosecutors want you to believe that this vicious rape, unwanted rape where he's choking her, pulling her down, breaking down doors and breaking into the bathroom, pulling her out and doing all these things occurs on August 25th, but within 15 hours Ms. W[.] picks him up, brings him home, spends the weekend at the house with her and her kids, they make love, spend the night together, has him watch their, her youngest daughter and now they want to make him out to be some kind of vicious monster rapist. It just doesn't make any sense whatsoever.

During cross-examination, defense counsel examined Ms. W. extensively about her actions following the August 25th incident, including her decision to rekindle the relationship with appellant, to engage in consensual sexual intercourse with him, and to leave her youngest child in his care.

During its redirect examination, the State sought to introduce testimony about appellant's bad acts involving Ms. W. Defense counsel objected. During a bench

conference, the State asked the trial court to rule on the admissibility of evidence of appellant's May 2016 guilty plea for second-degree assault of Ms. W. The State argued:

> The special relevance that the State is seeking to elicit – we would agree that if we were trying to use it for intent or force, the testimony has not supported that.
>
> But the Defense this entire time has been that her subsequent actions, not from the time that he said I will rape you, not from the time when he hit the fruit out of her hand and she said no, but after the actual violent rape that she is alleging happened, after that, her conduct in taking him back and resuming a relationship means, in the Defense's proffer and the cross-examination questions and the opening, that conduct means that violent offense did not happen, that a woman would not allow someone who committed violence against her to come back into the home, to be around her children.
>
> And the State is seeking that Your Honor find this as specially relevant to rebut that inference that they have chosen to make, that attack that they have chosen to make, not to prove intent, not to prove force, but to have a special relevance as to her consent at the time, which they have called into question because of her subsequent actions.

Defense counsel argued that the testimony was irrelevant because it did not shed light on the issue of consent, especially since the State had proffered the testimony to explain Ms. W.'s actions following the incident.

The trial court ultimately determined that the previous assault was relevant to the charged offense because "the victim is alleging a violent act but nevertheless continues to allow the defendant into her home and resumes a relationship with him." After finding that there was clear and convincing evidence that the assault had occurred because of the guilty plea, the trial court then considered whether the probative value of the evidence outweighed its undue prejudice to appellant, and ruled as follows:

> But [the] issue is not is it prejudicial. The issue is does the probative value outweigh the prejudicial impact of what the jury will hear. Under the circumstances of this case, the testimony that this Court has heard, which has included an emphasis on Mr. Galvez and Ms. W[.] continuing to text, to talk on the phone, to allow him to clean up the house, to come back to the house, to have consensual sex after the alleged violent rape, I do find that the probative value of that factor alone outweighs the prejudicial value.

The trial court ruled that Ms. W.'s testimony was admissible to shed light on her state of mind after the incident. The trial court also ruled that the evidence was admissible on the grounds that the State had a right to rehabilitate a witness whose credibility had been impeached.[1] Subject to defense counsel's continuing objection, the following testimony was then elicited from Ms. W. by the State:

> [STATE]: Ms. W[.], do you recall May the 12th of 2016?
>
> MS. W: Yes, ma'am.
>
> [STATE]: Did you have an argument with the defendant on May the 12th of 2016?
>
> MS. W: Yes.
>
> [STATE]: Where were you two?
>
> MS. W: In my car.

[1] Appellant asserts that since the State proffered the testimony under Md. Rule 5-404(b), that we are precluded by our holding in *Stoddard v. State*, 157 Md. App. 247, *rev'd on other grounds*, 389 Md. 681 (2006), from concluding that the testimony was admissible under Md. Rule 5-616 to rehabilitate Ms. W.'s credibility after it was attacked. This argument is without merit, as it clearly appears from the record that the trial court decided that the testimony was admissible pursuant to both Rules. *See* Md. Rule 8-131 ("Ordinarily, the appellant court not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court.").

[STATE]: Who was driving?

MS. W: Lonnie.

[STATE]: Okay. During that argument, did you put your hand up to indicate that you did not wish to argue anymore?

MS. W: Yes.

[STATE]: After you did that, what did the defendant do first?

MS. W: He grabbed my arm.

[STATE]: Okay. What happened after that?

MS. W: He grabbed my arm and pulled me towards him and bit me in my face.

[STATE]: After he bit you in the face and pulled your arm toward him, did he say anything to you?

MS. W: Yes.

[STATE]: What did he say, [Ms. W.].

MS. W: You're going to make me kill you, wait until we get home.

[STATE]: After he bit you in the face and told you you're going to make me kill you, wait until we get home, did you resume your relationship with him?

MS. W: Yes, I did.

[STATE]: [Ms. W.], when did you resume your relationship with him?

MS. W: A day later.

[STATE]: Okay. [Ms. W.], why did you resume your relationship with him after he bit you in the face and said you're going to make me kill you?

> MS. W: Because he apologized. He seemed sincere. He said he cared about me. I loved him. He said he loved me. He said he would get help. He promised to get help. He was looking on line trying to get help.
>
> [STATE]: Now, [Ms. W.], did you come to court with him for that assault case?
>
> MS. W: Yes, I did.
>
> [STATE]: Did he in fact plead guilty to that assault?
>
> MS. W: Yes, he did.

Immediately following her testimony, the trial court gave the jury a curative instruction to limit its consideration of this evidence to Ms. W.'s state of mind.[2]

[2] The court instructed the jury as follows:

> Ladies and gentlemen, you need to listen very carefully to me. You have just heard evidence that the defendant pled guilty to the crime of assault against [Ms. W.] for an offense occurring in May.
>
> You may not consider that evidence for any reason other than assessing the alleged victim's credibility as to whether the sexual encounter on August 25th was consensual or non-consensual in light of the fact that she resumed her relationship with the defendant.
>
> You may only consider it for that limited purpose. You may not consider it as evidence that the defendant is a bad character or that he has a tendency to commit a crime or that because he committed that crime, he's more likely to have committed this crime. You may not consider it for that purpose. Does everybody understand that? You may only consider it for the limited purpose of the state of mind of the alleged victim, Ms. [W.].

As to his first contention, appellant distinguishes the facts in this case from *Stevenson v. State*, 94 Md. App. 715 (1993), and claims that the Rule limits the permissible purposes for which other crimes evidence may be admitted to exceptions that pertain directly to the defendant. He further maintains that because his prior assault did not influence Ms. W.'s state of mind in relation to her consent to sexual intercourse, that the evidence was not sufficiently relevant to satisfy the first prong in *Faulkner*.

In *Stevenson*, the defendant was convicted of the second-degree rape of his estranged wife after he broke into her home, demanded that she have intercourse with him, and then raped her when she refused. *Id*. at 719. Stevenson's sole defense at trial was that Ms. Stevenson had consented to intercourse. *Id.* at 725. To counter Stevenson's assertion that she had given consent, Ms. Stevenson testified that she stopped fighting him during the rape "'[b]ecause we were in a fight before and it didn't turn out very well." *Id.* at 725. The State then elicited from Ms. Stevenson that ten months earlier her husband had broken into her house, asked her to have sexual intercourse with him, and when she refused, battered her and used a butcher knife to cut off her hair. *Id.* at 725-26. This Court held that "[e]vidence of the March battery was thus relevant, indeed critical, to counter the consent defense." *Id.* at 726.

Appellant's contention that the Rule the limits the admission of other crimes evidence to that which directly pertains to the defendant plainly misinterprets *Stevenson,* a case in which we affirmed the trial court's admission of other crimes evidence for the sole purpose of shedding light on the *victim's* state of mind to counter the defendant's consent defense. We also reject his assertion that *Stevenson* limits the admission of other

crimes evidence unless offered by the State to explain a victim's decision to comply or to stop resisting during a sexual assault. As we explained in *Stevenson,* the probative value of other crimes evidence to rebut a defense of consent in a rape case "is so great" that in some instances, courts have found evidence admissible even when the other crimes took place years before the charged offense, against victims other than the complaining witness or where the defendant was acquitted. *Id.* at 726-27 (citations omitted). *See also Merzbacher, supra*, 346 Md. at 409.

Turning to the three-prong test in *Faulkner*, it is clear that since consent was a contested issue in this case, evidence of the earlier assault -- and Ms. W.'s actions following the incident -- had special relevance to the issue of whether she consented to sexual intercourse on the morning of the incident. Here, Ms. W. testified she rekindled the relationship after the sexual assault because appellant had contacted her repeatedly to apologize and to assure her that he was going to undergo counseling to improve the negative aspects of their relationship. In this context, the trial court did not err in finding that evidence was admissible to show that she had previously reunited with appellant one day after a violent physical assault. Further, the trial court did not err in allowing the jury to consider whether the apologies helped to illustrate the context of the relationship for the jury and to rebut the implication that Ms. W.'s decision to reconcile after the sexual assault signified that she had consented to intercourse.

Appellant's second contention, that the risk of unfair prejudice emanating from the admission of testimony related to his guilty plea for assault far outweighed its probative value, is without merit. Analogizing his case to *Terry v. State*, 332 Md. 329, 338-39

(1993), appellant argues that the trial court's ruling admitting his other crimes was "tantamount to killing an ant with a pile driver." In *Terry*, however, the Court of Appeals' admonition in favor of proportionality was in response to the State's introduction of highly prejudicial evidence that the defendant had been convicted of crimes nearly identical to those he was currently facing to rebut defense counsel's reference to inadmissible evidence. *Id.* at 338. The "innocuous albeit improper suggestion" at issue in *Terry* is clearly distinguishable from the introduction of other crimes evidence to counter an inference raised in a contested issue central to this case.

We find no abuse of discretion on the part of the trial court in finding that the probative value of the testimony outweighed its unfair prejudice. "Prejudice in the evidentiary sense which can outweigh probative value involves more than mere damage to the opponent's cause." *State v. Allewalt*, 308 Md. 89, 102 (1986). Evidence is deemed "unfairly prejudicial" when "it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which [the defendant] is being charged." *Odum v. State*, 412 Md. 593, 615 (2010) (internal quotation marks and citations omitted).

In our view, the evidence of appellant's conviction for second-degree assault was not of a nature that would persuade the jury to ignore the facts of the case. The evidence was highly probative for the specific purpose of ascertaining whether, by resuming the relationship, Ms. W. had consented to intercourse. Moreover, a physical assault and verbal threat is sufficiently different from sexual assault such that a jury would be far less likely to mistakenly use the evidence as proof that appellant had a propensity to force sexual intercourse without consent or to commit crimes in general. Finally, the trial court

took the proper precautions to ensure that the jury did not utilize appellant's other crimes evidence improperly during its deliberations by providing a limiting instruction. "It is presumed that jurors will follow limiting instructions." *Berry v. State*, 155 Md. App. 144, 172 (citation omitted), *cert. denied*, 381 Md. 674 (2004).

Appellant's third and final argument, that the scope of scope of Ms. W.'s testimony was impermissibly broad, is not preserved. The State made clear in its proffer that it intended to elicit specific details about the earlier assault, including the fact that appellant bit her face, during Ms. W.'s testimony. The trial court articulated in its ruling that the testimony would include details about the violent nature of the incident. Defense counsel's arguments and objections in both instances were limited to the relevance of the testimony as it related to the issue of consent, not to its scope or the prejudicial impact of the relevant details. Since appellant's counsel stated a specific ground for objection at trial, all other objections are waived. *See Anderson v. Litzenberg*, 115 Md. App. 596 (1997).

In short, the trial court did not err in admitting testimony related to appellant's other crimes.

II. Admission of Hearsay Testimony

Appellant asserts that the trial court erred in admitting testimony from Ms. W.'s supervisor Paige Austin, because the testimony did not qualify as a hearsay exception. Ms. Austin was called by the State to corroborate Ms. W.'s testimony about the hours following the assault on August 25th and Ms. W.'s final confrontation with appellant on August 30th. The trial court admitted -- over defense counsel's objection -- testimony

from Ms. Austin that Ms. W. related an argument she had with appellant and that he had told Ms. W. that she would not report him to the police because "you like this. This is what you like."

Our review of the record supports the conclusion that appellant has waived this issue for review. Generally, an issue is waived when identical evidence or similar evidence is received without objection, even if a party later objects to that evidence. *See Ware v. State*, 170 Md. App. 1, 20 (2006) (citing *Williams v. State*, 131 Md. App. 1, 26 (2000)); *Standifur v. State*, 64 Md. App. 570, 579 (1985) (citing *Spriggs v. Levitt & Sons, Inc*., 267 Md. 679, 682-83 (1973)), aff'd 310 Md. 3 (1987)).

Although defense counsel objected to Ms. Austin's testimony relating to the altercation between appellant and Ms. W. outside of her workplace, he failed to object when Ms. W. offered nearly identical testimony about the argument and what was said during her direct examination, and in fact, elicited substantially similar details on cross-examination. Accordingly, appellant has waived any claim of error as to this testimony because similar testimony was admitted without objection.

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