Circuit Court for Wicomico County
Case No. C-22-CR-21-000389

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 907

September Term, 2022

TERRY LEE PARKS, JR.

v.

STATE OF MARYLAND

Nazarian,
Ripken,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.

Filed: December 22, 2023

Following a bench trial in the Circuit Court for Wicomico County, Terry Lee Parks, Jr. ("Appellant") was convicted of sexual abuse of a minor, fourth degree sexual offense, and second degree assault. The court sentenced Appellant to twenty-five years of incarceration for sexual abuse of a minor. The court suspended twelve years and six months of that sentence. The sentence included five years of supervised probation upon release. For the fourth degree sexual offense, Appellant was sentenced to one year of concurrent incarceration. For sentencing purposes, the assault conviction was merged with the conviction for fourth degree sexual offense. Appellant noted this timely appeal and presents two questions for our review:[1]

I. Whether the evidence was sufficient to sustain the conviction for sexual abuse of a minor.

II. Whether the circuit court erred in admitting evidence of Appellant's prior convictions for sexual abuse of a minor and third degree sexual offense.

For the following reasons, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was charged with sexually assaulting "K.", a 14-year-old child who lived next door to him.[2] During the motions hearings and at trial, Appellant did not dispute that some form of sexual contact had occurred. Instead, he asserted a defense of voluntary

[1] Rephrased from:

1. Is the evidence insufficient to sustain Appellant's conviction for sex abuse of a minor?
2. Did the lower court err by allowing the State to introduce evidence of Appellant's 2003 conviction?

[2] To protect the anonymity of the victim, we refer to the child by a letter selected at random.

intoxication.[3]

A. Pre-Trial Ruling on Admissibility of Prior Convictions

Prior to trial, the State filed a motion seeking to introduce evidence at trial that, in 2003, Appellant was convicted of sexual abuse of a minor and third degree sexual offense. The motion was based on Section 10-923 of the Courts and Judicial Proceedings Article ("CJP") of the Maryland Code ("Md. Code"), which provides for the admissibility of "other sexually assaultive behavior by the defendant" offered to (1) prove lack of consent or (2) rebut an allegation "that a minor victim fabricated the sexual offense." In addition, the State filed notice of its intent to introduce the prior convictions pursuant to Maryland Rule 5-404(b), which provides that evidence of other crimes may be admissible for limited purposes, including proof of intent. Appellant responsively, filed a motion in *limine* to exclude the prior convictions.

Following an evidentiary hearing, which we shall discuss in more detail below, the motions court ruled that the prior convictions were admissible under CJP § 10-923, to prove lack of consent, and were also admissible pursuant to Rule 5-404(b), to prove intent.

B. The Trial

A two-day bench trial was held before a judge who was not the same judge that presided over the motions hearing. Before the first witness was called, the State read the

[3] Voluntary intoxication "may constitute a defense to a crime requiring a specific intent 'where intoxication exists to a degree that it deprives the accused of his capacity to form a specific intent.'" *Cirincione v. State*, 75 Md. App. 166, 175 (1988) (quoting *Avey v. State*, 249 Md. 385, 388 (1968)). Appellant was charged with third degree sexual offense and fourth degree sexual offense, both of which require proof of specific intent to sexually arouse, gratify, or abuse either party. *See* footnote 7 *infra*.

following information into the record, in accordance with the order of the motions court:

> [O]n September 23rd of 2003, [Appellant] entered an Alford plea and was convicted of child abuse by a parent and third degree sexual offense. The victim for both counts was the daughter of [Appellant] who was between nine and eleven years of age at the time of the criminal conduct.

The evidence at trial demonstrated that Appellant and his wife, Dawn Parks ("Dawn"), moved next door to K. and K.'s family in March 2007. K. was approximately 18 months old at that time. Less than a month after moving in, Appellant and Dawn's child, "J." was born.[4]

Appellant, who testified at trial, said that "as time went on, [the two families] became closer knit as far as . . . a community." Similarly, K.'s mother testified that there was a "great neighborly relationship" between the two families. They attended pool parties, barbecues, baby showers, birthday celebrations and graduation parties at each other's homes. Appellant said that K.'s family was "like family" to him, and that he considered K. to be like a "niece."

K. and J. became good friends. They went to the same day care program, attended the same elementary school, and rode the bus together. They regularly played together after school and had "sleep-overs." The Parks family took K. to events, such as ball games. K.'s mother testified that "there were . . . times that . . . they've watched [K.] while we did stuff . . . [o]r vice versa."

K.'s mother became aware that Appellant was a registered sexual offender around

[4] To protect the anonymity of the minor child, we again refer to the child by a randomly selected letter.

the time that he moved to the neighborhood. According to K.'s mother, Dawn told her that the case had been "blown out of proportion by [Appellant's] ex-wife[,]" that "it was hearsay[,]" and that there "wasn't much to it." Dawn said that Appellant "pleaded [guilty] . . . for the benefit of" the victim, Appellant's child from a prior marriage, so that the child "wouldn't be in it or [be] accused of something[.]"

K.'s mother was asked by the prosecutor if she was comfortable having Appellant supervise K. She responded, "Well, I assumed, Dawn was always there, too . . . it was [a] group. It's not like I asked [Appellant] to babysit [K.] herself. . . . I was comfortable with [K.] being around him in a group environment."

When K. and J. were about 12 years old, K.'s mother and Dawn discussed that the children were "at that age," and therefore required close supervision while they were together, to ensure they were not engaged in risky or dangerous activities. K.'s mother explained her understanding of the expectations: "you know, no more sleep-overs . . . [t]he door is open . . . things like that." Appellant was not involved in this conversation.

On September 16, 2021, Appellant asked J. if K. would like to come over for a "camp fire" that evening. Around 7:00 p.m., J. texted K. "We're having a fire if you want to come over later." After getting permission from her mother, K. responded, "[f]or short [sic] just let me know when." At around 8:30 p.m., J. sent a text message to K. telling her that she could come over.

C. K.'s Testimony

K. testified that Appellant and J. were sitting in chairs around the bonfire when K. arrived. The three of them sat around the fire for about an hour. During that time, K.

consumed one and a half "mini bottles" of Fireball, which Appellant provided to her.[5]

At some point, J. got up and went into a recreational vehicle ("RV") that was parked in the driveway. A short time later, K. went into the RV to "check on" him. J. had a headache and was "resting" on a bunk over the driver's seat. K. laid down on a couch in the RV.

About ten minutes later, Appellant entered the RV and sat on the couch with K. He placed one of K.'s legs across his lap, put his hand on K.'s knee, and started moving his hand back and forth. Appellant then moved his hand up her thigh and rubbed her vagina through her leggings. At one point, he pulled the waistband of her leggings away from her body and put his hand inside of her underwear. With the leg that was resting on Appellant's lap, K. felt a "change" in Appellant's "genital area," which she thought was a "boner."

K. was "shocked," "vulnerable," and "very overwhelmed." She "knew it was getting . . . really inappropriate," but she "froze" and "didn't know what to do." She told Appellant that she had to leave so as not to miss her curfew while this was not so. Appellant said it would be "okay for a few more minutes," and continued to fondle K. A few minutes later, K. got up and went home. She reported the assault to her uncle's girlfriend the same night.

During the encounter, K. surreptitiously took photos and brief videos showing Appellant's actions. She explained that she did so "just because . . . no one ever . . . believes[,] and it's always like a he-said she-said." The photos and videos were

[5] According to the record, the "mini bottles" of Fireball contained 50 milliliters of 66 proof alcohol.

admitted into evidence.

D. Appellant's Post-Arrest Statements

Appellant was arrested the next day and gave a voluntary statement to a police detective. The recorded interview and a transcript of the interview were admitted into evidence. Appellant told the detective that, on the date of the incident, he drank one beer and three or four shots of Fireball. Appellant denied giving any alcohol to K. He said that, after J. and K. went into the RV, he followed them to find out "[what was] going on[,]" or "happening in [t]here." He explained that he did not leave J. and K. alone "for very long" because they were "young" and "impressionable." Appellant told the detective that K. and J. were "sacked" and were "falling asleep[,]" and he told them it was time for bed. He said, "[a]t that point, the evening ended."

The detective asked Appellant whether he sat next to K. Appellant acknowledged that he sat on the other end of the couch. When the detective asked Appellant what he remembered after that, Appellant said, "[u]s sitting there, just talking." The detective then showed Appellant the photographs K. had taken during the encounter. After viewing them, Appellant said, "I don't know what kind of state of mind I was in to make me want to do something like that." He added, "the only thing I can think of is . . . I was completely hammered to the point where I had no idea what I was doing."

E. Appellant's Trial Testimony

At trial, Appellant testified that Dawn would participate in the bonfires "from time to time" but "mostly it was myself and [J.]" Appellant stated: "that's my [child] and myself time."

Appellant's testimony regarding his alcohol intake the day of the assault differed from what he told the detective after his arrest. At trial, Appellant stated that he consumed a total of 18 miniature bottles of Fireball between 2:00 and 6:30 p.m., which included alcohol he consumed while at work and while driving home. Upon returning home from work around 6:30, he testified he consumed two additional mini bottles of Fireball and took "two puffs off of [his] vape pen" that contained a highly concentrated form of medical marijuana. While building the fire and sitting around it that evening, he said he had three to four "shots" of Fireball and two 12-ounce cans of beer. Upon entering the RV, Appellant indicated he took a "swig" from a bottle of Fireball that he estimated was equivalent to two or three shots.

Appellant testified that the night of the incident, he remembered sitting down in the RV but did not recall where he sat. The next thing he claimed to remember was vomiting in the bathroom of his home. He attributed his lack of recall to his consumption of alcohol and marijuana. As noted previously, Appellant was convicted of sexual abuse of a minor, fourth degree sexual offense, and second degree assault. Additional facts will be included as they become relevant to the issues.

DISCUSSION

I. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION FOR SEXUAL ABUSE OF A MINOR.

Appellant was charged with a violation of Section 3-602(b)(1) of the Criminal Law Article ("CR") of the Maryland Code, which provides that "[a] parent or other person who has permanent or temporary care or custody *or responsibility for the supervision of* a minor

may not cause sexual abuse to the minor." (emphasis added). "'Responsibility' in its common and generally accepted meaning denotes 'accountability,' and 'supervision' emphasizes broad authority to oversee with the powers of direction and decision." *Pope v. State*, 284 Md. 309, 323 (1979) (citation omitted).

"[R]esponsibility for supervision of a minor child may be obtained only upon the mutual consent, express or implied, by the one legally charged with the care of the child and by the one assuming the responsibility." *Id.* at 323. "In other words, a parent may not impose responsibility for the supervision of his or her minor child on a third person unless that person accepts the responsibility, and a third person may not assume such responsibility unless the parent grants it." *Id.* at 323–24; *see Westley v. State*, 251 Md. App. 365, 418 (2021).

A. The Parties' Contentions

Appellant asserts that the State failed to prove that he had responsibility for the supervision of K. He argues that, "[r]egardless of the fact that [he] was a longtime neighbor and friend of the family," there was no evidence to show that he and K.'s mother mutually agreed that he would have responsibility for supervising of K. According to Appellant, "[t]o the extent that any mutual consent existed, it existed between" Dawn and K.'s mother, and did not extend to him. The State contends that the evidence was sufficient to support a finding that K.'s mother implicitly consented to Appellant having temporary responsibility for the supervision of K., and that Appellant implicitly accepted such responsibility.

B. Standard of Review

"[A]ppellate review of the sufficiency of the evidence . . . is precisely the same in a

jury trial and in a bench trial alike." *Chisum v. State*, 227 Md. App. 118, 129 (2016). We ask "whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Grimm v. State*, 447 Md. 482, 494–95 (2016) (quoting *Cox v. State*, 421 Md. 630, 656–57 (2011)).

In determining the sufficiency of the evidence, we are "measuring a verdict against the supporting evidence itself and not looking at what a judge might say in rendering the verdict." *Chisum*, 227 Md. App. at 127. "[W]e will not set aside the judgment of the trial court on the evidence unless it is clearly erroneous, giving due regard to the trial judge's opportunity to judge the credibility of the witnesses." *Livingston v. State*, 192 Md. App. 553, 572 (2010). *See also* Md. Rule 8-131(c). "If there is any competent evidence to support the factual findings of the trial court, those findings cannot be held to be clearly erroneous." *Goff v. State*, 387 Md. 327, 338 (2005) (quoting *Solomon v. Solomon*, 383 Md. 176, 202 (2004) (additional citation omitted)).

"[T]he finder of fact has the 'ability to choose among differing inferences that might possibly be made from a factual situation[.]'" *Smith v. State,* 415 Md. 174, 183 (2010) (quoting *State v. Smith*, 374 Md. 527, 534 (2003)). We "give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [we] would have chosen a different reasonable inference." *Cox*, 421 Md. at 657 (quoting *Bible v. State*, 411 Md. 138, 156 (2009) (additional citation omitted)). We do not consider exculpatory inferences because they are "not a part of that version of the evidence most favorable to the State[.]" *Cerrato-Molina v. State*, 223 Md. App. 329, 351 (2015).

C. Analysis

1. The evidence was sufficient to support a finding that K.'s mother gave implied consent to Appellant to supervise K.

K.'s mother testified that she had been to bonfires on the Appellant's property on prior occasions. When K.'s mother was asked which family member "typically hosted" the bonfires, she said, "[Appellant] was out there more so," than Dawn, who would go "in and out" of the house. K.'s mother stated that, when she gave permission to K. to go over to Appellant's house for an outdoor fire on the night in question, she assumed that Appellant and/or Dawn would be supervising. Based on that evidence, the finder of fact could reasonably conclude that K.'s mother consented to have K. supervised at the bonfire by Appellant. *See Zaal v. State*, 85 Md. App. 430, 436 (1991) (child's parent gave implied consent to the defendant to supervise the child by giving the child permission to go to a movie theater with the defendant), *rev'd on other grounds*, 326 Md. 54 (1992).

Appellant claims that any inference that K.'s mother impliedly allowed him to supervise K. was negated because, according to Appellant, K.'s mother testified that she would "never ask [Appellant] to watch [K.] because he was a registered sex offender." We disagree. K.'s mother did not say that she would never ask Appellant to watch K. Her testimony was that she never asked Appellant to "babysit [K.] by herself," in other words, if no one else was present. But she was "comfortable with [K.] being around [Appellant] in a group environment." This testimony did not preclude a finding that K.'s mother impliedly consented to give Appellant responsibility for the supervision of K. A finder of fact could reasonably infer that K.'s mother consented to Appellant's supervision of K. at

the bonfire because it was her understanding that it would be a "group environment," that is, that Dawn and/or J. would also be present.

2. The evidence was sufficient to support a finding that Appellant consented to accept responsibility for the supervision of K.

In the light most favorable to the State, the evidence established that, prior to the date in question, Appellant and/or his wife had supervised K., at their home or on outings, when K.'s mother was elsewhere. On the day of the events giving rise to the charges, Appellant suggested that J. invite K. over for a bonfire, an activity which usually did not involve Dawn. Appellant told the detective that, because K. and J. were "young" and "impressionable," he did not leave them alone outside, except perhaps to prepare a snack or use the restroom. He said that the reason he followed K. and J. into the RV was to find out what they were doing. Based on this evidence, a reasonable finder of fact could infer that Appellant impliedly accepted responsibility to supervise K. on the date in question.

In support of his argument that the State failed to prove mutual consent between K.'s mother and Appellant, Appellant relies on *Pope v. State*, 284 Md. 309 (1979). The defendant in that case was charged with child abuse after a three-month old child died from physical injuries inflicted by the child's mother while at the home of and in the presence of the defendant. *Id*. at 313. The issue was whether the defendant, who had previously cared for the child, had responsibility for the supervision of the child at the time of the abuse by the mother.[6] *Id.* at 329. The Supreme Court held that the defendant did not have

[6] The defendant in Pope was charged child abuse pursuant to Article 27, Section 35A of the Maryland Code. *Pope*, 284 Md. at 312. That statute prohibited both physical and sexual abuse of a child and provided that "[a]ny parent, adoptive parent or other person who has

responsibility for the supervision of the child at the time the injuries were inflicted because "the mother was always present[,]" and the defendant had "no right to usurp the role of the mother even to the extent of responsibility for the child's supervision." *Id.* at 329–30.

Appellant argues that, as in *Pope*, he did not have responsibility for the supervision of K. because K.'s mother was "still present." The reasoning supporting this argument is unsound. Neither the fact that K.'s mother had previously attended bonfires on the Appellant's property, nor the fact that she was in her home at the time, establishes that she was "still present" during the offense.

Appellant next argues that "agreeing to a 'just keep an eye on the kids in the neighborhood type thing' does not constitute a legal responsibility without the requisite consent criteria." In support of this argument, Appellant relies on a hypothetical situation set forth in *Pope* to explain the rationale for the holding that mutual consent was required before a person could be held responsible for the supervision of a child. There, the Supreme Court stated:

> Were it otherwise, the consequences would go far beyond the legislative intent. For example, . . . a person who allows his neighbor's children to play in his yard, keeping a watchful eye on their activities to prevent them from falling into harm, could be held responsible for the children's supervision.

Id. at 325. Here, however, Appellant did more than simply allow a neighbor's child to play in his yard. He prompted J. to invite K. to his yard, for the express purpose of sitting by an open fire, a potentially dangerous activity. On the facts of this case, the evidence was

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the permanent or temporary care or custody or responsibility for the supervision of a minor child . . . who causes [physical or sexual] abuse to such minor child shall be guilty of a felony." Md. Code Ann. Art. 27, § 35A (repealed by Acts 2002, c. 26, §1).

sufficient to support a finding that Appellant accepted responsibility for the supervision of K.

In sum, viewing the evidence at trial in the light most favorable to the State, as we must, we conclude that the finder of fact could reasonably conclude that Appellant had responsibility for the supervision of K. The evidence was therefore sufficient to sustain the conviction for sexual abuse of a minor.

II. THE COURT DID NOT ERR IN ADMITTING EVIDENCE OF APPELLANT'S 2003 CONVICTIONS.

At the pre-trial hearing on the admissibility of the prior convictions for sexual abuse of a minor and third degree sexual offense, the detective who investigated that case testified that in 2003, the minor victim reported that Appellant, her biological father, had "fondled" her breasts," "rubbed" her vagina, and digitally penetrated her vagina. The detective said that Appellant also engaged in acts of exhibitionism and masturbation in the victim's presence. According to the detective, the victim said that "some type of abuse occurred every other day."

The abuse started when the victim was nine or ten. The victim was almost thirteen at the time of the reporting in February 2003. She told the detective that she made the decision to report the abuse at that time because "things were getting out of hand" and "she couldn't take it anymore." She described two incidents that had occurred in the preceding month. She said that Appellant pulled her pajama bottoms down and attempted to digitally penetrate her; and that he had straddled her while she was laying on her stomach, pulled her clothing aside, and touched her bare buttocks with his penis.

After Appellant was charged, the victim recanted her statement. She then withdrew her recantation after meeting with her attorney, the prosecutor, and a social worker. Appellant entered an Alford plea and was convicted of child abuse by a parent and third degree sex offense.

At the motions hearing in this case, the victim in the 2003 case testified that Appellant had never done any of the things that she accused him of in 2003. She said that she was "scared" of her stepmother, who abused her verbally and physically, and that she made up the allegations against her father so that she (the victim) would be removed from the home. She acknowledged that, after she recanted, the prosecutor told her that she could face charges of making a false statement, but she did not recall if that was what led her to withdraw her recantation.

A. The Parties' Contentions

Appellant asserts that the court committed reversible error in admitting evidence of his 2003 convictions for sexual abuse of a minor and third-degree sex offense. He contends that the facts of the 2003 case are "too dissimilar" from this case to be relevant to the issue of intent, and therefore, the convictions were improperly admitted pursuant to Maryland 5-404(b). He further contends that consent was not an issue in this case, and, therefore, the motions court erred in ruling that the convictions were admissible under CJP § 10-923 to prove lack of consent. Finally, Appellant claims that, even assuming evidence of his prior convictions was relevant to intent and/or lack of consent, the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

The State maintains that evidence of the prior convictions was admissible under

Rule 5-404(b) as it was relevant to the contested issue of intent and it was not unfairly prejudicial. We agree with the State.

B. Analysis

Pursuant to Maryland Rule 5-404(b), 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).[7] Rule 5-404(b) "is designed to protect the person who committed the 'other crimes . . .' 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) (citation omitted). Other crimes or prior bad acts may be admissible, however, where "the evidence is 'specially relevant' to a contested issue, besides 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)).

Before admitting evidence of other crimes or bad acts under Maryland Rule 5-404(b), the court must apply a three-part test:

> The court must determine first whether the proffered evidence fits into one of the Rule's exceptions. We review that decision *de novo*. The court then must assess whether the accused's involvement in the other crimes is established by clear and convincing evidence. Finally, the trial court must

[7] In pertinent part, Maryland Rule 5-404(b) provides:

> 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[.]

> weigh the necessity for and probative value of the 'other crimes' evidence . . . against any undue prejudice likely to result from its admission. We review the circuit court's balancing of probative value against undue prejudice for abuse of discretion.

Vigna v. State, 241 Md. App. 704, 727 (2019) (internal quotation marks and citations omitted), *aff'd* 470 Md. 418 (2020).

With respect to the first prong of the test, Appellant maintains that the 2003 convictions have "no bearing on [his] intent in the case at bar" because the cases are "so dissimilar[.]" Appellant claims that "[t]he only facts that the two cases have in common is that both victims are minor females and [he] was convicted of digitally penetrating [his daughter] under her clothing and accused of attempting to digitally penetrate [K.] over her clothing." This argument is unpersuasive. *See Woodlin v. State*, 254 Md. App. 691, 705–06 (2022) (finding a prior sexual act sufficiently similar to substantially outweigh the risk of unfair prejudice by comparing the victims' vulnerability, sex, consciousness, consent, and the manner of assault.)

We have no difficulty concluding that the prior convictions were specially relevant to the issue of intent. The State had the burden of proving that Appellant engaged in a sexual act or sexual contact with K. with the specific intent to sexually arouse, gratify, or abuse himself or K.[8] Because there was photographic evidence of sexual contact, the key

[8] The State charged Appellant with fourth degree sexual offense based on Section 3-308(b)(1) of the Criminal Law Article ("CR") of the Maryland Code, which prohibits "sexual contact with another without the consent of the other[.]" "Sexual contact" is defined as "an intentional touching of the victim's or actor's genital, anal, or other intimate area *for sexual arousal or gratification, or for the abuse of either party*." Md. Code CR § 3-301(e)(1) (emphasis added). Appellant was also charged with a third degree sexual offense pursuant to Md. Code CR § 3-307. The State's theory with respect to that

issue to be determined by the finder of fact was whether Appellant acted with specific intent. The court did not err in ruling that evidence that Appellant was previously convicted of child sexual abuse was relevant to that issue. *See* Md. Rule 5-401 (Evidence is relevant if it makes "the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.")

Moreover, we perceive no abuse of discretion in the court's determination that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.[9] "The special relevance that gives 'other crimes' evidence its probative value *ipso facto* makes it prejudicial in that it is, by definition, strong but legitimate proof that the defendant is guilty." *Oesby v. State*, 142 Md. App. 144, 166 (2002). But this "legitimate" or "self-evident prejudice" is not what is considered in determining whether the evidence is unfairly prejudicial. *Id.* "What is 'unfair' is only the incremental tendency of the evidence to prove that the defendant was a 'bad man.'" *Id.* "Evidence may be unfairly prejudicial if it might influence the [finder of fact] to disregard the evidence or lack of evidence regarding the particular crime." *Green v. State*, 259 Md. App. 341, 358 (2023) (quoting *Odum v. State*, 412 Md. 593, 615 (2010) (additional quotation omitted)).

charge was that Appellant engaged in a sexual act with a 14-year-old child. The definition of "sexual act" includes an act "in which an object or part of an individual's body penetrates, however slightly, into another's genital opening or anus; and that can reasonably be construed to be *for sexual arousal or gratification, or for the abuse of either party*." Md. Code CR § 3-301(d)(v) (emphasis added). "The phrase . . . that prohibits contact 'for sexual arousal or gratification, or for the abuse of either party' establishes a specific intent requirement." *Bible v. State*, 411 Md. 138, 157 (2009).

[9] Appellant does not challenge the court's finding that his involvement in the other crimes was established by clear and convincing evidence.

Here, where intent was the pivotal element to be proven, the probative value of Appellant's prior convictions for the same crime was not substantially outweighed by the danger of unfair prejudice. Accordingly, the court did not err in ruling that the 2003 convictions were admissible pursuant to Maryland Rule 5-404(b).

Although we need not go further, we conclude that the court did not err in ruling that the convictions were also admissible under CJP § 10-923. Appellant was charged with fourth degree sexual offense pursuant to CR § 3-308(b)(1), which prohibits "sexual contact with another without the consent of the other[.]" Accordingly, the State had the burden of proving lack of consent.

Appellant argues that evidence of his prior convictions was improperly admitted because an underage victim cannot consent to a sexual act with an adult and, therefore, it was "unnecessary" to prove lack of consent.[10] But, as this Court has "consistently recognized[,]" "a need for the evidence is not a factor in assessing probative value." *Newman v. State*, 236 Md. App. 533, 553 (2018). As Judge Moylan, writing for this Court, has explained:

> There is frequently a tendency to conclude that if the State's case is otherwise a strong one, the probative value of "other crimes" evidence is proportionately diminished. That is not the case. Probative value does not depend on necessity. When we are talking only about the legitimate prejudice that inevitably results from competent evidence enjoying a special or heightened relevance, there is no downside to making a strong case even stronger.

[10] "A person can consent to sexual relations in Maryland generally at 16 years old." *In re S.K.*, 237 Md. App. 458, 466 n. 4 (2018) (citing *Garnett v. State*, 332 Md. 571, 577 (1993)), *rev'd on other grounds*, 466 Md. 31 (2019).

Oesby, 142 Md. App. at 166 (2002). The court did not abuse its discretion in admitting the evidence to prove lack of consent.

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