Circuit Court for Cecil County
Case No. C-07-CR-22-001026

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1965

September Term, 2023

BRYANT NAKIA WHITE

v.

STATE OF MARYLAND

Nazarian,
Reed,
Albright,

JJ.

Opinion by Albright, J.

Filed: August 8, 2025

A jury in the Circuit Court for Cecil County convicted Bryant Nakia White, appellant, of attempted second-degree murder, two counts of first-degree rape, and other related offenses. On December 8, 2023, Mr. White was sentenced to two consecutive terms of life imprisonment plus a consecutive term of sixty years. He noted this appeal the same day, presenting us with one question that we rephrase as:[1]

> Did the circuit court err in admitting evidence of Mr. White's other sexually assaultive behavior under Maryland Code, Courts and Judicial Proceedings, § 10-923?

We answer this question "no" and affirm.

BACKGROUND

A. Mr. White's Offense

Mr. White assaulted A.G. in the early morning hours of April 6, 2002. She was walking on the street outside of her apartment in Port Deposit, Maryland, when a black car pulled up. From inside the vehicle, Mr. White asked A.G. what she was doing. She explained to him that she was checking if her boyfriend was back from walking a friend home. Mr. White drove away. Shortly afterwards, however, the car passed back by A.G., and Mr. White told her he had seen her boyfriend just down the street. Mr. White then offered A.G. a ride to her boyfriend and she accepted.

[1] Mr. White phrases the issue as:

> Was admitting testimony from a different victim about sexually assaultive behavior despite an expunged record and substantially undue prejudice erroneous?

Instead of taking A.G. to her boyfriend, Mr. White drove the car to a bridge under Interstate 95 and assaulted her. After choking A.G. with his arm wrapped around her neck until she thought her neck might be crushed, Mr. White forced her to perform oral sex on him. Mr. White then forced A.G. to undress before he vaginally raped her in the backseat of his car. Afterwards, Mr. White repeatedly struck A.G. in the head and face until she was unconscious before discarding her into a ravine along the roadside. A.G. regained consciousness in the ditch without clothing.

Mr. White was identified as the perpetrator nearly twenty years later. In November 2022, the State's DNA analyst matched Mr. White's DNA profile with DNA collected from a vaginal swab of A.G. taken soon after she had been raped. Mr. White was then indicted on one count of attempted second-degree murder, two counts of first-degree rape, one count of second-degree rape, two counts of first-degree sex offense, one count of second-degree sex offense, two counts of third-degree sex offense, one count of fourth-degree sex offense, one count of first-degree assault, one count of second-degree assault, one count of reckless endangerment, one count of kidnapping, and one count of false imprisonment.

A jury convicted Mr. White after a four-day trial in Cecil County from October 10–13, 2023. The jury found Mr. White guilty of attempted second-degree murder, first-degree rape, first-degree sex offense, second-degree sex offense, first-degree assault, second-degree assault, reckless endangerment, kidnapping, and false

imprisonment. The circuit court imposed a total sentence of two consecutive life sentences plus two consecutive thirty-year terms.[2]

B. Evidence of Mr. White's Other "Sexually Assaultive Behavior"

Prior to trial, the State moved to admit evidence of Mr. White's other sexually assaultive behavior under Maryland Code, Courts and Judicial Proceedings ("CJP"), § 10-923. Specifically, the State sought to admit testimony from another woman, R.M., who Mr. White purportedly raped a few months before the assault of A.G. Although Mr. White was charged and tried for the rape of R.M. shortly after it occurred, he was not convicted and the charges were expunged.[3] The circuit court held a hearing on the State's motion to admit R.M.'s testimony on October 6, 2023, and concluded it was admissible under CJP § 10-923.

1. R.M.'s Testimony

During both the hearing and at Mr. White's trial, R.M. testified that Mr. White raped her at her apartment in Port Deposit, Maryland, in February 2002. She was at home with only her 18-month-old son when the rape occurred. At the time, Mr. White was an acquaintance of R.M.'s friend. He had walked into R.M.'s apartment after he knocked on the door and she answered.

[2] Mr. White was sentenced to a thirty-year term for second-degree attempted murder, a consecutive life sentence for first-degree rape, another consecutive life sentence for first-degree sexual offense through force, and a consecutive thirty-year term for kidnapping. The rest of Mr. White's convictions merged during sentencing.

[3] According to the parties in this case, the case involving R.M. resulted in a hung jury.

Once he was in R.M.'s apartment, Mr. White grabbed a knife from her kitchen and subsequently threatened R.M. with it before raping her. He first held the knife up to R.M.'s neck and commanded her to undress before forcing her to perform oral sex on him. Eventually, Mr. White also undressed and forced R.M. to engage in vaginal intercourse with him—the knife pressed into her the entire time. Afterwards, Mr. White discarded the knife and left R.M.'s apartment.

Mr. White's counsel cross-examined R.M. during the hearing on October 6, 2023. During the questioning, Mr. White's counsel attempted to introduce a written statement that R.M. allegedly made to the police in 2002. However, R.M. was unable to recognize the unsigned document. Without other authentication, the circuit court sustained the State's objections to Mr. White's questions about the written statement.

2. The Circuit Court's Ruling

The circuit court ultimately admitted R.M.'s testimony under CJP § 10-923 after making specific findings on each of the statute's requirements. First, the circuit court noted that the requirements of CJP § 10-923(c)–(d) had been met.[4] Then, the circuit court

[4] CJP § 10-923(c) and (d) provide:

addressed the first three requirements of CJP § 10-923(e),[5] determining that the evidence was being used to prove a lack of consent, that Mr. White had an opportunity to confront and cross-examine R.M., and that R.M.'s testimony was credible and sufficient to prove the assault by clear and convincing evidence.

Motion required

(c)(1) The State shall file a motion of intent to introduce evidence of sexually assaultive behavior at least 90 days before trial or at a later time if authorized by the court for good cause.

(2) A motion filed under paragraph (1) of this subsection shall include a description of the evidence.

(3) The State shall provide a copy of a motion filed under paragraph (1) of this subsection to the defendant and include any other information required to be disclosed under Maryland Rule 4-262 or 4-263.

Hearing on admissibility

(d) The court shall hold a hearing outside the presence of a jury to determine the admissibility of evidence of sexually assaultive behavior.

[5] CJP § 10-923(e) provides that:

(e) The court may admit evidence of sexually assaultive behavior if the court finds and states on the record that:

(1) The evidence is being offered to:

(i) Prove lack of consent; or

(ii) Rebut an express or implied allegation that a minor victim fabricated the sexual offense;

(2) The defendant had an opportunity to confront and cross-examine the witness or witnesses testifying to the sexually assaultive behavior;

(3) the sexually assaultive behavior was proven by clear and convincing evidence; and

(4) The probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

The circuit court then weighed the probative value of R.M.'s testimony against the danger of unfair prejudice from it under CJP § 10-923(e)(4). To begin with, it noted that CJP § 10-923(e)(4) does not require the analysis of specific factors. However, the circuit court acknowledged that the Maryland Supreme Court set forth some appropriate factors to consider in balancing probative value versus the danger of unfair prejudice in admitting evidence of other "sexually assaultive behavior." *See Woodlin v. State*, 484 Md. 253, 283 (2023).

First, the circuit court found the similarity of the assaults and their temporal proximity to be "highly probative." In addressing the similarity or dissimilarity of the acts, the circuit court focused on the two specific categories provided in *Woodlin*: "(1) the characteristics of the victim, and (2) the nature of the Defendant's conduct." 484 Md. at 284. Both these considerations, the circuit court determined, weighed in favor of similarity because the victims "stand in a similar stature" due to their status as isolated young women and because "the sequence of events" was "remarkably similar in [the circuit court's] view." The circuit court then noted that less than sixty days had elapsed between the assaults.

Turning next to the *Woodlin* factors for assessing the danger of unfair prejudice, the circuit court found that the danger of unfair prejudice from R.M.'s testimony would not substantially outweigh the testimony's probative value. Specifically, the circuit court addressed whether R.M.'s testimony overshadowed the crime charged and found that it did not because the near fatal physical assault on A.G. was "more heinous" than the presence of a child and a weapon during the assault of R.M. Further, the circuit court

found that "the risk of a jury seeking to punish for the prior act rather than the present act" existed, but "to a far lesser extent" because the charges against Mr. White for his assault of R.M. had been expunged. In light of these findings, the circuit court determined that the probative value of R.M.'s testimony "is not substantially outweighed by the danger of unfair prejudice."

Finally, the circuit court considered both the need for and the manner of presentation of R.M.'s testimony before exercising its discretion to admit it. First, it determined that the State had a need for the evidence to prove a lack of A.G.'s consent. Then, the circuit court determined that the manner of R.M.'s testimony would not resemble a "mini-trial" that would "caus[e] a risk of confusion, conflation of issues in the minds of the jury." Accordingly, the circuit court permitted R.M.'s testimony about Mr. White's other sexually assaultive behavior.

Additional facts are provided as necessary in our discussion.

DISCUSSION

A. CJP § 10-923

CJP § 10-923 allows the admission of a defendant's "other sexually assaultive behavior"[6] in specific circumstances. The statute lays out a multi-step process that must be satisfied before the evidence can be admitted. Preliminarily, the circuit court must find that the evidence meets four requirements:

> (1) The evidence is being offered to:
>
> (i) Prove lack of consent; or
>
> (ii) Rebut an express or implied allegation that a minor victim fabricated the sexual offense;
>
> (2) The defendant had an opportunity to confront and cross-examine the witness or witnesses testifying to the sexually assaultive behavior;
>
> (3) The sexually assaultive behavior was proven by clear and convincing evidence; and
>
> (4) The probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

[6] The statute defines "sexually assaultive behavior" as follows:

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

CJP § 10-923(a).

CJP § 10-923(e). If all of the requirements are met, then the circuit court may exercise its discretion to admit the evidence. *Woodlin*, 484 Md. at 262.

In *Woodlin*, the Court laid out "an illustrative—but not exhaustive—list of appropriate factors that circuit courts *may* consider[,]" when analyzing evidence of other sexually assaultive behavior under both CJP § 10-923(e)(4) as well as the final exercise of discretion to admit or deny the evidence. *Id.* at 263. To determine the probative value of evidence of other sexually assaultive behavior, a court may consider the "similarity or dissimilarity of the acts," the "temporal proximity and intervening circumstances," and the "frequency of the sexually assaultive behavior." *Id.* at 284, 286–87. Unfair prejudice, on the other hand, may include considerations of "overshadowing of the crime charged" and "the jury's knowledge that a defendant previously was punished." *Id.* at 287–88. As for the circuit court's final exercise of discretion to admit the evidence, the "need" for and the "clarity and manner" of the evidence may be considered. *Id.* at 289–90.

B. Standard of Review

Varying standards of review apply to different steps of the circuit court's analysis under CJP § 10-923. Determinations regarding the interpretation and application of CJP § 10-923 are questions of law that we review de novo. *Green v. State*, 259 Md. App. 341, 352 (2023) (citing *Mayor & City Council of Balt. v. Thornton Mellon, LLC*, 478 Md. 396, 410 (2022).

A circuit court's finding that the "sexually assaultive behavior" was proven by clear and convincing evidence is reviewed for sufficiency of the evidence. *Browne v. State*, 486 Md. 169, 194 (2023) (citing *State v. Faulkner*, 314 Md. 630, 635 (1989))

(discussing a circuit court's finding of clear and convincing evidence of an accused's involvement in prior bad acts under Md. Rule 5-404(b)); *see also Cousar v. State*, 198 Md. App. 486, 497 (2011) (same).

Finally, we review the circuit court's weighing of probative value versus the danger of unfair prejudice, as well as the court's final decision whether to admit the evidence of other sexually assaultive behavior, for abuse of discretion. *See Woodlin*, 484 Md. at 277 (noting that the legislature "imported the same balancing test found in Maryland Rule 5-403 (probative value versus unfair prejudice) into CJP § 10-923(e)(4)[,]" which balancing we review for abuse of discretion). Under this standard, we will not reverse the circuit court's decision merely because we disagree with it. *Devincentz v. State*, 460 Md. 518, 550 (2018). Instead, "an abuse of discretion occurs when no reasonable person would take the view adopted by the circuit court." *Woodlin*, 484 Md. at 277 (cleaned up).

C. Mr. White's Contentions

In his sole issue presented in this appeal—whether the circuit court erred by admitting R.M.'s testimony under CJP § 10-923—Mr. White provides five reasons why the evidence of his other sexually assaultive behavior should not have been admitted. First, as a preliminary matter, Mr. White argues that CJP § 10-923 does not apply to R.M.'s testimony since the charges related to his assault of R.M. were expunged. In the event that CJP § 10-923 does apply, however, Mr. White asserts error in each step of the circuit court's analysis under CJP § 10-923(e)(2), (e)(3), and (e)(4), as well as in the

circuit court's ultimate exercise of discretion to admit the evidence.[7] In our analysis below, we lay out Mr. White's specific contentions along with our reasons for disagreeing with each one.

D. Analysis

1. Mr. White failed to preserve his argument that CJP § 10-923 does not apply due to expungement of his charges involving R.M.

Because Mr. White failed to raise his expungement argument below, it is not preserved for our review. *See* Md. Rule 8-131(a) ("Ordinarily, an appellate court will not decide any [non-jurisdictional] 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."). The State filed its motion to admit R.M.'s testimony under CJP § 10-923 on February 24, 2023. Mr. White filed a response on August 21, 2023. The circuit court then held a motion hearing on R.M.'s testimony on October 6, 2023. Trial occurred from October 10–13, 2023. At no point before this appeal, however, did Mr. White object to the applicability of CJP § 10-923 on the basis that the charges involving R.M. had been expunged. Nor do we see how addressing this contention on appeal for the first time would be "necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." Md. Rule 8-131(a). Accordingly, we do not address Mr. White's expungement argument.

[7] Mr. White does not assert error in the circuit court's determination under CJP § 10-923(e)(1). We therefore omit that portion of the circuit court's analysis from our discussion.

2. The circuit court did not err by determining that Mr. White had an opportunity to confront and cross-examine R.M. during her testimony about Mr. White's other sexually assaultive behavior.

Mr. White next contends that the circuit court erroneously determined that he had an opportunity to confront and cross-examine R.M because "[t]here was no record of testimony and cross-examination." Because the case against Mr. White for his assault of R.M. was expunged, he claims that "[a]ll evidence to confirm [R.M.]'s claim that she testified and that she was cross-examined was destroyed[,]" and "[m]erely accepting [R.M.]'s claim that she testified and was cross-examined about the incident replaces CJP § 10-923(e)(2)'s directive for proof of such testimony and cross-examination with mere hearsay and speculation that it occurred."

Mr. White's argument here fails because he had (and indeed utilized) an opportunity to confront and cross examine R.M. during the hearing on October 6, 2023. Contrary to Mr. White's argument suggesting otherwise, a plain reading of CJP § 10-923 does not require that the defendant have had an opportunity to confront and cross examine in a *previous* proceeding. *See* CJP § 10-923(e)(2) (requiring the defendant to have "an opportunity to confront and cross-examine the witness or witnesses testifying to the sexually assaultive behavior."). In fact, CJP § 10-923 applies to all sexually assaultive behavior "that *would* constitute" a series of specified sexual offenses, not merely to behavior that resulted in charges or convictions for that behavior. CJP § 10-923(a) (emphasis added). The Supreme Court in *Woodlin* reiterated this point, explaining that "[CJP § 10-923] does not require that the other sexually assaultive behavior yield a conviction." 484 Md. at 267. Thus, evidence of other sexually assaultive behavior may

have no relation to any prior proceedings at all, and the fact that the charges arising out of Mr. White's assault of R.M. were expunged is not determinative of the admissibility of that behavior in this case. Here, R.M. appeared and testified outside the presence of the jury, and Mr. White's counsel cross examined her before the evidence was admitted at trial. Thus, we see no error in the circuit court's conclusion that CJP § 10-923(e)(2) was satisfied.

3. Sufficient evidence supported the circuit court's finding that Mr. White's other sexually assaultive behavior was proven by clear and convincing evidence.

Addressing CJP § 10-923(e)(3), Mr. White contends the circuit court erred in finding that R.M.'s testimony was proven by clear and convincing evidence. Specifically, Mr. White argues that the circuit court was not presented with clear and convincing evidence because (1) R.M.'s testimony was inconsistent with her written statement; and (2) the circuit court did not allow Mr. White to cross-examine her on the statement.[8] As a result, Mr. White asserts, the circuit court erred[9] in this portion of its analysis.

[8] Mr. White argues that R.M.'s testimony on November 7, 2022, was inconsistent with a written statement she purportedly provided to the police on February 7, 2002. In particular, R.M. testified at the hearing that she did not know Mr. White well but the written statement included a statement that "[p]reviously within the last two [months Mr. White] has been trying to sleep with me and has attempted numerous times to try to come in my house with me." Mr. White's counsel attempted to question R.M. about this inconsistency, but R.M. stated that she did not recall making the unsigned statement, and the court sustained the State's objection to further questioning into it.

[9] An appellate court reviews the circuit court's finding that another sexually assaultive behavior was proven by clear and convincing evidence for sufficient evidence. *See Browne*, 486 Md. at 194. Given this standard of review, we assume that Mr. White challenges whether sufficient evidence supports the circuit court's finding here.

CJP § 10-923(e)(3) requires that evidence of other sexually assaultive behavior be proven by clear and convincing evidence. To satisfy this standard, "the witness to a fact must be found to be credible, and that the facts to which [they testify] are distinctly remembered and the details thereof narrated exactly and in due order, so as to enable the trier of the facts to come to a clear conviction, without hesitance, of the truth of the precise facts in issue." *Cousar*, 198 Md. App. at 514–15 (citing *Goroum v. Rynarzewski*, 89 Md. App. 676, 684–85 (1991)). Of note, however, is that "[CJP § 10-923] was enacted in recognition that many sexual assault offenses occur in private and may not generate any physical evidence." *Woodlin*, 484 Md. at 262 (citing S.B. 270, 2018 Reg. Sess., Fisc. & Pol'y Note).

Here, the circuit court determined that clear and convincing evidence proved Mr. White's sexually assaultive behavior based on the clarity and unambiguity—and thus the credibility—of R.M.'s testimony about the other sexually assaultive behavior:

> The Court heard the testimony of [R.M.]. The Court found [R.M.]'s testimony credible. [R.M.] testified as to the occurrence, the sequence of events. She did so clearly and cogently. The facts of what she offered, in the Court's view, were unambiguous and set forth with a clarity discussed in the case law regarding clear and convincing evidence.
>
> Moreover, her demeanor upon the stand, in this Court's view, presented in such a way as evidencing in her demeanor those hallmarks establishing indicia of reliving past trauma. She recounted having -- I mean, this was 20 years ago, and that having reviewed no documentation prior to her testimony, that at the time of the first alleged assault, she was home at her residence in Port Deposit. Than [sic] an individual who she knew of but did not know well, knocked upon her door, entered into her home. She got him a glass of water, he sat on the couch. She sat on the coffee table. Her 18-month-old child was present. That that individual then went into the kitchen, returned with a steak knife that she described -- with a knife that she described as a steak knife, having been pulled from a butcher block, and made a statement, "You know I'm crazy, don't you?"

> She recounted the brandishing of the weapon. She recounted the instruction to remove her clothing. She recounted the instruction to perform oral sex. After that individual had removed his clothing, she recounted him laying on the couch. She recounted being instructed to climb on top of him. She recounted being aware of the presence of the knife on her body. She recounted at the conclusion of the interaction, kicking the knife under the couch. That that individual then left, that she went to a pay phone seeking transportation to her mother's house, which ultimately occurred, whereupon, law enforcement was contacted. [R.M.] also positive[ly] identified Mr. White present in court as the individual who perpetrated those acts against her.
>
> Based on the substance and testimony offered by [R.M.] and based upon the demeanor and her presentation in offering that evidence, the Court finds that element three has been satisfied. That prior sexually assaultive behavior has been proven to this Court by clear and convincing evidence.

We are satisfied that the circuit court's conclusion was premised on sufficient evidence. In short, the circuit court found that R.M. was "credible," and her narrative was "distinctly remembered and the details thereof narrated exactly and in due order." *See Cousar*, 198 Md. App. at 514; *see also Rothe v. State*, 242 Md. App. 272, 293 (2019) ("[T]he assessment of testimonial credibility has always been the fundamental responsibility of the factfinder, jury or trial judge, as a matter of fact. It is not and never was the function of appellate review, as a matter of law."). We will not disturb this finding because Mr. White provides reasons the circuit court could have reached an alternative finding. *See, e.g., Smith v. State*, 374 Md. 527, 534 (2002) (discussing the factfinder's "ability to choose among differing inferences that might possibly be made from a factual situation and the deference [appellate courts] must give in that regard to the inferences a fact-finder may draw."). Because the circuit court found R.M.'s testimony to be credible, there was sufficient evidence to prove Mr. White's other sexually assaultive behavior.

4. The circuit court did not abuse its discretion in determining that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

Mr. White also challenges the circuit court's treatment of the factors laid out in *Woodlin* for assessing probative value versus the danger of unfair prejudice, and the circuit court's conclusion, based on those factors, that the probative value of R.M.'s testimony was not substantially outweighed by the danger of unfair prejudice to Mr. White. We see no abuse of discretion in the circuit court's conclusion.

This criterion of CJP § 10-923(e) "imports the same balancing test utilized in Rule 5-403[.]" *Woodlin*, 484 Md. at 268. This balancing test requires the circuit court to determine that "[t]he probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." CJP § 10-923(e)(4); *see also Woodlin*, 484 Md. at 268. Since it is a discretionary determination, we review it for an abuse of discretion. *Woodlin*, 484 Md. at 268 (citing *Dejarnette v. State*, 478 Md. 148, 175 (2022)).

The circuit court is not required to conduct an analysis of any specific factors when conducting this balancing test. *Id.* at 278. Instead, it is the prerogative of the parties "to argue any factor they deem relevant or applicable," and we will not address a factor on appeal that was not argued before the circuit court. *Id.* at 283 (citing *DeLeon v. State*, 407 Md. 16, 29–30 (2008) and Md. Rule 8-131(a)).

i. Probative value of the evidence

The circuit court, Mr. White argues, incorrectly determined that R.M.'s testimony about Mr. White's other sexually assaultive behavior was probative. Although no factors are required to be considered, *Woodlin* laid out an illustrative set of factors for gauging

the probative value of evidence, including the similarity (or dissimilarity) of the acts, the temporal proximity between the acts, and the frequency of the sexually assaultive behavior. *Woodlin*, 484 Md. at 284–87. The circuit court here analyzed each of those three factors, and Mr. White asserts error in its analysis of each one.

a. Similarity/dissimilarity of the evidence

First, Mr. White argues that neither the characteristics of the victims nor the nature of Mr. White's conduct "revealed any similarity of the alleged acts of sexually assaultive behavior." In comparing the victims' characteristics, Mr. White specifically contends the circuit court "overlooked other important factors, namely that, [A.G.], unlike [R.M.], was intoxicated when the incident occurred." He also asserts the circuit court's finding of similarity between the incidents themselves was flawed because of the difference in A.G.'s and R.M.'s relationships with Mr. White, because of the different locations of the incidents, and because "[R.M.] was merely threatened with a knife while [A.G.] was severely beaten, suffered serious injuries including the mere [sic] loss of her right ear, and was left for dead."

A circuit court's analysis of the similarity between the incidents "necessarily involves an assessment of both similarities and differences[,]" and more similarity increases the probative value. *Woodlin*, 484 Md. at 284. At least two assessments generally should be made to determine similarity: "(1) the characteristics of the victim; and (2) the nature of the defendant's conduct." *Id.* at 285. The first category looks to "the victim's age, biological sex, gender identity, and status (mental state, physical prowess, capabilities, etc.)[.]" *Id.* The second category addresses "both the method of perpetrating

the sexual offense (use of violence/weapons, use of drugs to incapacitate, abuse of a position of trust, etc.) and the sexual offense itself (the specific acts committed, the location of the assault, etc.)." *Id.*

The circuit court addressed both similarities and dissimilarities between the victims and the incidents before concluding there was probative value in the similarities:

> As far as the characteristics of the victim that the Court finds pertinent and germane to the analysis, in each of the matters, the alleged victims were young women who were effectively alone. [R.M.] was in the home with her 18-month-old child. Well, I mean, there was somebody present, but there was nobody present who could have done anything. The alleged victim in the present matter was found alone walking along the roadside and entered into Mr. White's vehicle allegedly. So the Court finds that the characteristics of the victims are similar in this instance.
>
> This is not a matter where there is a very young minor victim in one case, and a victim who has attained the age of majority in another, or where there are notable and material differences between the nature and characteristics of the victims. Rather, the Court finds the victims to stand in a similar stature.
>
> The second prong is the nature of the Defendant's conduct. Allegations in the first instance, the first case, are entry into a residence and the brandishing of a weapon. In the second instance, it is the invitation of an individual into a vehicle, but without the brandishing of a weapon. Those are dissimilarities, but the Court does not find those dissimilarities dispositive.
>
> It is the similarities between the two actions that weigh heavier in the Court's analysis. A young adult woman in a context in which she is alone and vulnerable. Accosting that individual while they are in that state of isolation. Allegations of threats of force and use of force in the perpetration of violent sexual assaults. The allegation in the first instance being the brandishing of a bladed weapon and the use of that weapons against the body of the victim. The allegations in the second instance being choking and strangulation, and battering to the point of unconsciousness. Not the exact same modality of violent act, but a violent act nonetheless.
>
> Moreover, the sequence of events in the alleged perpetration of the sexual assault is remarkably similar in this Court's view. An instruction to disrobe, followed by the disrobing of the perpetrator. An instruction to perform oral sex, followed by nonconsensual vaginal intercourse. The sequence of events in both alleged assaults are nearly identical. The Court finds that the similarity of the two alleged acts is highly probative.

We perceive no abuse of discretion in the circuit court's conclusion. First, we do not address Mr. White's contention that the circuit court failed to consider "that, [A.G.], unlike [R.M.], was intoxicated when the incident occurred." To be sure, an individual's state of intoxication may, in some situations, be considered when analyzing the similarities in the "status" of victims of sexually assaultive behavior. *See Woodlin*, 484 Md. at 285 (including "capabilities" in the relevant considerations of "status"). Mr. White, though, did not raise this dissimilarity to the circuit court. *See id.* at 283 ("[I]t generally is incumbent upon the parties to argue any factor they deem relevant or applicable. A precondition to arguing on appeal that a factor was not properly weighed or considered is that the party brought that particular factor to the circuit court's attention."). Here, the circuit court made a reasoned determination that A.G. and R.M. had similar characteristics and "stand in a similar stature" after noting they were both "young women" who were "effectively alone," and with no "notable and material differences." Without being presented with other grounds to consider the similarities and dissimilarities between A.G. and R.M., we see no abuse of discretion in the circuit court's decision.

Second, we disagree with Mr. White that the circuit court's "focus on similarities in conduct was misguided." To support this position, Mr. White notes three differences between A.G. and R.M.: their differing relationships with Mr. White, the different locations of the assaults, and the varying degree of physical harm inflicted, as reasons the circuit court should have concluded otherwise. Contrary to Mr. White's claims, though,

the circuit court did make findings on these points by acknowledging that the "entry into a residence and the brandishing of a weapon" during the assault of R.M. versus "the invitation of an individual into a vehicle, but without the brandishing of a weapon[]" against A.G. were "dissimilarities."

In light of the circuit court's other findings that both assaults were against "a young adult woman," "in a state of isolation[,]" with "threats of force and use of force in the perpetration of violent sexual assaults[,]" in addition to occurring in a "remarkably similar" sequence of events, the circuit court's ultimate conclusion that the similarities "weigh heavier" than the differences is not a conclusion that no reasonable person could have reached. *See Woodlin*, 484 Md. at 277. Accordingly, we see no abuse of discretion in the circuit court's finding of probative value in R.M.'s testimony due to the similarity between the assault of R.M. and that against A.G.

b. Temporal proximity

Mr. White next argues the circuit court's finding that the temporal proximity of the assaults on A.G. and R.M. was "flawed." He argues that "there is no correlation between these offenses beyond allegations of sexual assault by each alleged victim." Additionally, Mr. White relies on the expungement of his charges arising out of his assault of R.M. to assert that he "was not convicted of any action or behavior against [R.M.], whose testimony . . . the jury did not find convincing."

The temporal proximity factor for determining relevance, however, depends on only a single consideration, the closeness in time between the charged conduct and the evidence of the other sexually assaultive behavior. *Woodlin*, 484 Md. at 286. Indeed, the

analysis is based on common sense: "[t]he closer in time between the other sexually assaultive behavior and the crime charged, the more probative it becomes to proving the crime charged." *Id.*

Here, the circuit court determined that a two-month gap in time between the incidents was highly probative:

> The date of the first incident and [sic] the mistrial matter was February the 7th of 2002. The date of the incident in the present matter is April the 6th of 2002, less than 60 days apart. The temporal proximity is striking, and the Court finds its probative value to be high.

We are unpersuaded by Mr. White's arguments since they do not address the circuit court's analysis of the time period between the assaults but instead focus on the similarity of the incidents and the level of proof supporting R.M.'s testimony. Even if Mr. White had addressed the circuit court's determination that an interval of time "less than 60 days" presents "striking" temporal proximity, however, we would not view the circuit court's decision as an abuse of discretion. *See Woodlin*, 484 Md. at 264, 278, and 295 (finding no abuse of discretion in admitting evidence of sexually assaultive behavior from nine years prior to the charged conduct); *Green*, 259 Md. App. at 362 (finding no abuse of discretion in admitting evidence of sexually assaultive behavior from eight years before).

c. Frequency

As to the frequency factor, Mr. White argues that the circuit court misapplied the Court's instructions in *Woodlin*. He avers that the circuit court did so by ignoring the "straightforward" analysis that probative value builds as frequency increases, as well as

"the facts of this case that there is *no* proven alleged sexually assaultive behavior by Mr. White."

A court's analysis of frequency is, in fact, "rather straightforward to apply: the more frequent the defendant's other sexually assaultive behavior, the more probative it becomes of the crime charged." *Woodlin*, 484 Md. at 287.

The circuit court acknowledged the lack of frequency but concluded it was not dispositive because of the probative value from the similarity of, and the temporal proximity between, the assaults on A.G. and R.M.:

> We have got an allegation of one prior sexually assaultive incident, but this Court doesn't read the cases establishing that one is somehow nonprobative, where a series would then become probative. The *Woodlin* Court quotes from a California case,[10] where it notes that the value of uncharged sexual misconduct will depend on various factors including frequency, similarity, and temporal proximity to the charged offense.
>
> So the Court has written approvingly of those considerations appearing to stand equal with one to not be given greater weight than the other, and though that speaks of uncharged sexual misconduct, I think that the Court can apply that same line of reasoning to the charged sexual misconduct in the present matter.
>
> So though the frequency was only once, as alleged, similarity in the sequence of events and the less than two month window between the two acts, as proximity. Again the Court finds that there would be probative value there.

[10] Mr. White also argues that the circuit court incorrectly interpreted *Woodlin*'s discussion of *People v. Trujillo Garcia*, 89 Cal. App. 4th 1321 (2001). The circuit court noted that *Woodlin* found *Trujillo* persuasive for the proposition that frequency is one of several factors to be considered in determining probative value. *See Woodlin*, 484 Md. at 287. We see no error in the circuit court's reading of *Trujillo*, particularly as the circuit court concluded that a lack of frequency is not dispositive under these circumstances rather than concluding that frequency (or lack thereof) is never relevant to assessing probative value.

We see no abuse of discretion in the circuit court's conclusion. Contrary to Mr. White's first argument, the circuit court carried out *Woodlin*'s "straightforward directive" and acknowledged that "the frequency was only once." As a result, the circuit court did not assign probative value to the frequency of Mr. White's other sexually assaultive behavior. Instead, the circuit court determined that a lack of frequency did not preclude the overall conclusion that the assault of R.M. was probative because of its similarity to, and temporal proximity with, the assault of A.G. Furthermore, Mr. White's second argument regarding his lack of conviction for the assault against R.M. does not pertain to the frequency analysis, and as discussed above, does not preclude admission of R.M.'s testimony under CJP § 10-923. *See Woodlin*, 484 Md. at 287. Thus, we are not convinced that the circuit court's analysis of frequency produced a conclusion that "no reasonable person would take[.]" *See Woodlin*, 484 Md. at 277.

ii. Danger of unfair prejudice in R.M.'s testimony

Mr. White also argues that the circuit court abused its discretion when analyzing the danger of unfair prejudice in admitting R.M.'s testimony. We, again, disagree.

Evidence is unfairly prejudicial if it has the potential to "influence the jury to disregard the evidence or lack of evidence regarding the particular crime." *Green*, 259 Md. App. at 358 (quoting *Odum v. State*, 412 Md. 593, 615 (2010)). As explained in *Woodlin*, factors concerning unfair prejudice under CJP § 10-923 may include overshadowing of the crime charged and the jury's knowledge that a defendant was, or was not, previously punished. *Woodlin*, 484 Md. at 287–88.

a. Overshadowing of the crime charged

Mr. White first contends the circuit court abused its discretion by finding that R.M.'s testimony would not overshadow the charges against Mr. White. Specifically, Mr. White argues that the circuit court's overall conclusion contradicted its specific findings that the assault of R.M. presented "more egregious circumstances" than the assault of A.G. Mr. White's argument is not supported by the record.

Whether evidence of sexually assaultive behavior "overshadows" the charged crime turns on whether the other sexually assaultive behavior is more egregious than the charged conduct. *See Woodlin*, 484 Md. at 287. If so, a defendant may be substantially prejudiced if the other sexually assaultive behavior becomes the focus of the trial rather than the charged conduct. *Id.*

Below, the circuit court found that the facts of A.G.'s assault were, overall, "more heinous" than the previous incident of R.M.'s assault:

> [I]n the [assault on R.M.], you have the presence of a weapon. In the [assault on R.M.] you have the presence of a child, those are perhaps more egregious circumstances.
>
> In the [assault on R.M.], and I say this without minimizing the nature of the alleged sexual assault, but the condition of [R.M.] at the conclusion of the alleged act was not the same. The conclusion of the alleged act in the first instance [R.M.] was able to maintain consciousness, leave her home, go to a pay phone, make contact with another individual, get to a place of safety, and make contact with law enforcement.
>
> [A.G.] in the alleged second act was not so fortunate. [A.G.] was alleged to have been choked unconscious, to have been battered, to have been raped, and to essentially have been dumped in a gulch and left for dead. The Court finds those alleged facts to be more heinous than the alleged facts of the first instance. And finds that the risk of overshadowing by a more heinous prior act is not present.

We see no abuse of discretion in the circuit court's determination that Mr. White's conduct toward R.M. did not overshadow his conduct towards A.G. Although, as Mr. White emphasizes, the circuit court described the presence of an infant and a weapon during the assault on R.M. as "perhaps more egregious circumstances," it went on to weigh the *full* set of circumstances from both the assaults against each other before making a final determination. Of note, the circuit court also discussed how R.M. "was able to maintain consciousness, leave her home," and "get to a place of safety," after Mr. White raped her, and weighed those considerations against the facts that A.G. was "choked unconscious," "battered," and "left for dead[.]" It was these facts that carried the day in circuit court's ultimate conclusion that the totality of circumstances from the assault against A.G. were "more heinous." We do not disagree.

b. Knowledge of the defendant's previous punishment

As to the jury's knowledge of Mr. White's previous punishment (or lack thereof) for his assault of R.M., Mr. White asserts error because "speculation" as to whether Mr. White was previously punished for the assault on R.M. was "present in this case."[11] Thus, he contends, the circuit court's analysis of the unfair prejudice stemming from R.M.'s testimony was an abuse of discretion.

[11] Mr. White further argues that the risk the jury would seek to punish Mr. White for the assault on R.M. was amplified by "a race bias-type situation . . . due to the fact that Mr. White is an African American and [R.M.] is obviously not." However, Mr. White provides no evidence to support his argument that the circuit court did not properly weigh this consideration, or that it would necessitate a different outcome in the circuit court's decision. *See* Md. Rule 8-504(a)(4) (requiring briefs to contain "[a] clear concise statement of the facts material to a determination" of the issues). Without more evidence to back up this assertion, Mr. White's argument does not change our analysis.

Whether the jury knows that a defendant was (or was not) punished for other sexually assaultive behavior is something the circuit court may consider when determining the danger of unfair prejudice in admitting the other sexually assaultive behavior. *Woodlin*, 484 Md. at 288. The risk of unfair prejudice arises from the opportunity for jurors "to be swayed by the notion that the defendant previously escaped punishment[,]" if the jury is left to speculate about the consequences the defendant may have suffered. *Id.* This risk, however, does not mean that the State cannot introduce evidence of other sexually assaultive behavior if it did not result in a conviction. *Id.* at 289. Instead, notifying the jury of a conviction is just one way to "lessen the fear that the jury will convict simply because the jury believes the defendant escaped punishment for the other sexually assaultive behavior." *Id.*

The circuit court determined that prejudice from the jury's lack of knowledge regarding any punishment Mr. White received for the assault on R.M. would be diminished by the jury's knowing that the charges arising from that assault did not result in a conviction:

> [The] factual background cuts both ways. There is a risk to the defense that the jury interprets the first instance as an unpunished crime. There is a risk to the State that the jury interprets that factual record as, you tried this man, and he was not convicted. What 12 people randomly selected from the voter rolls and driving records in Cecil County will do with that information is anyone's guess.
>
> I think the risk to [Mr. White] that the jury will interpret that record as a bad act having gone unpunished, is lesser than had this been a circumstance where the alleged prior sexually assaulted behavior had gone uncharged and untried.
>
> In that instance, the jury could conclude that there was no attempt to hold the perpetrator of that bad act to account. Whereas here, the jury m[a]y

> fairly interpret the man who was alleged to have committed those acts was charged, tried, and not convicted.
>
> So the Court finds that -- I mean, the risk of a jury seeking to punish for the prior act rather than the present act, cannot say that it does not exist. But on the record, as the Court understands it, it exists to a far lesser extent.

Yet again, the circuit court considered the arguments Mr. White highlights on appeal before determining that other considerations weighed heavily in the analysis, too. In fact, the circuit court did not—as Mr. White's argument suggests—find that there was *no* risk of the jury punishing him for a perceived unpunished crime. Instead, it determined that any risk of the jury punishing Mr. White for uncharged conduct would be lessened by the competing inference that could have been drawn from Mr. White's having been tried but not convicted. This, too, is not a decision we perceive as an abuse of discretion.

In conclusion, we are satisfied that the circuit court's determinations about the individual factors of similarity, temporal proximity, frequency, overshadowing, and knowledge of punishment were within the bounds of a reasonable determination. *See Woodlin*, 484 Md. at 277 ("[A]n abuse of discretion occurs when no reasonable person would take the view adopted by the [trial] court." (cleaned up)). Based on these reasonable determinations, the circuit court ultimately concluded that the probative value from the similar nature and circumstances of the victims, the similar conduct in the assaults, and the temporal proximity between them was not outweighed by the danger of unfair prejudice stemming from not knowing whether Mr. White was punished for the assault of R.M. Nor did the assault against R.M. overshadow that against A.G. Accordingly, the circuit court did not abuse its discretion in the determinations it made under CJP § 10-923(e)(4).

5. The court did not abuse its discretion by admitting R.M.'s testimony.

Mr. White's final argument is that the circuit court erred in its analysis of the State's need for R.M.'s testimony, as well as in the manner of its presentation. Thus, he contends, the circuit court abused its discretion by allowing the testimony to be admitted in trial. We disagree.

The four criteria in CJP § 10-923(e) are "*conditions precedent*" to the admissibility of evidence under the statute. *Woodlin*, 484 Md. at 268. Once they are satisfied, a circuit court still must exercise its discretion a second time to determine whether to admit the evidence. *Id.* As with analysis of the probative value versus the danger of unfair prejudice in admitting other sexually assaultive behavior, *Woodlin* lays out "[f]actors concerning admissibility generally after the State has satisfied CJP § 10-923(e)(1)–(4)." *Id.* at 289. Two "illustrative" factors include "need" and "manner." *Id.* at 283, 289–90.

i. Need

Mr. White argues that the circuit court's determination on the need for R.M.'s testimony was erroneous because "[t]he State had other evidence that it could use in an effort to meet its burden of proof[.]" Specifically, Mr. White contends that DNA evidence "could have the same if not a greater effect on the jury as a lack of consent."

The State's need for evidence of other sexually assaultive behavior is a factor "that can cut both ways[.]" *Woodlin*, 484 Md. at 290. If "the State lacks other evidence to carry its burden at trial," the need for the evidence of sexually assaultive behavior increases. *Id.* However, "the risk that a jury will use such evidence for an improper propensity purpose

also increases." *Id.* As a result, this is "a rather difficult factor to balance . . . before making an ultimate determination whether this factor weighs in favor of inclusion or exclusion." *Id.*

The circuit court addressed this factor, determining that the State had a need for R.M.'s testimony to prove that A.G. did not consent to Mr. White's conduct:

> The existence of the DNA evidence specifically establishes neither consent nor lack of consent. The need for the State as this Court sees it, in presenting the proposed evidence of prior sexually assaulted behavior, is in the establishing of the lack of consent, which is an element of the crimes charged -- an element of some of the crimes charged. That evidence can be used by the State arguably to establish lack of consent through a pattern of historical behavior.
>
> So the Court is unable to find that because of the existence of the DNA evidence, that the State has no viable need for the proffered or proposed evidence of prior sexually assaulted behavior.

Once more, we do not see an abuse of discretion in the circuit court's determination. Importantly, as the circuit court noted, consent is an essential element of several of the charges against Mr. White.[12] Although Mr. White claims the DNA evidence was equally capable of establishing a lack of consent, he does not explain how. To be sure, the presence of Mr. White's DNA in a vaginal swab taken from A.G. supports that Mr. White engaged in sexual activity with A.G., but it has no bearing on whether that sexual activity was consensual. Here, Mr. White identifies no other evidence as an alternative to R.M.'s testimony that the State could have relied on to corroborate A.G.'s testimony that Mr. White's sexual contact with her was non-consensual. Accordingly, we

[12] *See, e.g.*, Md. Code, Crim. Law, § 3-303 (defining first-degree rape).

see no reason the circuit court abused its discretion by determining that the State had a need for R.M.'s testimony to prove a lack of consent in Mr. White's assault on A.G.

ii. Manner

Finally, Mr. White contends that the circuit court erred in determining the manner in which R.M.'s testimony would be presented.[13] In his view, R.M.'s testimony created a "mini trial" because "[t]he jury discovered that Mr. White was not convicted for the alleged acts against [R.M.] and it focused more on her testimony about the alleged acts against her than the alleged acts against [A.G.]"

As with Maryland Rule 5-403, the "manner" consideration of the admissibility of evidence under CJP § 10-923 permits circuit courts to consider "whether the evidence would confuse the issues, mislead the jury, amount to an undue delay or waste of time, or represent cumulative evidence." *Woodlin*, 484 Md. at 291. A "mini trial" is a "hallmark" indication of the prejudice that can result from confusion of the issues or undue delay. *Woodlin*, 484 Md. at 291; *see also Allen v. State*, 440 Md. 643, 655 (2014) (holding that a mini trial would have occurred if the defendant was to introduce DNA evidence suggesting an alternate suspect, which evidence the State would then have to enter a significant amount of evidence to rebut).

[13] Mr. White also, seemingly, asserts that the circuit court erred because it did not expressly address the "clarity" of R.M.'s testimony when determining whether to admit it. However, "clarity already is encapsulated by the requirement that the State prove by clear and convincing evidence the defendant's involvement in the other sexually assaultive behavior under [CJP] § 10-923(e)(3)." *Woodlin*, 484 Md. at 290. Consequently, the circuit court was not required to address "clarity" at this stage of its analysis. In short, we see no merit in Mr. White's contention regarding "clarity."

The circuit court considered the impact R.M.'s testimony would have on the trial, however, and determined that it would be slight:

> As the Court perceives the manner in which the State would be able to introduce the evidence proposed here, I mean I -- the Court sees it as a single witness, subject to direct, cross, and redirect. In the Court's view, that does not rise to the level of a mini trial within the larger trial. It is a single witness and the testimony to be adduced on examination by both sides.

We do not see an abuse of discretion in this determination, either. As the circuit court noted, the introduction of R.M.'s testimony about Mr. White's other sexually assaultive behavior required testimony from a single witness subject to the same form of examination as the other fourteen witnesses that testified at trial. Mr. White contends otherwise but provides no support for his assertions that the testimony from a single additional witness caused a mini trial, or that the jury "focused more on [R.M.'s] testimony about the alleged acts against her" than the assault on A.G. Our review of the record does not provide support for Mr. White's claims, either.

In sum, we find no abuse of discretion in the circuit court's findings that the State had a need for R.M.'s testimony to prove a lack of A.G.'s consent, and that the manner in which R.M.'s testimony was introduced did not amount to a mini trial. We, therefore, also see no abuse of discretion in the circuit court's decision to admit R.M.'s testimony as evidence of Mr. White's other sexually assaultive behavior under CJP § 10-923.

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