UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1196

September Term, 2015

JAMES McALLISTER

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Graeff,
White, Pamela J.
(Specially Assigned),

JJ.

Opinion by White, Pamela J., J.

Filed: August 4, 2016

Statement of the Case

James McAllister was charged on September 4, 2014 with first degree rape, second degree rape, first degree assault, and second degree assault of girlfriend Marjorie Athias. The events occurred on July 23, 2014 in Athias' home. McAllister was tried on May 13, 2015 in the Circuit Court for Montgomery County. After a three-day jury trial he was found guilty of second degree assault and acquitted of the other charges. McAllister was sentenced to six years with all but four years suspended. His timely appeal followed, and presents two questions, rephrased for clarity:

1. Did the trial court err by denying McAllister's Motion to Dismiss for Lack of Speedy Trial?

2. Did the trial court err upon admitting evidence of prior bad acts of McAllister?

Statement of Facts

Marjorie Athias and James McAllister met by telephone sometime in 2013. From then until July 23, 2014, the day of the incident, the two maintained what could be at best described as a rocky relationship as girlfriend and boyfriend. After meeting over the telephone in 2013, their interactions with each other consisted of telephone conversations, occasional visits by Athias to McAllister, and Athias sending him money. They were not intimate with each other until sometime in June of 2014, when McAllister returned to Montgomery County. Two days after McAllister returned to Montgomery County, Athias dropped her older son off at college. She then began to notice a difference in behavior from McAllister.

According to Athias, McAllister started to display more aggressive behavior towards her. She stated that he would physically and verbally assault her, destroy or damage her property, and was generally an abusive boyfriend. As a result of this behavior, Athias attempted to end the relationship. However, McAllister did not receive the message. Following Athias' attempt to end the relationship, McAllister began to engage in additional aggressive behavior which will be labelled by this Court as alleged "prior bad acts." During the trial, Athias testified, over objection of defense counsel, that McAllister: followed her, came to her job without permission, came to her home unannounced, threatened her with violence, threatened to kill her (and himself), physically assaulted her, placed unwanted calls to her, tried to have sex with her without consent, physically embraced and kissed her without consent (at least on one occasion), and exhibited a variety of stalking behaviors. Athias resisted and fought back during each of the physical encounters. McAllister's advances were not welcomed. Athias continued to try to avoid his communication and visits. It is not clear how long the time period extended during which the prior bad acts occurred, but the two reconciled at some point during the weekend of July 18, 2014, the weekend prior to the incident. The two were intimate on July 21, 2014.

On the morning of July 23, 2014 at approximately 4am, McAllister woke up Athias asking her to make him breakfast. She refused. McAllister then asked her to accompany him to another bedroom, in her home, to have sex. Again, she refused. Upon this refusal a physical altercation began with McAllister placing his hands on her mouth. Athias fought back and resisted, and the two began to tussle. She escaped and ran outside of her home

and began calling for help. McAllister followed and forcefully removed some of her clothes, which caused her to run back inside her house. Once there, McAllister slammed her on the bed, grabbed a knife and placed it on her side, stating that he would kill her and then kill himself. He then removed more, or the remainder, of her clothes. Athias stated that McAllister raped her.

Afterwards, McAllister did not leave right away, rather the two began a brief conversation. McAllister told Athias not to have sex with anybody else. She rebuffed this demand and informed McAllister that she would make her own decisions. McAllister's reaction was to smack Athias' head against the wall, then to grab and bend her leg. At this point McAllister suddenly left the house. Upon his departure, Athias ran outside and called for help. An unidentified person called the police, who responded to the scene a few minutes later. An arrest warrant was issued for McAllister on July 25, 2014. McAllister turned himself in on August 6, 2014.

On September 4, 2014, McAllister was indicted on the following charges arising from the events on July 23, 2014: first degree rape, second degree rape, first degree assault, and second degree assault. The parties agreed to the first scheduled trial date on February 2, 2015. However, the trial was postponed twice and began on May 13, 2015. After a three day jury trial, McAllister was found guilty on a single count, second degree assault. He was found not guilty on the rape and first degree assault charges. McAllister was sentenced to a six year term of imprisonment with all but four years suspended on July 20, 2015. His timely appeal to this Court followed.

McAllister's appeal raises two issues. First, the trial court erred by denying McAllister's Motion to Dismiss for Lack of Speedy Trial, where the delays followed the State's efforts to obtain DNA evidence. Second, McAllister asserts the trial court improperly admitted evidence of other crimes, wrongs, or acts pursuant to Maryland Rule 5-404(b) ("prior bad acts evidence"). McAllister claims that these two errors by the trial court, individually and cumulatively, require a reversal of his conviction. This Court will address both issues raised in McAllister's appeal, examining first the right to a speedy trial.

Analysis

Speedy Trial

McAllister first argues that his 6th Amendment right to a speedy trial under the United States Constitution was violated by the lengthy delay in bringing him to trial. McAllister urges that the State violated his right to a speedy trial by seeking, and receiving, two trial postponements, over his objection, because of dilatory efforts to secure unnecessary DNA evidence. The relevant timeline with respect to McAllister's Motion to Dismiss for Lack of Speedy Trial follows.

The incident between McAllister and Athias took place on July 23, 2014. A warrant for his arrest in connection with the incident followed on July 25, 2014. McAllister was arrested on August 6, 2014. The date of arrest is when the clock began to run for purposes of McAllister's right to a speedy trial. *See Divver v. State*, 356 Md. 379, 388 (1999); *Epps v. State*, 276 Md. 96, 109 (1972); *Lloyd v. State*, 207 Md. App. 322, 328 (2012).

The indictment occurred on September 4, 2014. The following day on September 5, 2014, a sample of McAllister's DNA was collected to use in connection with completion of the DNA analysis by the State. McAllister's attorney entered her initial appearance and filed an omnibus pre-trial motion, which included a request for a speedy trial, on September 8, 2014. On September 24, 2014, DNA samples from McAllister and Athias, along with swabs from a rape kit were sent to a private laboratory, Bode Technology ("Bode"), in order to initiate the process of utilizing the DNA results at trial, set for February 2, 2015. Bode did not receive these materials until approximately two weeks later on October 8, 2014. Bode completed the initial analysis of the materials on December 3, 2014. The State received the initial analysis around December 23, 2014. Defense was not served the initial analysis until January 5, 2015, because the Assistant State's Attorney ("ASA") assigned to the case had been out of the office since Thanksgiving. Upon her return, the ASA served defense with the initial analysis and sought her first trial postponement. The postponement hearing took place on January 15, 2015.

McAllister's trial was postponed, over his objection, to March 2, 2015 because of the following reasons. The ASA served defense with the initial analysis on January 5, 2015 as a result of being out of the office since Thanksgiving; the complete DNA analysis would not be received by the ASA until approximately January 27, 2015; in order to comply with her requirements under the Courts and Judicial Procedures Article § 10-915(c)[1] the ASA

[1] The statute in its entirety reads: § 10-915(c) "In any criminal proceeding, the evidence of a DNA profile is admissible to prove or disprove the identity of any person, if the party seeking to introduce the evidence of a DNA profile: (1) Notifies (continued…)

had forty-five days before the start of trial to notify McAllister, in writing, of its intent to use evidence of his DNA profile; and as a consequence of the late service, defense urged it was no longer ready to proceed for trial on February 2, 2015. On January 27, 2015, the ASA received the complete DNA analysis from Bode. And upon or shortly after receipt, the ASA learned for the first time, after contacting Bode, that one of the technicians who analyzed the DNA would be unable to testify during her maternity leave, until April 13, 2015 (some forty days after the second trial date). On February 9, 2015, the ASA sought a second postponement, which was heard on February 24, 2015.

After listening to the arguments, the trial judge referred the matter to the administrative judge to determine if good cause had been shown to delay the trial for a second time.[2] After attempting, and failing, to get the parties to stipulate on the DNA

in writing the other party or parties by mail at least 45 days before any criminal proceeding; and (2) Provides, if applicable and requested in writing, the other party or parties at least 30 days before any criminal proceeding with: (i) First generation film copy or suitable reproductions of autoradiographs, dot blots, slot blots, silver stained gels, test strips, control strips, and any other results generated in the course of the analysis; (ii) Copies of laboratory notes generated in connection with the analysis, including chain of custody documents, sizing and hybridization information, statistical calculations, and worksheets; (iii) Laboratory protocols and procedures utilized in the analysis; (iv) The identification of each genetic locus analyzed; and (v) A statement setting forth the genotype data and the profile frequencies for the databases utilized." Md. Code Ann., Cts. & Jud. Proc. § 10-915 (2015).

[2] Pursuant to Md. Code Ann., Crim. Proc. § 6-103(b) (2015), "[f]or good cause shown, the county administrative judge or a designee of the judge may grant a change of the trial date in a circuit court: (i) on motion of a party; or (ii) on the initiative of the circuit court. (2) If a circuit court trial date is changed under paragraph (1) of this subsection, any subsequent changes of the trial date may only be made by the county administrative judge or that judge's designee for good cause shown."

evidence, the administrative judge found that good cause was shown and postponed the trial until May 11, 2015. On April 10, 2015, McAllister's Motion to Dismiss for Lack of Speedy Trial was heard and denied. Trial proceeded as scheduled on May 11, 2015.

The 6th Amendment right to a speedy trial, imposed on the states by the Due Process Clause of the 14th Amendment, is fundamental. This right seeks to ensure that criminal defendants are brought to trial promptly and without undue delay. *Lloyd*, 207 Md. App. at 327-28. Article 21 of the Maryland Declaration of Rights serves the same purpose. *Id.* In Maryland, courts have consistently applied the four factor balancing test established in *Barker v. Wingo*, 407 U.S. 514, 515 (1972) to determine whether a criminal defendant's right to a speedy trial has been violated. The four factors are: the length of the delay, the reasons for the delay, the defendant's assertion of his right to a speedy trial, and prejudice to the defendant as a result of the delay. *Barker*, 407 U.S. at 530; *see Glover v. State*, 368 Md. 211, 221-22 (2002); *Divver*, 356 Md. at 388; *Epps*, 276 Md. at 71; *see also Lloyd*, 207 Md. App. at 327. A reviewing court conducts a *de novo* constitutional analysis of a trial court's decision on a motion to dismiss for a speedy trial violation in light of the relevant facts produced at the trial level. *Glover*, 368 Md. at 220-21.

Length of Delay

A pre-trial delay of a particular length is "presumptively prejudicial" triggering the balancing test and application of the remaining three factors. *Divver*, 356 Md. at 388. The first factor is essentially a triggering mechanism; "[u]ntil there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Id.* (internal quotations omitted). The delay is measured from the date of

arrest to the date of trial. *Id.*; *Epps*, 276 Md. at 109; *Lloyd*, 207 Md. App. at 328. "The nature of the charges levied also affects the permissible delay: the more complex and serious the crime, the longer a delay might be tolerated because society also has an interest in ensuring that longer sentences are rendered upon the most exact verdict possible." *Lloyd*, 207 Md. App. at 328. The length of delay itself, is not a weighty factor in favor of granting a motion to dismiss for lack of a speedy trial. *Id.*

"The Court of Appeals has consistently held . . . that a delay of more than one year and fourteen days is presumptively prejudicial and requires balancing the remaining factors." *Lloyd*, 207 Md. App. at 329. In *Divver*, a delay of a year and sixteen days raised a presumption of prejudice and triggered the balancing test. *Divver*, 356 Md. at 389 (a driving while under the influence and failure to stop at a red light case). In *Epps*, a delay of one year and fourteen days triggered the balancing test. *Epps*, 276 Md. at 110 (a robbery with a dangerous or deadly weapon case). According to *Lloyd*, a delay of eight months and fifteen days might be considered presumptively prejudicial. *Lloyd*, 207 Md. App. at 329 (a second degree assault case); *see also, White v. State*, 223 Md. 353, 385 (2015).

Because the nine months and five days delay might be considered presumptively prejudicial, we shall examine the remaining *Barker* factors.

Reasons for the Delay

The length of the delay is closely related to the reasons for the delay. "A deliberate attempt to delay the trial . . . to hamper the defense . . . [should weigh] heavily against the . . . [State]. A more neutral reason such as negligence or overcrowded courts . . . should [weigh] less heavily . . . ." *Divver*, 356 Md. at 391; *see also Lloyd*, 207 Md. App. at 328.

A valid reason such as a missing witness would justify some sort of delay. *Divver*, 356 Md. at 391-92.

The reasons for the two delays essentially can be reduced to: an inability of the State to secure the DNA analysis promptly for trial and an inability of the State to secure a technician to testify in time for trial. The State has the responsibility to secure its witnesses, sources of evidence, and timely disclose what is necessary to be disclosed to the defense under discovery obligations. The defense likewise has the responsibility to secure its witnesses, sources of evidence, and disclose what should be disclosed to the State in a timely manner. The State urges that "we get the [DNA] results back when we get them back." The State argues that any delay in securing the DNA analysis is attributable to a heavy case load. Any delay in this case was a product not of mal-intent to stop McAllister from having his day in court, rather it was a result of relatively minor delays to obtain DNA analysis.

The State in all criminal matters brings the case against the defendant. The "State . . . [has] a duty to coordinate the various criminal divisions, including those responsible for laboratory analysis, necessary to bring a defendant to trial. This duty includes . . . ensuring that critical discovery materials, such as DNA evidence, are properly monitored and accounted for, and not simply collecting dust in state or federal crime labs." *Glover v. State*, 368 Md. 211, 226 (2002). However, securing DNA evidence can take time. The "scientific intensity of DNA evidence may entail slightly more time for acquisition than that which would be normally acceptable." *Id.* at 228. It can provide critical inculpatory or

exculpatory information to a fact finder. *Id.* ("DNA evidence has the potential, depending on the factual circumstances, to be completely exculpatory or virtually inculpatory.").[3] "[M]inor delays in obtaining DNA evidence will not be weighed heavily against the State, nor against a defendant seeking his or her own DNA analysis, delays likely will not be tolerated upon clear demonstrations of a failure to monitor or aggressively pursue the attainment of these results." *Id.* at 226.

This Court cannot conclude that the State was dilatory. The defense makes no allegation that the State intentionally sought to delay McAllister's trial. No chronological facts or procedures suggest that the ASA made a conscious effort to delay the start of trial. However, it is unclear why the ASA did not monitor the progress of the DNA analysis, or have her office do so while she was out attending to family matters, all so as to ensure the defense was timely served as required by Md. Code Ann., Cts. & Jud. Proc. § 10-915. Specifically, the initial Bode analysis was completed on December 3, 2014, yet the State did not receive it until December 23, and defense counsel was not served the initial analysis until January 5, 2015. Stating "we get the results back when we get them back" as a sufficient reason to delay trial does not aid in the preservation of the defendant's right to a speedy trial. This factor weighs slightly in McAllister's favor.

[3] McAllister states that the DNA evidence sought by the State was "unnecessary." The Court will not give this argument any regard in analyzing the second *Barker* factor. The State has the ability, as does the defense, to utilize whatever evidence it desires so long as that evidence is admissible. The State decided to use DNA evidence in its case in chief, and that was a determination for the State to make.

Defendant's Assertion of Right to Speedy Trial

If a defendant fails to invoke his right to a speedy trial, it will be much more difficult for a court to determine the right has been violated. "The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *Lloyd*, 207 Md. App. at 331-32 (quoting *Barker v. Wingo*, 407 U.S. 514, 531-32 (1972)). McAllister first filed a request for speedy trial as part of an omnibus defense motion on September 8, 2014. McAllister objected to both the first and the second postponement requests. Following the second postponement, on February 24, 2015, McAllister filed a Motion to Dismiss for Lack of Speedy Trial on April 10, 2015. It is readily apparent that McAllister invoked his right to a speedy trial throughout the delays. This factor weighs slightly in favor of McAllister.

Prejudice to the Defendant

Prejudice to a defendant "may result from any of three factors: (1) oppressive pretrial incarceration; (2) anxiety and concern; and (3) impairment of the defense." *See Barker v. Wingo*, 407 U.S. 514, 532 (1972); *Glover*, 368 Md. at 229; *Divver*, 356 Md. at 392. If the defendant can show prejudice he has a much stronger case. *See Jones v. State*, 279 Md. 1, 16 (1976). The most serious factor is the third. The inability of the defendant to defend himself as a result of the delay slants the scales of justice in favor of the prosecution, "because the inability of a defendant to adequately prepare his case skews the fairness of the entire system." *Barker*, 407 U.S. at 532; *Glover*, 368 Md. at 230 ("A delay in trial can result in the impairment of one's defense due to both tangible factors, such as the unavailability of witnesses or loss or destruction of records, and intangible factors,

including fading memories about the incident in question and a decrease in the likelihood that exculpatory witnesses can be found.").

The Court of Appeals acknowledges that pre-trial incarceration and the emotional distress that go along with it are troublesome. *Glover*, 368 Md. at 229-230 (stating that emotional distress from a prolonged delay can be presumed). "[I]ntangible personal factors should prevail if the only countervailing considerations offered by the State are . . . connected with crowded dockets and . . . case loads." Prejudice is more than just an "assertion that the accused has been living in a state of constant anxiety due to the pre-trial delay. Some indicia, more than a naked assertion . . . [must] support the dismissal of an indictment for prejudice." *Id.* at 230. In *Glover*, the defendant was accused of a murder that took place around February 24, 1998, and was arrested on February 26, 1999. The case was postponed four times with the trial set to begin on May 1, 2000. *Id.* at 217-18. The Court of Appeals found that the delay did not prejudice the defendant because of the particular facts of the case and the reasons for the delay, namely the acquisition, dissemination, and suppression of DNA evidence. *Id.* at 230-32. The Court of Appeals stated that "[t]he peculiar circumstances of this case, namely the attempts to acquire complete DNA evidence, coupled with the fact that no evidence on the record established prejudice, leads us to our conclusion that the petitioner's speedy trial right was not violated." *Id.* at 232. The facts in *Glover*, though somewhat dated, are quite similar to those in McAllister's case.

There is no claim in McAllister's brief, nor were any claims raised during oral arguments, that the defense was hampered or harmed in any way as a result of the two

postponements. The nine months and five days delay was not alleged to have prevented the defendant from presenting a defense. McAllister makes no allegations that he was unable to present a defense. There is no allegation of a missing witness, or of fading memories, or that McAllister was unable to assist his counsel because of the pre-trial incarceration. There is not a single suggestion that evidence was lost because of the delay. McAllister says nothing about any concerns for his defense because the State requested, and received, two postponements. Thus the prejudice factor weighs against McAllister.

Upon balancing all the factors, if the delay in McAllister's case was lengthy enough to trigger the analysis, that balancing weighs in favor of affirming the circuit court; analysis of those factors informs that dismissal was not warranted.

Prior Bad Acts Evidence

During trial the State introduced a litany of interactions that took place between McAllister and Athias for approximately two weeks prior to July 23, 2014. These interactions, referred herein as "prior bad acts," were characterized by Athias as McAllister being generally "very aggressive and bossy . . . ." Specifically, there were over fifteen instances in which Athias described prior bad acts of McAllister. Defense counsel objected to most of this testimony from Athias. Only a few of those objections were sustained by the trial court. The pertinent parts of the testimony, during direct examination of Athias by the State, is reproduced below.

> Q. Okay. And after . . . [you dropped your son off at college] . . . you noticed a change in the defendant's demeanor towards you?
>
> A. Immediately. He started bossing me around, telling me how to drive and we just got in a big argument.

[Defense Counsel]: Objection

The Court: Overruled. . . .

A. About a week later. We just kept arguing. We weren't getting along. So I went to him and I said, James we're not getting along. Let's just end this. And he started—he was at my house. He started trying to destroy my house, break my TV.

[Defense Counsel]: Objection.

The Court: Overruled.

The Witness: Trying to destroy my house, break my TV and you know like roughing me up and stuff and trying to have sex with me.

[Defense Counsel]: Objection

The Court: Overruled. . . .

Q. And . . . you broke off the relationship with the defendant about after a week and then you went to work the next morning. Is that correct?

A. Yes.

Q. Okay. What was the next contact that the defendant made with you after that?

A. As soon as I walked in work, he showed up.

Q. And what was his demeanor like at that time?

A. He was looking through the window.

[Defense Counsel]: Objection.

The Court: Overruled. . . .

Q. And there came a point in time where your own phone rang. Is that correct?

A. Yes.

Q. And who was on the other line?

A. Mr. McAllister.

Q. Okay. And what did he say to you at that time?

A. Please come outside and talk to me. I'm sorry. I love you. That's what he was – just come outside and talk to me. . . .

Q. And there came a point in time when you had contact with him again.

A. It was like almost every—all day long he was calling my phone. He kept calling me, calling me, calling me. He was popping up at my job, my house.

Q. . . . You said that all day long he would be calling you. And where would you be at that point?

A. At work. I just turned my phone [sic] because he was just calling and calling and calling.

[Defense Counsel]: Objection.

The Court: Overruled. . . .

Q. And what would . . . [the defendant] say to you [when you answered the calls], if anything?

A. Can you just talk to me. I just want to talk to you. He just wanted—he wanted to get back together but I didn't because I was afraid of him.

[Defense Counsel:] Objection.

The Court: Overruled. . . .

Q. And why were you afraid of him at that time?

A. Because he was very—

[Defense Counsel]: Objection.

The Court: Overruled.

The Witness: He is a pretty big guy and he is very abusive and controlling. . . .

Q. Okay. . . . And you said there came occasions where he would show up at your work place. Is that correct?

A. Yes.

Q [sic]. During that time period.

A [sic]. And what would you do when he showed up at your workplace?

Q [sic]. Some of the times I saw him and one day he came up and as soon as I got out of the car he attacked me—he came up to me and he was picking me up.

[Defense Counsel]: Objection.

The Court: Overruled. . . .

Q. Some of the times he didn't—you said that there came times where he would call you on the phone.

A. Yes.

Q. Okay. And did there comes [sic] a point in time where he would notify you that he had seen you?

A. Yes.

Q. And what specifically would he say?

A. He would tell me where I was. You were sitting on the steps smoking and what I had on.

Q. He would tell you what you were wearing?

A. Yes.

Q. Okay. And how did that make you feel at the time?

A. Very scary.

[Defense Counsel]: Objection.

The Court: Overruled. . . .

Q. Okay. And you also said there came a point in time where he came to . . . [a store near your work place]. Is that correct?

A. Yes. . . .

Q. Okay. And describe for us what happened for us when you got out of your son's car [as you were going to work]?

A. When I got out of the car, I saw—he was standing. I didn't see him until he started walking towards me. And then he came up and started kissing me, tried to kiss me because I kept prying my lips. He started picking me up by my pants. He was whispering I love you . . . .

[Athias continued to answer the same question after being interrupted by the State]

A. Okay. He started whispering—he was saying I love you like that. He wouldn't say it out loud. And can we talk and he was just picking me up trying to kiss me.

Q. And what did you do at that time?

A. I just was trying to get away and then—you know I was trying to get way [sic] and then finally he let me go. . . .

Q. Okay. And did there come a point in time where you also encountered Mr. McAllister at your home as well?

A. A couple of times.

[Defense Counsel]: Objection.

The Court: Overruled. . . .

Q. Okay. And again in relation to when you broke off the relationship with him after the first week, when did you encounter him at your home?

A. The first time was one of the days that Monday—because I'm off Mondays, Tuesdays, and Wednesdays and he knew my schedule.

[Defense Counsel]: Objection.

The Court: That will be overruled. . . .

Q. Okay. And [what happened when you encountered him at your home]?

A. I was leaving to go out and run errands. And when I opened my door, he was out there.

Q. And what was he doing at that time?

A. He was just standing there. He was trying to get in my house. He was like let me in.

[Defense Counsel]: Objection.

The Court: Overruled. . . .

The Witness: And then I walked away to the entrance of my building and went to the left. And went in the rear office. He stood by the entrance of my building. I went in the rear office. Went through the side door of the office. Came around the back because my son's car was parked far away at this point. I wouldn't even park in my neighborhood. . . .

Q. Why wouldn't you park your son's car?

A. Because that's the way he would tell I was there.

Q. Okay.

A. And so I ran around the building and . . . [h]e was at my – the front of my building and I was on the side because I came through the side door of the rental office. And I was watching him. And as soon as he started walking towards the rental office, I ran down the street, got in my car and left. When I got to the shopping center, he was up in the shopping center.

[Defense Counsel]: Objection.

The Court: Overruled. . . .

Q. On what other occasions did you come in contact with the defendant during that time period?

A. Then another time when I was going out one night when I came outside he was at my door. That's why it was so scary because he was like –

[Defense Counsel]: Objection.

The Court: Overruled.

The Witness: Right outside of my building when I would come out and stare. My girlfriend was coming to pick me up. She was in the car waiting. He wouldn't say anything. . . .

Q. [A]nd during this time period, you said a couple of weeks and you were broken up with the defendant, did he make any threats to you during that time?

[Defense Counsel]: Objection.

The Court: Overruled.

The Witness: Yes. . . .

Q. What were the threats that he made to you during that time?

A. Basically telling me he was going to get crackheads to beat me up.

[Defense Counsel]: Objection.

The Court: Overruled. Go ahead.

> The Witness: And what he was going to do to me. He was just threatening me with getting people to beat me up.
>
> Q. And what specifically did he say that he would do to you?
>
> A. He said he would stab me 20 times and then he would kill himself.
> . . .
>
> Q. . . . What occurred at the time that you called the police and they responded.
>
> A. Oh, okay. He called—Mr. McAllister called me and told me that he wanted his stuff. And I said, okay. So I said you can come and get it. And I called the police because he had tried to destroy my house before when I tried to break up with him. So I called the police.
>
> [Defense Counsel]: Objection.
>
> The Court: Overruled.
>
> The Witness: And I said –
>
> Q. Without telling us what you said, what was happening at that time that would cause you to call the police?
>
> A. Nothing happened. It was just – I was afraid that he was going to try to destroy my house again so I just called the police to come and get his stuff.

McAllister moved to exclude Athias' testimony about the prior bad acts as irrelevant and as prejudicial character evidence.

Pursuant to Maryland Rule 5-404(b), "[e]vidence 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 . . . 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." There are two rationales for the general rule of exclusion of prior bad acts evidence. *Odum v. State*, 412 Md. 593, 610 (2010); *see also Synder v. State*, 210 Md. App. 370, 393 (2013). "First, if a jury considers a defendant's prior criminal activity,

it may decide to convict and punish him for having a criminal disposition. Second, a jury might infer that because the defendant has committed [past] crimes[,] . . . he is more likely to have committed the crime . . . [charged]." *Odum*, 412 Md. at 610.

In order to admit prior bad acts evidence and dispense with the general rule of exclusion a trial court must apply a three part test. The first step is for the trial court to determine whether the evidence fits into one of the enumerated exceptions under Rule 5-404(b). That is, the evidence must be "specially relevant" and unrelated to the defendant's predisposition to commit crimes. *Streater v. State*, 352 Md. 800, 808 (1999). Next, if the evidence fits into one of the exceptions, a trial court determines whether the defendant's involvement with the prior bad act(s) is established by clear and convincing evidence. *Id.* at 809. Finally, the trial court must carefully balance the need for and probative value of the prior bad acts evidence to determine if it outweighs any unfair prejudice that would result from its admission. *Id.* at 810.

> [T]he concern [is] that . . . [prior bad acts] evidence is generally more prejudicial than probative. Prejudice may result from a jury's inclination to convict the defendant, not because it has found the defendant guilty of the charged crime beyond a reasonable doubt, but because of the defendant's unsavory character or criminal disposition as illustrated by the other crimes evidence.

Id. (citation omitted).

In evaluating McAllister's objections to the testimony, the trial court did not follow the three part test. The trial court failed to conduct the third, and arguably most critical, part of the test. The trial court concluded that the evidence would be relevant to intent and motive. We agree. The trial court appropriately concluded that McAllister's prior bad acts

provides context and is relevant to intent and motive. However, the trial court erred by stating: "[I]n . . . [this] situation, we're not doing a balancing of prejudice versus probative, and I'm not going to strike or prohibit the State from introducing this proof. And if it means that it opens the door to exactly what the Defense has postured, then so be it." McAllister contends that the trial court abused its discretion in admitting this testimony from Athias. More specifically, he asserts that by not conducting part three of the test, the trial judge committed reversible error.

In reviewing a trial court's decision to admit prior bad acts evidence pursuant to Maryland Rule 5-404(b), an appellate court applies an abuse of discretion standard. *See Odum v. State*, 412 Md. 593, 615 (2010); *see also Smith v. State*, 218 Md. App. 689, 704 (2014). The trial judge explicitly stated that the court would not conduct the third part of the test to admit prior bad acts evidence. If a trial court fails to conduct this part of the inquiry, a reviewing court will do the balancing itself. *Snyder v. State*, 210 Md. App. 370, 393 (2013) (asserting that if a trial court fails to perform the weighing analysis of probative versus prejudice, the trial court's decision to admit the evidence is less deferential). Because the trial judge did not conduct the balancing inquiry, this Court shall do the balancing *de novo*. *Id.* at 394.

Evidence is unfairly prejudicial if it has some adverse effect aside from proving a fact or issue in contention, which justified its admission. *Smith v. State*, 218 Md. App. 689, 705 (2014).To "determine whether a particular piece of evidence is unfairly prejudicial ...

[a reviewing court] balance[es] the inflammatory character of the evidence against the utility the evidence will provide to the jurors' evaluation of the issues in the case." *Id.*

Evidence of weak probative value is not to be admitted if admission would cause a jury to convict based on the fact that the defendant has a propensity to commit crimes or was a person of "general criminal character." *Id.* Prejudicial evidence is excluded so as to avoid the possibility that a jury will convict because of the defendant's other actions for which he has not been charged. *Id.*

Prior bad acts evidence has been admitted when the prior bad acts "arise during the same transaction and are intrinsic to the charged crime or crimes." The Court of Appeals interpreted "intrinsic" to mean that the prior bad acts "are so connected or blended in point of time or circumstances with the crime or crimes charged that they form a single transaction, and the crime or crimes charged cannot be fully shown or explained without evidence of the other crimes." *Odum v. State*, 412 Md. 593, 611 (2010) (holding that evidence of the victims being kidnapped, carjacked, and the defendant's use of money from the kidnapping to buy drugs was admissible to explain what precipitated the murder of the victims, as part of a singular criminal episode); *Boyd v. State*, 399 Md. 457, 484-86 (2007) (finding that the trial court erred in a case about violating a protective order by admitting evidence of the defendant contacting the victim three different days other than the day for which he was charged with violating the order, as being more prejudicial than probative and could have lead the jury to convict for his criminal propensity); *see also Smith*, 218 Md. App. at 689 (finding that the trial court erred by admitting evidence of unrelated

firearms and ammunition owned by the defendant because the evidence was minimally relevant, unrelated, and did not help to prove the victim's death was caused by the defendant); *Marshall v. State*, 213 Md. App. 532, 546-48 (2013) (admitting evidence of the defendant's prior gang involvement and affiliation so the State could prove and explain to the jury that the defendant violated a statute in which gang activity was a prerequisite to being charged).

The State contends that the evidence in issue was "substantially relevant to showing the nature of the relationship between McAllister and Athias in the two weeks leading up to the incident." The State urges that without admission of the prior bad acts evidence the jury would not be able to "explore" their relationship and would have been provided with a "sterile account of the incident without any context within which to evaluate the motive or intent" of McAllister. The State does not address prejudice in its brief. McAllister argues that the events that took place prior to July 23, 2014 were not the reason for the altercation on that date. Rather the reason for the July 23, 2014 incident was Athias' "refusal to have sex with him on that morning (even though the jury acquitted . . . [him] on both rape charges)." McAllister states the probative value of the evidence was minimal, while the prejudicial effect of the evidence was substantial. Appellee asserts that not only did Athias' testimony "impugn McAllister's character," but it failed to prove a specific motive or intent for the incident on July 23, 2014. McAllister states that the State used the propensity evidence provided by Athias to create a narrative that he was a "dangerous and possessive man." "There is a very reasonable possibility that without the State's successful attempt to

impugn McAllister's character, the jury would not have believed . . . [he] was capable of committing the assault."

The probative value of the testimony provided by Athias is clear. While not intrinsic to the crimes charged, the testimony provided by Athias explained to the jury the bases for the events that took place on July 23, 2014. The two weeks that led up to day of incident allowed the jury to understand more about the nature of their relationship. The evidence provided the jury a history of violence, abuse, and controlling behavior by McAllister. The jury would learn of this information and form an idea about the intentions and motives of McAllister with respect to his treatment and interactions with Athias. She informed the jury of her fears and concerns. Her testimony also was probative—and prejudicial—as to a propensity to attack, threaten, harass, and stalk Athias. Athias' testimony might have invited the jury to convict McAllister because of his "general criminal character." The events that took place two weeks prior to July 23, 2014 were not part of a singular transaction but described a succession of different situations in which McAllister touched, approached, and contacted her after she ended their relationship. The timing is not clear, nor is it apparent when each of these instances, or the circumstances, occurred in relation to July 23, 2014. The evidence described McAllister as a man who continued his advances towards Athias as if they never broke up, or as a stalker or scorned lover whose behavior was disturbing and unsettling.

However, the probative value of the incidents preceding July 23 prevails over the potential prejudice. Athias' testimony was helpful to the jury, to learn her side of the story

and her feelings about McAllister. McAllister and Athias' history with each other was critical to the State proving its case. Because of McAllister's behavior with Athias in the past, the ASA was able to present to the jury vital information about his conduct. The State demonstrated to the jury that their relationship and all the events which took place during the two weeks leading up to July 23, 2014 proved McAllister's motive, opportunity, and intent to commit the crimes charged. McAllister assaulted Athias prior to July 23, 2014. He had an aggressive, assaultive, recent history with Athias, which included stalking, harassment, and threats. The background relationship information about McAllister provided the State with the necessary ammunition to pursue its theory of the case and reach a conviction. The prior bad acts evidenced his intent and motive. The prejudice may be potent, but the State's narrative created by Athias' testimony provided the jury with persuasive, contextual, and highly probative information about McAllister's intent and conduct. We find the trial court did not err in admitting this testimony.

Conclusion

For all of the foregoing reasons, the denial of McAllister's Motion to Dismiss for Lack of Speedy Trial is affirmed, and the trial court's decision to admit the prior bad acts evidence is affirmed.

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