UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2482

September Term, 2015

BRIAN WAYNE HOTT

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Nazarian,
Battaglia, Lynne
(Senior Judge, Specially Assigned),

JJ.

Opinion by Battaglia, J.

Filed: December 27, 2016

Brian Wayne Hott, Appellant, was charged in the Circuit Court for Frederick County with sixteen counts of violating a protective order, pursuant to Section 4−509 of the Family Law Article of the Maryland Code (1984, 2012 Repl. Vol.).[1] Hott was alleged to have sent sixteen letters to his wife over a period of three months in violation of the order;[2] each letter was the subject of a separate count of violating the protective order.

[1] Section 4−509 of the Family Law Article of the Maryland Code (1984, 2012 Repl. Vol.) provides:

> (a) *In general*. — A person who fails to comply with the relief granted in an interim protective order under § 4–504.1(c)(1), (2), (3), (4)(i), (7), or (8) of this subtitle, a temporary protective order under § 4–505(a)(2)(i), (ii), (iii), (iv), (v), or (viii) of this subtitle, or a final protective order under § 4–506(d)(1), (2), (3), (4), or (5), or (f) of this subtitle is guilty of a misdemeanor and on conviction is subject, for each offense, to:
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> (1) for a first offense, a fine not exceeding $1,000 or imprisonment not exceeding 90 days or both; and
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> (2) for a second or subsequent offense, a fine not exceeding $2,500 or imprisonment not exceeding 1 year or both.
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> (b) *Arrest*. — An officer shall arrest with or without a warrant and take into custody a person who the officer has probable cause to believe is in violation of an interim, temporary, or final protective order in effect at the time of the violation.

[2] The final protective order entered in March of 2014 that Mrs. Hott obtained against Mr. Hott required:

1. That unless otherwise stated below, this Order is effective until 3/10/2015.
2. That the Respondent [Brian W. Hott] SHALL NOT abuse, threaten to abuse, and/or harass ANIS HOTT.
3. That the Respondent SHALL NOT contact (in person, by telephone, in writing, or by any other means) or attempt to contact ANIS HOTT except to facilitate any child visitation ordered in #6 below.
4. That the Respondent SHALL NOT enter the residence of ANIS HOTT at 5404 OVERLOOK CIR, WHITE MARSH, MD, 21162 or wherever the protected party(ies) resides.
   (Residence includes yard, grounds, outbuildings, and common areas surrounding the dwelling.)
   UNLESS GIVEN PERMISSION FOR VISITATION ONLY.
5. That custody of BRIANNA HOTT is awarded to ANIS HOTT.

(continued . . .)

Prior to trial, Hott had filed a Motion to Sever Counts in which he argued that each of the sixteen charges should be tried separately, because the counts were not charged as part of a scheme and were not "relevant to each other to prove motive, intent, absence of mistake or accident, or identity." He also averred that joinder of the sixteen counts would pose a "significant danger that members of the jury will infer a criminal propensity on the part of the Defendant or consider evidence related to only one charge when weighing evidence of an unrelated charge."

Hott offered to stipulate to having written the letters and that there was a protective order in place, on condition that the State would sever the counts. The State, however, rejected Hott's proffered stipulation and argued that the sixteen counts were mutually admissible as other crimes evidence.

Judge Scott L. Rolle of the Circuit Court for Frederick County held a hearing on Hott's motion and denied it, after framing the issue regarding joinder of the charges as:

> Number one, is the evidence concerning the offenses or defendants mutually admissible? We're not talking about defendants here because it's only one defendant. And two, does the interest in judicial economy outweigh any other

(. . . continued)

6. Visitation with BRIANNA HOTT is granted to BRIAN W HOTT every THURSDAY 4-8PM & SUN 10-6PM;PETITIONER WILL DELIVER & PICK UP BRIANNA @ MCDONALD'S ON CAMPBELL BLVD. Visitation shall be supervised by RESPONDENT'S MOTHER.
7. That the Respondent SHALL PAY Emergency Family Maintenance in the amount of $1,200.00 every month to ANIS HOTT beginning 3/18/2012 and mail payment to the following address 5404 OVERLOOK CIRCLE, WHITE MARSH, MD. 21162
8. That the Respondent SHALL immediately surrender all firearm(s) to law enforcement agency BALTIMORE COUNTY POLICE, and to refrain from possession of any firearm, for the duration of this Order.

arguments favoring severance, which obviously would be prejudicial arguments and things of that nature. The Court did consider that too and also Maryland Rule 5−901(b),[3] which is the requirements to authenticate evidence.

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[3] Maryland Rule 5−901(b) (1998) governs the requirement of authentication or identification of evidence and provides, in relevant part:

> (b) **Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Rule:
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> (1) Testimony of witness with knowledge. Testimony of a witness with knowledge that the offered evidence is what it is claimed to be.
>
> (2) Non-expert opinion on handwriting. Non-expert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.
>
> (3) Comparison with authenticated specimens. Comparison by the court or an expert witness with specimens that have been authenticated.
>
> (4) Circumstantial evidence. Circumstantial evidence, such as appearance, contents, substance, internal patterns, location, or other distinctive characteristics, that the offered evidence is what it is claimed to be.
>
> (5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, based upon the witness having heard the voice at any time under circumstances connecting it with the alleged speaker.
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> (6) Telephone conversation. A telephone conversation, by evidence that a telephone call was made to the number assigned at the time to a particular person or business, if
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> (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or
>
> (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.
>
> (7) Public record. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, is from the public office where items of this nature are kept.
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> (8) Ancient document or data compilation. Evidence that a document or data compilation:
>
> (A) is in such condition as to create no suspicion concerning its authenticity,
>
> (B) was in a place where, if authentic, it would likely be, and
>
> (C) has been in existence twenty years or more at the time it is offered.

(continued . . .)

Judge Rolle concluded that the sixteen counts were mutually admissible:

> Basically the Court having considered the evidence and the arguments of counsel I do find that the evidence would be mutually admissible in this case and I do make that holding. I think the Defendant, Defense in this case failed to show that they were entitled to severance and to do that they basically have to establish that the evidence as to each individual offense would not be mutually admissible at separate trials. The Defense failed to do that. In fact in this case the Court finds that the evidence would be mutually admissible because they involve the same method. In fact in all 16 cases I believe they were handwritten letters. In this case they involve the same victim and basically the same methodology. So because I find that the evidence would be mutually admissible and that the Defense failed to establish that the evidence to each individual offense would not be mutually admissible, the Court will deny the motion to sever.

A jury trial ensued, and Hott was convicted; he then was sentenced to a total of sixteen years' imprisonment with all but five years suspended as well as five years' supervised probation.

Hott filed a timely notice of appeal in which he has posited a single question that asks, "Whether the Circuit Court erred in denying Appellant's Motion to Sever?"

Joinder of the sixteen counts was permitted under Maryland Rule 4−203 (2015), which provides:

> (a) **Multiple offenses.** Two or more offenses, whether felonies or misdemeanors or any combination thereof, may be charged in separate counts of the same charging document if the offenses charged are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
> (b) **Multiple defendants — Circuit court.** In the circuit court, two or more defendants, whether principals or accessories, may be charged in the same

(. . . continued)

> (9) Process or system. Evidence describing a process or system used to produce the proffered exhibit or testimony and showing that the process or system produces an accurate result.

> charging document if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. The defendants may be charged in one or more counts together or separately, and it is not necessary to charge all defendants in each count.

Severance of the joined counts is governed by Maryland Rule 4−253, which provides:

> (a) **Joint trial of defendants.** On motion of a party, the court may order a joint trial for two or more defendants charged in separate charging documents if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.
> (b) **Joint trial of offenses.** If a defendant has been charged in two or more charging documents, either party may move for a joint trial of the charges. In ruling on the motion, the court may inquire into the ability of either party to proceed at a joint trial.
> (c) **Prejudicial joinder**. If it appears that any party will be prejudiced by the joinder for trial of counts, charging documents, or defendants, the court may, on its own initiative or on motion of any party, order separate trials of counts, charging documents, or defendants, or grant any other relief as justice requires.

The application of Rule 4−253 is subject to a two-part test articulated in *Conyers v. State*, 345 Md. 525, 553 (1997):

> [T]he analysis of jury trial joinder issues may be reduced to a test that encompasses two questions: (1) is evidence concerning the offenses or defendants mutually admissible; and (2) does the interest in judicial economy outweigh any other arguments favoring severance? If the answer to both questions is yes, then joinder of offenses or defendants is appropriate. In order to resolve question number one, a court must apply the first step of the "other crimes" analysis announced in [*State v.*] *Faulkner* [314 Md. 630 (1986)]. If question number one is answered in the negative, then there is no need to address question number two. . .

The first step of the two relies on the paradigm articulated in *State v. Faulkner*, 314 Md. 630 (1989), for admissibility of "other crimes" evidence, which is primarily dependent on "whether the evidence fits within one or more of the *Ross* [*v. State*, 276 Md. 664, 669−70 (1976)] exceptions." *Faulkner*, 314 Md. at 634. The *Ross* exceptions to non-admissibility of other crimes evidence permits the admission of such evidence to establish motive,

intent, absence of mistake, a common scheme or plan, and identity, *Ross*, 276 Md. at 669−70, as long as the "accused's involvement in the other crimes is established by clear and convincing evidence." *Faulkner*, 314 Md. at 634−35. *Faulkner*'s final step involves a balancing test that weighs the probative value of the evidence against its potential prejudice: "[t]he necessity for and probative value of the 'other crimes' evidence is to be carefully weighed against any undue prejudice likely to result from its admission." *Id*. at 635.

Maryland Rule 5−404(b) (2013) embodies the *Ross* exceptions; Rule 5−404(b) states:

> (b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts including delinquent acts as defined by Code, Courts Article, § 3-8A-01 is not admissible to prove the character of a person in order to show action in conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

See Boyd v. State, 399 Md. 457, 482 (2007) (Rule 5−404(b) "embodies the Maryland common law of evidence concerning other crimes, etc., which existed prior to adoption of the Rule."). Essentially, "other crimes" evidence is not admissible to show propensity to commit a crime but may be admissible if evidence fits within one or more of the exceptions in Rule 5-404(b), as we stated in *Wilder v. State*, 191 Md. App. 319, 343 (2010), *cert. denied State v. Wilder*, 415 Md. 43 (2010):

> This Rule and "the common law preclude the admission of other crimes [or other acts] evidence, unless the evidence fits within a narrowly circumscribed exception." *Carter v. State,* 366 Md. 574, 583, 785 A.2d 348 (2001). In

> addition, Md. Rule 5–403[4] requires the exclusion of relevant evidence if its admission proves to be unfairly prejudicial.
>
> The propensity rule is a rule of exclusion. *See Wynn v. State,* 351 Md. 307, 312, 718 A.2d 588 (1998); *Harris v. State,* 324 Md. 490, 500, 597 A.2d 956 (1991). "Evidence of prior criminal acts is not admissible to prove the guilt of the defendant." *Carter,* 366 Md. at 583, 785 A.2d 348. The ordinary prohibition against the admission of "other crimes" evidence "ensure[s] that a defendant is tried for the crime for which he or she is on trial and to prevent a conviction based on reputation or propensity to commit crimes, rather than on the facts of the present case." *Sessoms v. State,* 357 Md. 274, 281, 744 A.2d 9 (2000).
>
> The mutual admissibility aspect of the "other crimes" test is a "legal

determination" and a trial court's ruling on the question is not subject to deference on appeal. *Conyers*, 345 Md. at 553; *Cortez v. State*, 220 Md. App. 688, 694 (2014), *cert. denied*, 442 Md. 516 (2015). Once the evidence is determined to be mutually admissible, severance is subject to the discretion of the trial judge, who balances admissibility against prejudice:

> Rulings on matters of severance or joinder of charges are generally discretionary. *Frazier v. State,* 318 Md. 597, 607, 569 A.2d 684, 689 (1990); *Grandison v. State,* 305 Md. 685, 506 A.2d 580, *cert. denied,* 479 U.S. 873, 107 S. Ct. 38, 93 L.Ed.2d 174, *reh. denied,* 479 U.S. 1001, 107 S. Ct. 611, 93 L.Ed.2d 609 (1986); *Graves v. State,* 298 Md. 542, 544, 471 A.2d 701, 702 (1984). This discretion applies unless a defendant charged with similar but unrelated offenses establishes that the evidence as to each individual offense would not be mutually admissible at separate trials. *McKnight v. State,* 280 Md. 604, 612, 375 A.2d 551, 556 (1977). In such a case, the defendant is entitled to severance. *Id.* Nevertheless, where a defendant's multiple charges are closely related to each other and arise out of incidents that occur within proximately the same time, location, and circumstances, and where the defendant would not be

[4] Maryland Rule 5−403 provides:
Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

> improperly prejudiced by a joinder of the charges, there is no entitlement to severance. *Frazier,* 318 Md. at 611, 569 A.2d at 691; *Graves,* 298 Md. at 549–550, 471 A.2d at 704–05. In those circumstances, the trial judge has discretion to join or sever the charges, and that decision will be disturbed only if an abuse of discretion is apparent. *See Graves,* 298 Md. at 549–50, 471 A.2d at 704–05.

Carter v. State, 374 Md. 693, 704−05 (2003).

Hott, of course, argues that the sixteen counts should not be tried together because the evidence of each was not mutually admissible against one another. We disagree.

The trial judge determined that the letters were mutually admissible to show common method, that being, handwritten letters written by the same person to a singular victim. As such, Judge Rolle was referring to the proof of identity of Hott as the author of the letters. *See Wilder,* 191 Md. App. at 344.

In addition, during the trial, Hott's counsel had argued that Hott's wife provoked him to respond to her, when he wrote each of the sixteen letters during approximately three months. As such, Hott's motive or intent in writing the letters had been queued up by him. Other crimes evidence related to motive has been admitted in domestic violence prosecutions to show hostility on the part of the abuser toward the victim, as in *Snyder v. State*, 361 Md. 580, 608−09 (2000), in which the Court of Appeals affirmed the admission of evidence of a couple's "'stormy' relationship" as well as witness testimony that the defendant stated that his wife was "a dead woman" to show the defendant's motive to murder his wife. Reflecting a compendium of case law, the Court stated:

> Motive is not an element of the crime of murder, but, in addition to supporting the introduction of other crimes evidence, it also may be relevant to the proof of two of the other exceptions to Rule 5–404, intent or identity. *See Bryant v. State,* 207 Md. 565, 586, 115 A.2d 502, 511 (1955) (allowing evidence of convictions to be admitted because it showed appellant's behavior toward girl whom he killed only a

> month later, thus tending to show motive and intent); *see also Harris v. State,* 324 Md. 490, 501, 597 A.2d 956, 962 (1991) (noting to establish motive or intent, evidence of other bad acts may have substantial relevance); *Faulkner, supra,* 314 Md. at 634, 552 A.2d at 898 (figuring other crimes evidence "may be admitted if it tends to establish *motive, intent,* absence of mistake, a common scheme or plan, *identity,* opportunity, preparation, knowledge, absence of mistake or accident") (emphasis added); *Ross v. State,* 276 Md. 664, 669–70, 350 A.2d 680, 684 (1976) (holding that when "several offenses are so connected in point of time or circumstances that one cannot be fully shown without proving the other," then evidence of other bad acts is admissible to show motive). To be admissible as evidence of motive, however, the prior conduct must be " 'committed within such time, or show such relationship to the main charge, as to make connection obvious,' . . . that is to say they are 'so linked in point of time or circumstances as to show intent or motive.' " *Johnson v. State, supra,* 332 Md. [456] at 470, 632 A.2d at 158–159 [(1993)], *quoting Bryant v. State,* 207 Md. at 586, 115 A.2d at 511 and *Harrison v. State,* 276 Md. 122, 155, 345 A.2d 830, 849 (1975).

Id. at 604−05. The Court of Appeals concluded that the "evidence was probative of a continuing hostility and animosity, on the part of the petitioner, toward the victim and, therefore, of a motive to murder, not simply the propensity to commit murder." *Id.* at 608-09.

In *Stevenson v. State*, 222 Md. App. 118 (2015), Stevenson had been convicted of first degree murder of his romantic partner, among other charges. We determined that the circuit court did not err in admitting testimony that Mr. Stevenson argued with his wife, slapped her, and forced her to have sex less than a month before she was killed because it was relevant to show "a continuing hostility"; the evidence of "previous quarrels and difficulties" was admissible to show motive. *Id.* at 148−50.

In the present case, the letters were admissible to show that Hott was not merely responding to Mrs. Hott's letters or facilitating visitation for their daughter, which was

permissible contact under the protective order. The letters reflected that Hott's motive or intent was not merely to enable visitation, but contained abusive content.[5]

The letters were mutually admissible also under the "close connection" exception, because they formed a narrative. In *Emory v. State*, 101 Md. App. 585, 615 (1994), this Court comprehensively reviewed the "other crimes" exceptions and defined the "close connection" exception as:

> [C]rimes so connected in point of time or circumstances that one cannot be fully shown without proving the other, the contemplated connection seems to be more narrative than functional. The unities of time, space, and circumstance make it difficult to fragment too finely the narrative of a criminal episode even when there is no necessary cause-and-effect relationship between its parts.

In *Tichnell v. State*, 287 Md. 695 (1980), the Court of Appeals considered whether three separate indictments that charged Tichnell, of storehouse breaking, killing a police officer, and robbery of a police officer and theft of his car could be properly consolidated at one trial. The Court applied the "close connection" exception for other crimes evidence, which it defined as "the admission of evidence of other crimes when the several offenses are so connected or blended in point of time or circumstances that they form one transaction, and cannot be fully shown or explained without proving the

[5] One example of abusive content is a letter authored in January of 2015 in which Hott vented: "I wish you'd die every day. I fucking breathe now. I tell you one thing this is not done you will have action taken to the IRS you think you're above the law nope this is my lifelong mission." In another letter, he wrote: "Today I'm ready for the new war, to clear my name and prove who you really are. Your[e] a tax evader and a lying extortion thief. Anis I tell it all in court and this time I not leaving until I', done. Life ruining piece of Venezuelan dictator crap." In yet another letter, Mr. Hott wrote, "I never had a chance because you are a freak. Watch out Frederick criminals are coming for the money. 6123 Pinecrest [ ] (301) 305-6859 thank your police for that manipulating freak we go to war!"

others," *id.* at 712, and relied on "the proximity of time and space within which the offenses were committed," where the separate offenses occurred within a "tightly confined" geographic area and a fifteen-minute time period, in concluding that the trial court did not abuse its discretion in consolidating the three indictments. *Id.* at 713.

The sixteen handwritten letters, written over a period of approximately three months, were mutually admissible because their close connection created a story or narrative of Hott's hostility and level of vituperativeness. The sixteen letters were handwritten and sent from the same location to Mrs. Hott at her home.

No matter which exception is applied, the letters also had been proven by clear and convincing evidence and did not unduly prejudice Hott. Judge Rolle balanced the prejudice that Hott could have experienced against the probative value of the joinder. Judge Rolle did not abuse his discretion.

Hott, however, relies on *Emory*, 101 Md. App. 585 (1994), for the proposition that other crimes evidence is not admissible when there is no "genuinely contested issue," as he offered to stipulate to writing the letters. In *Emory*, 101 Md. App. at 604, Judge Charles E. Moylan, writing for this Court stated:

> The "other crimes" evidence testified to by Lawrence Leiben in this case failed to pass the first part of *Faulkner's* three-pronged test in that it was not "substantially relevant to some contested issue in the case," 314 Md. at 634, 552 A.2d 896. In terms of the standard of appellate review, this is a legal "call" as to which the trial judge is either right or wrong. There is no deference extended, as there would be with respect to primary or ancillary fact finding (where the judge is affirmed unless the fact finding is *clearly* erroneous) or with respect to discretionary rulings (where the judge is affirmed unless the ruling is a *clear abuse* of discretion). *Faulkner* on this point was clear, 314 Md. at 634, 552 A.2d 896, "That is a legal determination and does not involve any exercise of discretion."

In the present case, there were genuinely contested issues, queued up by Hott about his reasons for writing the letters, which rendered the letters mutually admissible. As a result, we affirm the trial court.

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