Circuit Court for Baltimore City
Case No. 121077003

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2040

September Term, 2022

SARAH LYNN JOHNSON

v.

STATE OF MARYLAND

Albright,
Tang,
Raker, Irma S.
(Senior Judge, Specially Assigned),

Opinion by Raker, J.

Filed: January 30, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Appellant, Sarah Lynn Johnson, was convicted in the Circuit Court for Baltimore City of two counts of second-degree assault. Appellant presents the following question for our review:

> 1. "Did the circuit court err and/or abuse its discretion in allowing the State to introduce prior bad acts evidence of drug possession and dealing over defense objection and denying appellant's mistrial motion on the basis of the erroneously admitted evidence?
> 2. Did the circuit court commit plain error by impermissibly considering acquitted conduct in fashioning Ms. Johnson's sentence?"

Because we shall find that the trial court erred in admitting evidence of prior bad acts, and that error was not harmless, we shall reverse. [1]

I.

Appellant was indicted by the Grand Jury for Baltimore City of two counts of first-degree assault, two counts of second-degree assault, reckless endangerment, and use of a handgun in a crime of violence. A jury found appellant guilty of both counts of second-degree assault and not guilty of all other charged crimes. The court sentenced appellant to a term of incarceration of fourteen years, all but seven suspended, to be followed by three years of probation. This timely appeal followed.

[1] Because we shall find that the court erred in admitting prior "bad acts" evidence, we will not set out the facts underlying appellant's claims regarding her sentencing.

Bryan Garcia and Leonal Garcia[2] were driving to a church event on February 18, 2021. They were driving down Janney Street in Baltimore City when they came upon appellant's car. The car was double parked with its door open, making it difficult to pass. Bryan Garcia asked appellant to move her car. According to both Bryan Garcia and Leonal Garcia, appellant refused and pulled out a gun. She pointed it at Bryan Garcia and Leonal Garcia, aiming at each in turn. Leonal Garcia observed appellant pull the trigger back. At some point during this interaction, appellant moved her door closed slightly. After Bryan Garcia saw the gun but realized that appellant was not shooting the gun, he used the additional space to pull around appellant's car and drive away.

Surveillance footage from a camera on the house Bryan Garcia and Leonal Garcia were traveling to showed the end of this altercation in which Bryan Garcia drove away. But, because of the angle, it did not show appellant with a gun. Officers identified appellant as the owner of the car Bryan Garcia and Leonal Garcia had encountered. They created a photo array using appellant's MVA picture and showed it to both Bryan Garcia and Leonal Garcia. Bryan Garcia identified appellant. Leonal Garcia did not. The police arrested appellant on the basis of this identification.

One of the central questions at trial was whether appellant had possessed a gun as both victims claimed. Appellant conceded she had been in her car on Janney Street on February 18 and that she had double parked. She testified that she had seen Bryan Garcia attempting to squeeze past her car and conceded that she had had a verbal interaction with

[2] Despite sharing a last name, Bryan Garcia and Leonal Garcia are not related.

him. However, she denied pulling out a firearm or having a firearm on her person. She stated that the only object in her hand was a phone and pointed out that surveillance video had shown her with a phone when she entered her car shortly before the incident.

The State offered several audio recordings of calls appellant had made from jail on a recorded line. The calls contained an instance in which appellant asked someone to remove a yellow item from a "Rick and Morty" bag in her car. A later call referenced appellant's father going through appellant's car and not finding a gun. Later, appellant asked someone if he had put an item in the house. The individual responded that the item was not in the house and that "my man kicked it." The State maintained at trial that the calls, taken as a whole, were evidence that appellant was attempting to conceal a firearm that had been inside the Rick and Morty bag.

Appellant sought to preclude the State from introducing these phone calls because they contained references to her possession of various drugs, including marijuana and yellow pills. In pertinent part, the contested portions of the jail calls contained the following audio. From a call dated February 22, 2021 at 5:37 p.m.:

> "Ms. Johnson: Is Justin in the house?
>
> Female Voice: Yeah, he's right here. Okay. This doesn't say – I know how to (inaudible) thing now.
>
> Ms. Johnson: No, no, give the phone to Justin.
>
> Female Voice: Okay. Wait one second because he is messing with his (inaudible).
>
> Ms. Johnson: I only got 15 minutes, mom.
>
> Justin: Hello. What am I doing?

Ms. Johnson: Hey, Justin.

Justin: What?

Ms. Johnson: I need you to do a 3-way for me but before that, hey, look, I need you to go in my car. Don't say nothing to mommy or daddy. In my car in my drivers side door in the panel, like the door, in my door, I need you to grab that bag. It's like a Rick and Morty bag. It's got something yellow in there. I need you to put that up for me when I got home. I got some weed in my room. Make sure that shit stays there until I get home, yo, for real, because I'm going to be –

(Simultaneous speaking.)

Justin: Okay, yeah, if it's still there. Chris might have took it with him.

Ms. Johnson: No, Chris didn't. I already talked to him. I got Black & Milds in there, too."

From a call dated February 22, 2021 at 6:50 p.m.:

"Male Voice: All I can say is just hang in there. Think positive. Don't get yourself all upset and try to take a focus on (inaudible), more focus. You do have people out here, you do. [I]t shocked the shit out of me that Chris can come up with $600.

Ms. Johnson: Yeah, but I mean he ain't –

Male Voice: (Inaudible)

Ms. Johnson: He really – He –

Male Voice: I've got respect for him now

***

Male Voice: But he's your man. He's your man, he should do what you all –

> Ms. Johnson: But it's just a pride thing. Like I don't like asking him for stuff.
>
> Male Voice: I hear you. I hear you.
>
> Ms. Johnson: Sometimes I don't got no weed and he be trying to get me weed and I'll lie and tell him I got weed or I don't have no money and he trying to buy me food and I'm telling him I'm not hungry, like -- I was the same way with Charles. Like that's just how I am."

Initially, the trial court proposed redacting the jail calls to remove appellant's references to drugs. The prosecutor responded that he did not know how to do such a redaction. As a result, the trial court weighed the probative value of introducing the unredacted calls against the prejudicial effect of those calls. The trial court ruled that the calls were admissible. Appellant's counsel renewed his objection to playing the portions of the calls that involved references to drugs immediately before the State played them for the jury. The court overruled the objection. The calls were admitted in their entirety, and portions were played for the jury.

During the cross-examination of appellant, the State questioned appellant on the items that were in her car. The State asked appellant if there were drugs in her bag, and appellant agreed that there were. The State played the portion of the jail call, transcribed above, in which the contents of the Rick and Morty bag were discussed. Appellant raised no objection.

Further, appellant's counsel discussed the drug evidence during the examination of several witnesses. Appellant sought to undermine the State's theory that she had been attempting to have family members dispose of a gun on the jail calls. Rather, she argued,

she was having them get rid of her drugs. On the cross-examination of the primary detective in the case, appellant's counsel pursued the following line of questioning:

> "[DEFENSE COUNSEL:] And did you listen later when she told you what was—And something yellow she said, right, remember that? Something yellow in that bag?
>
> [DETECTIVE:] Something yellow in that bag, that's correct.
>
> [DEFENSE COUNSEL:] Okay. Did you listen later, the rest of the tape, where it said it was pills in the bag?
>
> [DETECTIVE:] Drugs?
>
> [DEFENSE COUNSEL:] Pills?
>
> [DETECTIVE:] Yes."

On direct examination, appellant testified as follows:

> "[DEFENSE COUNSEL:] Did you ever tell Chris to get rid of the gun?
>
> [APPELLANT:] No.
>
> [DEFENSE COUNSEL:] What were you talking about when he said he sold something?
>
> [APPELLANT:] The drugs in my car.
>
> [DEFENSE COUNSEL:] What was in your car?
>
> [APPELLANT:] Percs and weed. Percocets and weed.
>
> [DEFENSE COUNSEL:] Where was that?
>
> [APPELLANT:] In my driver's side door.
>
> [DEFENSE COUNSEL:] Was it in a bag?

> [APPELLANT]: Yes. It was in a Rick and Morty bag that I originally told my brother to get out of my car.
>
> [DEFENSE COUNSEL:] There wasn't a gun in that car, was there, or was there?
>
> [APPELLANT:] No, sir, there was no gun.
>
> [DEFENSE COUNSEL:] What was Chris talking about when he said he sold something for $600?
>
> ***
>
> [APPELLANT:] He was talking about the pills in my car. I don't know if the clip played, but you hear me ask him did he sell it, did he get rid of them."

At the close of trial, appellant moved for a mistrial on grounds that the jail calls were admitted improperly. The trial court denied that motion. Appellant was found guilty of second-degree assault only. The trial court sentenced appellant as described above.

II.

Appellant argues that the evidence of drug possession presented in the jail calls played for the jury was inadmissible evidence of uncharged "bad acts" by appellant prohibited by Md. Rule 5-404(b). Appellant argues that the evidence of marijuana possession and possession of "yellow pills" had no special relevance to the State's case except to prejudice the jury against appellant for her drug possession. At the very least, appellant argues that any probative value was outweighed by the prejudicial effect. Thus, the jail calls should have been redacted to remove any references to drugs. If the State could not figure out the technology to do that, the calls should have been stopped and

started so as to skip the portions referencing drugs when the State played the calls for the jury or the calls should have been excluded entirely. Appellant argues that the admission of the jail calls warrants reversal and that appellant's motion for a mistrial should have been granted.

Appellant acknowledges that the State played one of the jail calls again on cross-examination and that appellant discussed her drug possession on direct examination. But appellant argues that, once the evidence had been admitted by the trial court, appellant was not required to object every time the same evidence was referenced or to refrain from referencing or explaining that evidence to mitigate its effects.

The State argues that appellant's claim of error is waived. The State argues that appellant failed to preserve her objection when her counsel failed to object to the State's cross-examination of appellant about the jail calls. Further, appellant waived any objection when she cross-examined the detective and elicited facts about her drug possession and then offered those same facts as affirmative evidence on direct examination. The State argues that, where, as here, appellant has introduced evidence of the same conduct, reversal based upon the State's use of "bad acts" evidence is inappropriate.

In the alternative, the State argues that the court properly admitted the evidence. The State argues that the jail calls were evidence that appellant was attempting to hide contraband in her car, including both drugs and a firearm. The State contends that appellant was using coded language to refer to the firearm because she was on a recorded line. This firearm is intrinsic to the crime charged because the presence of the firearm in that car would help demonstrate that appellant had pointed a firearm at the victims. As for the

references to hiding drugs, the State argues that the possession of drugs occurred during the same criminal episode as the charged crimes and that the evidence of appellant's attempts to hide drugs helps to explain and contextualize appellant's attempts to hide other contraband in her car. The State maintains that the inclusion of the drug evidence in the jail calls was not overly prejudicial because the court instructed the jury that the evidence should not be held against appellant in any way.

Finally, the State argues that any error was harmless. The State maintains that the drug evidence was beneficial to appellant's case, not detrimental. It allowed appellant to argue that she was attempting to dispose of drugs from her car rather than a firearm. Indeed the State argues that the mixed verdict might have suggested that the jury believed appellants claim that she had drugs and not a firearm. As a result, the State maintains, the drug evidence was harmless beyond a reasonable doubt.

III.

As a threshold matter, we consider whether the issue is preserved for our review. Both parties agree that appellant moved to exclude the calls at the beginning of the trial and that counsel objected immediately before the calls were offered by the State into evidence. We hold that the issue is preserved for our review.

The State argues that appellant waived her objection to the evidence when the State re-played portions of the recording later at trial and appellant did not object. The general rule is that an objection to the admissibility of evidence is not preserved for appeal unless a contemporaneous objection is made each time the contested evidence is raised at trial.

See Clemons v. State, 392 Md. 339, 361 (2006). Where, for instance, the State seeks to question a new witness on the same fact, ordinarily, the defendant must object to the subsequent questioning to preserve his objection for appeal. *Spriggs v. Levitt & Sons, Inc.*, 267 Md. 679, 682-83 (1973).

This case, however, is not such a case. Here, the State replayed or republished the same evidence to the jury. Defense counsel had twice made clear to the trial court that he strenuously objected to the drug references on the recorded call, to no avail. Another objection would clearly have been futile. As the Supreme Court of Maryland has recognized, when counsel has objected to a particular piece of evidence through strenuous objection and the court has overruled that objection and admitted the evidence, counsel need not object each time that evidence is published to the jury if such an objection would be futile. *Standifur v. State*, 64 Md. App. 570, 579-80 (1985). Here, appellant objected strenuously at the beginning of trial and again when the evidence was admitted. By the time of the State's cross-examination, the evidence was in the record and in front of the jury. Further objection to republication would have been futile.

The State also argues that appellant waived her objection when she discussed the drug possession after the it had been admitted. Yet this court has been clear that, once evidence has been introduced by the State, a defendant is not required to ignore it to preserve her objection:

> "However, there are some practical limits to what counsel must do, or refrain from doing, in order to preserve the objection. When a party makes a clear objection to specific evidence and that objection is plainly overruled, he is not required to play the ostrich and simply ignore the evidence, or its potential effect upon his case, for fear of losing his ground for appeal. He

> may cross-examine (or, in this instance, re-directly examine) the witness about the evidence, *Peisner v. State*, 236 Md. 137, 144 (1964), and make other reasonable efforts to show that the evidence, admitted over his objection, should nevertheless be discounted or disregarded by the trier of fact."

Baltimore v. Smulyan, 41 Md. App. 202, 219 (1979).

Appellant did not introduce new evidence of drug possession. Rather, she sought to explain the evidence on the record. All of the jail calls were introduced into evidence and available to the jury. Those jail calls made clear that appellant had "marijuana" and "yellow pills." Appellant was permitted to cross-examine the detective on whose direct examination the calls were admitted about the nature and extent of the evidence he collected and the credibility of his investigation of that evidence. Appellant was also permitted to explain and contextualize the calls on direct examination. That was the extent of appellant's evidence of drug possession. The fact that appellant put a positive spin on the evidence the State introduced does not mean she waived her objection.

We turn to the merits of appellant's claim. Md. Rule 5-404(b) precludes the use of "Evidence of other crimes, wrongs, or other acts . . . to prove the character of a person in order to show action in the conformity therewith." However, this evidence may be used for other purposes. *Id.* Maryland courts admit evidence of prior "bad acts" if that evidence satisfies three requirements. *Gutierrez v. State*, 423 Md. 476, 489-90 (2011). First, the evidence must be "substantially relevant to some contested issue in the case." *Id.* Second, the evidence must be "clear and convincing in establishing the accused's involvement in the prior bad acts." *Id.* Third, the evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." *Id.*

The evidence of drug possession did not meet the first requirement, relevancy. Our analysis of the first requirement is a legal determination and does not involve any exercise of discretion. *State v. Faulkner*, 314 Md. 630, 634 (1989). We review the trial court's decision *de novo* to determine whether there was "special relevance" to the evidence. *Green v. State*, 259 Md. App. 341, 370 (2023). The State alleged at trial that the relevance of the jail calls was that appellant referenced disposing of or removing something from the car. The State alleged that this was a firearm. This is an argument that the jail calls were relevant, not that the references to drugs were relevant. Indeed, even on appeal, the State presents no argument that the evidence of appellant's drug possession, in particular, was relevant. Rather, the State argued at trial that it was unable to redact the references to drugs from the calls that also referenced removing the item that the State alleged was a firearm. On appeal, the State argues that the drug-related evidence was so intrinsic to the evidence of the charged crime that its admission was appropriate, citing *Smith v. State*, 232 Md. App. 583, 600 (2017). We see no "special relevance" to the evidence of drug possession. It may have been adjacent to other evidence the State found relevant, but it was not, itself relevant. Because this evidence had no relevance for a non-character purpose, it was not admissible under Rule 5-404(b).

Even if we were to accept the State's claim that it was not possible to redact an audio recording, or to use any other method to convey the calls to the jury without playing the portions that referenced drugs (e.g., a redacted transcript, or admission of only the relevant portion of each call), the solution was not to admit inadmissible evidence. Rule 5-404(b) is a rule of exclusion. *Emory v. State*, 101 Md. App. 585, 601 (1994) (holding that the

proposition that "other crimes" evidence should be excluded is subject to numerous exceptions but, pending proof of entitlement to one of the exceptions, the initial presumption is in favor of exclusion). The burden is on the State to tailor the evidence to satisfy the rules of admissibility.

Finally, the State maintains that, if there was error, the error was harmless. Harmless error occurs when "a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict." *Dorsey v. State*, 276 Md. 638, 659 (1976). Consequently, "errors that do not contribute to a defendant's guilty verdict do not warrant reversal." *State v. Jordan*, 480 Md. 490, 506 (2022). The State has the burden of establishing beyond a reasonable doubt that an error was harmless. *Dionas v. State*, 436 Md. 97, 108 (2013). We hold that the error was not harmless error.[3]

This case turned largely on a credibility battle between appellant and the alleged victims over whether appellant had a gun. The State was unable to produce the gun. The State's video evidence did not show the gun. While the State produced many of appellant's jail calls that the State alleged demonstrated that appellant had disposed of a gun, those jail

[33] It is interesting that the State argues here that the drug evidence, even if not relevant, was harmless in light of the State's arguments in other firearm cases that there is a strong nexus between possession of drugs and possession of guns. *See e.g. Parker v. State*, 402 Md. 372, 410 (2007) ("The State also suggests that, because 'guns are a tool of the drug trade,' the amounts of drugs found on Parker's person and in the house 'allow a reasonable inference of Parker's constructive possession of the handgun.'"); *see also Handy v. State*, 175 Md. App. 538, 574 (2007) (Where a defendant is in possession of drugs for the purpose of drug trafficking and a firearm is found nearby, that firearm may be assumed to have been "possessed in relation to a drug trafficking crime").

calls never directly stated that appellant had a gun. The State resorted to an argument that appellant had been speaking in code. Thus, evidence affecting appellant's credibility and character was key. "Bad acts" evidence may improperly damage appellant's credibility. It may cause the jury to believe that, because appellant was a bad person who possessed drugs unlawfully, she was more likely to be the kind of person who would possess the gun. In short, it is prejudicial. Particularly in light of the weak evidence of gun use in this case and the paramount importance of credibility, we cannot say beyond a reasonable doubt that the error did not contribute to the verdict.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED CASE REMANDED TO THAT COURT FOR A NEW TRIAL. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.