Circuit Court for Anne Arundel County
Case No. 02-K-11-002647

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2094

September Term, 2015

WILLIAM LLOYD MCDONALD

v.

STATE OF MARYLAND

Wright,
Berger,
Leahy,

JJ.

Opinion by Leahy, J.

Filed: February 12, 2018

On August 12, 2006, at approximately 2 a.m., Benjamin Curtis and Rhonda Briscoe were robbed at gunpoint. The assailant shot Mr. Curtis in the head.

Appellant William L. McDonald ("McDonald") was tried before a jury in the Circuit Court for Anne Arundel County and convicted of first-degree felony murder and second-degree murder, armed robbery of both Mr. Curtis and Ms. Briscoe, use of a handgun in the commission of a violent crime, and possession of a firearm after a conviction of a crime of violence.

McDonald presents five questions for our review:

1. "Did the trial court err in admitting irrelevant and/or highly prejudicial letters into evidence?"

2. "Did the trial court err in admitting other irrelevant evidence; inadmissible hearsay; and/or testimony in violation of appellant's constitutional rights of confrontation?"

3. "Did the trial court err in instructing the jury?"

4. "Did the trial court err in refusing to propound Appellant's requested *voir dire*?"

5. "Did the trial court err in denying Appellant's motion to strike the State's *Notice of Intent to Seek Sentence of Imprisonment for Life Without Possibility of Parole*?"

We hold that the trial court abused its discretion by admitting the letters at issue without first reviewing them and without conducting the requisite analysis under Maryland Rule 5-404(b). *See State v. Faulkner*, 314 Md. 630 (1989). More specifically, the court did not consider the inferences involved in establishing the special relevancy of the letters as evidence of consciousness of guilt, or weigh the probative value of the evidence against their prejudicial effect. Because we cannot say the letters at issue are not highly prejudicial,

we must reverse McDonald's convictions and remand this case for a new trial. We do not, therefore, reach McDonald's remaining issues on appeal.[1]

BACKGROUND

The following testimony and evidence was presented at McDonald's trial, which began on May 5 and ended on May 14, 2015.[2]

Mr. Curtis and Ms. Briscoe were very close friends. On August 11, 2006, they met some friends after work at the Star Inn, a bar in Odenton, Maryland. Mr. Curtis and Ms. Briscoe left the bar together in Mr. Curtis's SUV and drove to the American Legion in

[1] Regarding McDonald's fifth question, he contends that the trial court erred in denying its motion to strike the State's notice of intent to seek a sentence of life imprisonment without parole for two reasons. First, he asserts that "a provision of the Maryland Code [Section 2-304 of the Criminal Law Article] and Maryland Rule[] [4-342] are in direct conflict" for the reason that the statute contemplates sentencing by a jury while the rule provides for sentencing by the court. The second reason McDonald advances is that "the Maryland sentencing scheme for first-degree murder is void for vagueness as it lacks guidelines for the circuit court or a jury in deciding whether to impose a sentence of life imprisonment without the possibility of parole." At oral argument, both parties acknowledged that the Court of Appeals' opinion in *Bellard v. State*, 452 Md. 467 (2017), published after the briefing deadlines in this case, is directly on point. In *Bellard*, the Court considered the same issues and held that "the trial court, not the jury, determines whether to sentence the defendant to life imprisonment or life imprisonment without the possibility of parole; stated otherwise, [CL] § 2-304 does not grant a defendant who is convicted of first-degree murder the right to have a jury determine whether to impose a sentence of life imprisonment without the possibility of parole[.]" *Id.* at 474. The Court also instructed that, "in the absence of statutory guidelines explicitly limiting a trial court's discretion, the imposition of a sentence of life imprisonment without the possibility of parole rests with the trial court's discretion and is subject to traditional sentencing procedures." *Id.* at 512-13.

[2] McDonald was tried previously on these charges, but that trial ended with a mistrial on October 17, 2013 due to "the State's failure to disclose that a witness[, Kim Finch,] had received immunity for her testimony."

Baltimore. They returned to Odenton around 2 a.m. to pick up Ms. Briscoe's car, which was parked near the Star Inn and My Place, another bar.

Ms. Briscoe testified that while they were sitting in Mr. Curtis's SUV, a man approached the driver's window, which was partially open, and pointed his handgun through the window. According to Ms. Briscoe, the man, later identified in the course of the investigation as McDonald, said, "give me your wallet and give me your purse, this is a robbery[.]" Mr. Curtis handed his wallet and Ms. Briscoe's purse to McDonald. McDonald then got in the backseat of Mr. Curtis's SUV and rifled through the wallet and purse. McDonald said "come on man, I know you got more money than that." Mr. Curtis gave McDonald the remaining money in his pocket. McDonald took the money and then, in an apparent shift of his intentions, told Ms. Briscoe to remove her shirt. After Ms. Briscoe was forced to remove her shirt at gunpoint, Mr. Curtis attempted to subdue McDonald. Meanwhile, Ms. Briscoe fled from the SUV. As she ran she heard the gun discharge. McDonald then got out of the SUV and shouted after her to come back or he would shoot her too. Ms. Briscoe ran approximately a quarter of a mile to a gate at the Fort Meade United States Army Installation for help.

McDonald had left the area by the time the police responded, according to Corporal Dennis Stackewicz, one of the Anne Arundel County police officers who responded to the scene. Mr. Curtis died shortly after arriving to a hospital from a single gunshot wound to his head.

The Investigation

In the early morning hours of August 12, 2006, Corporal Martin Freeman of the Anne Arundel County police department, was the first officer to respond to the scene. Upon finding Mr. Curtis wounded and unresponsive in the SUV, Cpl. Martin called for backup. The officers searched the SUV for evidence of gunshots or projectiles and to determine Mr. Curtis's identity and how his wounds were inflicted. In the course of this search, Corporal Ronald Gamble, one of the Anne Arundel County police officers who responded to Cpl. Freeman's service call, found a bullet fragment in the rear floorboard of the SUV. Cpl. Freeman turned the bullet fragment over to an evidence technician, who bagged it as evidence along with other items located during the search.

Detective Shelly Powell served as the lead investigator for the homicide investigation of Mr. Curtis's murder in 2006 and testified for the State at trial. Det. Powell learned that Mr. Curtis and Ms. Briscoe's cell phones were taken during the robbery so she obtained both numbers and had the Career Criminal Unit trace the location of the phones. One cell phone was traced to an apartment in the Quarterfield Crossing Apartments in Glen Burnie, Maryland.[3] Det. Powell, along with other detectives, went to the apartment complex to investigate two days after the shooting and armed robbery. Multiple Spanish-speaking individuals lived in the apartment unit. Det. Powell asked the residents about the cell phone, which turned out to be Ms. Briscoe's cell phone. Det. Powell recounted the

[3] McDonald lived with Kim Finch, his girlfriend at the time, at Quarterfield Crossing Apartments. This was not known to Det. Powell at the time she located the cell phones.

residents' responses over the defense counsel's objection on the grounds of hearsay and the right to confrontation. Specifically, Det. Powell testified that

> they [(the apartment's residents)] explained that they had found the phone, but it wasn't working. They had taken . . . the SIM card[] out of one of theirs and put it into the phone that they found to see if it was working.

The residents told Det. Powell that they found the cell phone by the swimming pool of the apartment complex. Det. Powell searched the swimming pool area and found pieces of a cell phone everywhere—this phone was later identified by its serial number as Mr. Curtis's phone. Det. Powell testified that, after speaking with the residents of the apartment, she deduced that they were not involved in the armed robbery and murder of Mr. Curtis. She obtained a list of all residents residing in the apartment complex and conducted background checks on each, but none of the residents were identified at that time as suspects or related to the murder and armed robbery.

On August 22, 2006, Craig Robinson, an evidence coordinator with the Anne Arundel Police Department, brought the bullet fragment recovered from Mr. Curtis's car to Torin Suber, a firearm and toolmark examiner with the Maryland State Police. Suber identified the fragment as a "fired caliber .40 S&W /10mm copper jacketed bullet." Based on the impressions on the bullet, Suber narrowed the list of the type of firearm to those manufactured by Glock, Israeli Military Industries, Heckler & Koch, and Kahr Arms.

Det. Powell and Robinson searched Mr. Curtis's car for a second time on August 24, 2006, to recover any trace evidence. During this search, Robinson found a .40 caliber cartridge case lodged in the rear passenger seat. He processed the cartridge and logged it as evidence.

Carlos Wells, one of the State's key witnesses, became involved in the investigation after he was arrested in New Jersey on September 4, 2006, with a gun in his possession as a suspect in an unrelated drive-by shooting. The New Jersey police ran a NCIC check on the handgun and learned that it was reported as stolen from Maryland. They sent an intelligence bulletin notifying the Anne Arundel County Police Department that Wells was arrested with a .40 caliber Glock handgun, which was one of the possible types of guns used in the murder of Mr. Curtis and armed robbery of Ms. Briscoe.

Det. Powell interviewed Wells at a detention center in Atlantic City. She asked Wells, among other things, how he procured the handgun. Det. Powell testified that it was through this interview that she identified McDonald as a suspect in the armed robbery and murder of Mr. Curtis.[4] Det. Powell then interviewed Kim Finch (formerly Kim Smith), McDonald's girlfriend at the time, on at least two occasions–October 2, 2006, and July 3, 2007. Kim Finch denied knowledge of the murder and armed robbery.

Det. Powell's report stated that Ms. Briscoe claimed she had seen a portion of the gunman's face because he was not wearing a mask, but he was wearing a black skull cap. Ms. Briscoe testified that the gunman was a black male, who could also have been biracial or Hispanic, with a southern accent. On January 18, 2007, she attended a line-up at the police station. McDonald was one of the six males in the line-up, all wearing black skull caps; she did not identify any of the six people as the gunman. On cross examination, Det.

[4] Carlos Wells had a plea agreement with the United States Attorney's Office for the District of Maryland. At the time of trial, McDonald was serving a sentence for a theft conviction that resulted from a burglary charge.

Powell admitted that the police were not able to match McDonald's DNA to any evidence from the crime.

At some point, the investigation became dormant. Although Det. Powell suspected McDonald of committing the crimes by September 2006, the State did not have sufficient evidence connecting McDonald to the crime. In April 2011, the investigation was reinvigorated, however, when the Anne Arundel Police Department assigned Detective John Gajda and the Homicide Cold Case Unit to this case.

Shortly thereafter, on June 3, 2011, Kim Finch finally agreed to talk with the police about the crimes, after denying knowledge of them in 2006 and 2007, when she was granted immunity. At trial, she testified that McDonald called her in the early morning on August 12, 2006, to pick him up at the Eagle's Nest (a club on Fort Meade) and he asked her to park by the woods. She testified that she parked at the agreed upon location, he ran to the car, asked her to pop the trunk, and he got in the trunk. At McDonald's instruction, Finch drove home by a different route. After they arrived home, Finch testified that McDonald admitted to the armed robbery and explained that he shot someone. Finch also testified that McDonald immediately showered and she believed he destroyed the clothes he wore on August 12, 2006. After his shower, McDonald continued to detail the events of that early morning, including that the people be robbed drove an SUV. Finch also testified that McDonald later told her he lent his gun to Carlos Wells after the murder and armed robbery. At McDonald's request, Finch made three or four attempts to call Wells to get McDonald's gun back, but Wells did not answer or return her calls. McDonald was finally indicted on

December 16, 2011—five years after the crimes occurred.

Det. Gajda testified that in January 14, 2014, he brought the bullet fragment, cartridge case, and handgun to the New Jersey State Police Lab for additional testing. James Storey, a firearms identification expert with the New Jersey State Police Ballistics Unit, performed a microscopic comparison of the bullet fragment and shell casing, and concluded that the bullet and casing had similar impression marks, which indicated that they were fired from the same handgun. After comparing the bullet, casing, and handgun, Storey concluded that there was a reasonable degree of certainty that the bullet and casing were fired by the handgun. Ultimately at trial, the parties stipulated that, prior to Mr. Curtis's murder, McDonald was in possession of the same Glock .40 caliber model handgun recovered from Wells, and that this handgun was the used in the murder of Mr. Curtis.

In February 2012, Adrian Lincoln, a friend of McDonald's, gave two undated letters to Detective Frank Springer, a detective with the homicide unit of the Montgomery County Police Department (the "Lincoln Letters").[5] The first letter was addressed to Lincoln and was signed by "William". In the first letter, which carried the instruction, "Burn this letter

[5] Montgomery County Police and State's Attorney's Office had investigated McDonald for crimes committed in Montgomery County and for which he was successfully prosecuted. Adrian Lincoln was also investigated by the Montgomery County Police in connection with those other crimes. Montgomery County Detective Frank Springer testified in the motions hearing in this case that there was no agreement, formal or information, between Lincoln and the State in regard to his cooperation in the investigation of McDonald. The State's Attorney for Montgomery County testified that the Lincoln Letters in this case were not used in any prosecutions in Montgomery County.

one you read it. A.S.A.P.," William writes

> Adrian,
> This is my last stamp. I had no other way of contacting you so don't be mad. . . . I need your help Adrian. I need money, support, even some gangster shit from you. I need you to help Kim out with my lawyer[.] . . . I need you for once put your nuts on the line for me like you know I'd do for you at any given moment. I'm scared [] for the first time in my life of another[.] . . . This nig*** all the way in New Jersey and committing crimes but want to include me. What happened to the code of the streets – I don't know. . . . The nig*** told them that he thinks I commit [sic] crimes in Silver Spring[.[6]] That's why the po-po's is out there like that with that I think you understand what I need you to do. You ain't dumb and I know you can handle it. This is my life [Adrian]. My life!! I know you probably got my last letter I sent thru Melissa so this is just a continue [sic] of that shit. Call Kim and tell her you need to meet her[.] . . . Let her explain to you everything about the nig*** (the rat) his name is Carlos and go from there. She knows where his people's live and everything.

William clarified what was at stake:

> . . . 25 to life is what I'm facing[.] I can't risk this bi**h getting locked up because if he does it's guaranteed that he could appear in court. I beat this if this bi**h is dead[.] I can't stress enough how much I need this shit done. . . .

William then gives explicit instructions on how to murder Carols Wells:

> Don't say my name or anything else but [get his family] to call him and get him there. . . . Duct tape [his family] in the back and wait for him. Take the phones off the hook and cell phones from them. Matter of fact put them bi**hes in the bathroom (where no phones are at). If you shoot him it'll make noise, but if you cut this nig***'[s] throat and in the heart and neck (make sure you masked up) then you in and out. . . .

The second letter appeared to be a follow-up after Lincoln did not respond to the first letter or carry out its request. This time the letter was written on the back of a Maryland Division

[6] Wells had already informed on McDonald for the theft conviction in Silver Spring.

of Correction form. Although the second letter was not addressed to Lincoln, it was signed again by "William" and referenced multiple topics mentioned in the first letter:

> You know, I'm not mad at you for nothing. . . . I guess you felt that what I asked of you was pretty strange didn't you? It's cool. . . . Even though I asked you destroy it once (the letter) you were done, you could've still replied to me with something. Anything. . . . You know I would never ask of you anything that you couldn't handle so it not getting done is strange. On the other hand, you being my last resort plus me asking you to have some nuts for me for once, I should've known that that request would be too much for you to bare [sic]. . . . You couldn't even help me with a lawyer or nothing huh??

The State first introduced the Lincoln Letters during Finch's testimony, and she identified McDonald as the author of the letters through her familiarity with his handwriting. Altogether three witnesses, including an expert in forensic document examination, testified that McDonald wrote the Lincoln letters. When the State moved to admit the letters into evidence, the defense objected on the grounds that the letter with instructions for murdering Carlos Wells (State Exhibit 6) constituted evidence of prior bad acts (Maryland Rule 5-404(b)) and was "extraordinarily prejudicial." A lengthy colloquy ensued; the following is an excerpt:

> [Defense Counsel:] Also, Your Honor, the letters aren't relevant, they're not related to this crime at all, they're not connected in any way to this event, they don't mention this event in any way. They mention a Mr. Wells, but that's all they do, but it's certainly not connected. There's no date on the letters, there's no evidence that these letters were written before, after, or during this alleged event.
>
> The Court: Well, that's a probative issue, prejudice versus probative value.
>
> [Counsel for State:] And I think, Your Honor, that goes more to the weight rather than to the admissibility. [A]nd I think the content of especially State's Exhibit 6 [the First Lincoln Letter] will -- I think it will authenticate that it has absolutely to do with this. The details that are in the letter regarding Mr.

> Wells, regarding New Jersey -- it refers to New Jersey, it refers to information that [McDonald's] given, and it refers to things that clearly indicate that he's talking about Mr. Wells.
>
> The Court: **They say what they say. I have no idea. I haven't seen what the content of the letters are.**
>
> [Defense Counsel:] But – well I'm making and I'm renewing the [Maryland Rule 5-]404(b) objection to both of these letters, but particularly the one that's not written on the prison document. And I would ask the Court to review that and make a weighing to determine whether or not they're more prejudicial than probative.
>
> The Court: Okay. Denied.
>
> (Counsel returned to the trial tables, and the following occurred in open court:)
>
> The Court: Okay. As we left it the State had offered the letters into evidence, the defense noted an objection, it's been overruled, so they'll be admitted.

(Emphasis added).

The jury convicted McDonald of first-degree felony murder, second-degree murder, two counts of armed robbery, use of a handgun in the commission of a violent crime, and possession of a firearm after a conviction of a crime of violence.

Sentencing

The State filed a notice of intention to seek imprisonment for life without the possibility of parole on January 11, 2013. McDonald filed a motion to strike the State's notice on April 1, 2014. The parties argued these motions on the first day of trial. McDonald renewed this motion on September 18, 2015. The State filed a memorandum in opposition to McDonald's motion to strike the State's notice of intention to seek a sentence of life without parole on November 24, 2015. The trial court denied McDonald's motion in a written order dated December 1, 2015.

At the outset of the sentencing hearing, McDonald renewed his motion to strike the State's notice of its intention to seek the sentence of life without parole and motion for a jury sentencing. The sentencing court denied both motions without hearing argument.

The court then sentenced McDonald to the following consecutive sentences on December 1, 2015: life without the possibility of parole for the felony murder of Mr. Curtis, (second-degree murder merged into the felony murder conviction); 20 years' of incarceration for the armed robbery of Ms. Briscoe; 20 years' incarceration for use of a handgun in the commission of a crime of violence (the first 5 years of that sentence are without the possibility of parole); and 5 years without the possibility of parole for possession of a firearm after a conviction of a crime of violence.[7]

McDonald timely noted his appeal on December 3, 2015.

DISCUSSION

I.

Lincoln Letters

McDonald's principal challenge is that the trial court erred in admitting the Lincoln Letters under Maryland Rule 5-404(b) because the court did not examine the letters for their relevance or weigh the probative value against any undue prejudice that may result from their admission. McDonald argues, as he did at trial, that the letters are not relevant because they do not mention the crimes for which he was on trial, are not connected to

[7] According to the sentencing court, at the time of sentencing, McDonald was incarcerated and serving a sentence in an unrelated case. The sentences in this case are consecutive to the sentence in the unrelated case.

these crimes, and do not contain a date indicating the letters relate to these crimes. He further asserts that the letters are not admissible as evidence of consciousness of guilt because the State did not establish each of the four inferences described in *Decker v. State*, 408 Md. 631 (2009).

The State counters that the circuit court did not err in admitting the Lincoln Letters, despite not examining them, because trial counsel informed the circuit court of the contents of the letters through their extensive proffers when arguing for and against the admissibility of the letters. The State contends that, even if the trial court "committed some analytical error," he is not entitled to reversal because special relevancy under Rule 5-404(b) is reviewed de novo, and, if the trial court fails to conduct the probative vs. prejudicial balancing test under Rule 5-403, then the "'appeals court will do the balancing itself.'" *Snyder v. State*, 210 Md. App. 370, 393 (2013). The State contends that the letters are relevant and highly probative because they are "strong proof that McDonald committed the crimes with which he was charged."

Evidence of a defendant's other crimes or bad acts is generally inadmissible. Maryland Rule 5-404(b); *see also Wilder v. State*, 191 Md. App. 319, 343 (2010). There is a tangible concern that evidence of prior bad acts may predispose the jury to believe the defendant is guilty of the crime for which he is on trial. *Wynn v. State*, 351 Md. 307, 317 (1998). A defendant "should only be convicted 'by evidence which shows he is guilty of the offense charged, and not by evidence which indicates his guilt of entirely unrelated crimes.'" *Page v. State*, 222 Md. App. 648, 660, *cert. denied*, 445 Md. 6 (2015) (quoting

Ross v. State, 276 Md. 664, 669 (1976)).

The Court of Appeals explained that evidence of other crimes may be admitted if it has special relevancy, which means the evidence "is 'substantially relevant for some other purpose than to show a probability that he committed the crime on trial because he is a man of criminal character.'" *Ross*, 276 Md. at 669 (citation omitted). And in *Faulkner*, *supra*, the Court stated that, "[w]hen a trial court is faced with the need to decide whether to admit evidence of another crime . . . it first determines whether the evidence fits within one or more of the *Ross* exceptions." 314 Md. at 634. The *Ross* exceptions are: "(1) motive, (2) intent, (3) absence of mistake, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, and (5) the identity of the person charged with the commission of a crime on trial." *Ross*, 276 Md. at 669–70.

The exclusionary rule that was later adopted by the Court of Appeals expanded the *Ross* exceptions.[8] Rule 5-404(b), governing the admission of other crimes evidence, provides:

> (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

[8] The Court of Appeals adopted Title 5 of the Maryland Rules in 1993. Maryland Rules (1994 Repl. Vol.). Prior to 1993, Maryland's "evidence law consisted of a grab bag of statutory provisions, rules of practice and, primarily, common-law precedent." Alan D. Hornstein, *The New Maryland Rules of Evidence: Survey, Analysis and Critique*, 54 Md. L. Rev. 1032, 1032 (1995).

accident.

The exceptions identified in this rule "are 'neither mutually exclusive nor collectively exhaustive.'" *Emory v. State*, 101 Md. App. 585, 616 (1994) (citation omitted). Maryland courts have recognized additional exceptions including consciousness of guilt. *See Decker*, 408 Md. at 640 (quoting *Thomas v. State*, 372 Md. 342, 351 (2002) ("It is well established in Maryland that, '[i]f relevant, circumstantial evidence regarding a defendant's conduct may be admissible under Md. Rule 5-403, not as conclusive evidence of guilt, but as a circumstance tending to show a consciousness of guilt.'")).

We recently explained the required determinations and attendant standards of review that apply to evidence admitted under Maryland Rule 5-404(b):

> In order for "other crimes" evidence to be admissible, the circuit court—in its role as the evidentiary sentry—must conduct a threefold determination before permitting the evidence to be presented to the jury. First, the court must find that the evidence is "'relevant to the offense charged on some basis other than mere propensity to commit crime.'" *Skrivanek v. State*, 356 Md. 270, 291, 739 A.2d 12 (1999) (quoting *Whittlesey v. State*, 340 Md. 30, 59, 665 A.2d 223 (1995)). In other words, the question is whether the evidence falls into one of the recognized exceptions. *State v. Faulkner*, 314 Md. 630, 634, 552 A.2d 896 (1989). This determination does not involve discretion; on review by this Court, it "is an exclusively legal [question], with respect to which the trial judge will be found to have been either right or wrong." [*Oesby v. State*, 142 Md. App. 144, 159] (citing *Faulkner*, 314 Md. at 634, 552 A.2d 896). Second, the court must "decide whether the accused's involvement in the other crimes is established by clear and convincing evidence[,]" and we "review this decision to determine whether the evidence was sufficient to support the trial judge's finding." *Faulkner*, 314 Md. at 634–35, 552 A.2d 896 (citations omitted). Third, "[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[,]" and this is a determination that we review for abuse of discretion. *Id.* Not until the court determines that the evidence can clear these hurdles may the court open the gates for the admission of "other crimes" evidence. Indeed, "[t]hese substantive and procedural protections are necessary to guard against the

> potential misuse of other crimes or bad acts evidence and avoid the risk that the evidence will be used improperly by the jury against a defendant." *Streater v. State*, 352 Md. 800, 807, 724 A.2d 111 (1999).

Page, 222 Md. App. at 661-62.

a. Special Relevance Under Consciousness of Guilt

In this case, we are presented with a series of letters in which "William" requested his friend brutally murder a key witness that were introduced into evidence to establish McDonald's consciousness of guilt. Evidence of consciousness of guilt "'will overcome the presumption of exclusion that is attached to "other crimes" evidence.'" *Jackson v. State*, 132 Md. App. 467, 485 (2000) (quoting *Conyers v. State*, 345 Md. 525, 554 (1997)). Several cases explain the special relevancy analysis that a court must undertake under the first of the tri-part 5-404(b) examination when evidence is offered to show consciousness of guilt.

In *Thomas*, the petitioner was tried for the murder of Ms. Mitchell and related crimes. 372 Md. at 346. During the course of the investigation, the police obtained a search warrant to take hair and blood samples of the petitioner. *Id.* The petitioner did not willingly comply with the warrant and the officers had to forcibly restrain the petitioner to obtain the blood sample. *Id.* The petitioner was excluded as the source of blood found at the crime scene through laboratory testing. *Id.* Prior to trial, the petitioner moved *in limine* to prevent the State from introducing the evidence that he resisted when the police obtained the blood sample. *Id.* at 347. The trial court denied the motion and the State introduced the evidence at trial. *Id.* at 348. The petitioner was subsequently convicted of felony murder and related crimes. *Id.* On certiorari review, the Court of Appeals considered

"whether the trial court erred in admitting as evidence of consciousness of guilt the fact that petitioner resisted when, pursuant to a search warrant, the police sought to obtain a sample of his blood." *Id.* at 344.

Evidence of consciousness of guilt referring to evidence of "[a] person's behavior after the commission of a crime may be admissible as circumstantial evidence from which guilt may be inferred." *Id.* at 351. This evidence "is considered relevant to the question of guilt because the particular behavior provides clues to the person's state of mind." *Id.* at 352. Guilty behavior alone, however, is not automatically relevant and admissible as consciousness of guilt. To be relevant, we must be able to "say that the fact that the accused behaved in a particular way renders more probable the fact of their guilt." *Id.* at 352 (citation and quotation marks omitted). Elaborating on the relevancy test, the Court explained that "[a]s is the nature of circumstantial evidence, the probative value of 'guilty behavior' depends upon the degree of confidence with which certain inferences may be drawn." *Id.* Taking guidance from the relevant inferences delineated in *United States v. Myers*, 550 F.2d 1036, 1049 (5th Cir. 1977), and subsequently in *Snyder v. State*, 361 Md. 580, 596 (2000), the Court fashioned the following four inferences to establish the relevancy of the petitioner's resistance to the blood test:

> (1) from his resistance to the blood test, a desire to conceal evidence; (2) from a desire to conceal evidence, a consciousness of guilt; (3) from a consciousness of guilt, a consciousness of guilt of the murder of Ms. Mitchell; and (4) from a consciousness of guilt of the murder of Ms. Mitchell, actual guilt of the murder.

Id. at 356. The Court expanded on the third inference, explaining that in order

> [f]or the evidence to have value as evidence of consciousness of guilt, and

> then as evidence of guilt of the murder, there must be evidence to support an inference from petitioner's conduct to a consciousness of guilt for the particular crime charged. The jury should not have been permitted to draw an inference of guilt from petitioner's conduct unless the conduct was related to the murder investigation.

Id. at 357–358. The Court concluded that the record could not support the third inference. *Id.* at 358. The police obtained the petitioner's blood and hair sample over three years after Ms. Mitchell's murder and there was no evidence in the record demonstrating that the petitioner was aware that the police obtained the blood test in connection with the investigation into Ms. Mitchell's murder. *Id.* at 357. Ultimately, the Court held that the petitioner's resistance to the blood test was irrelevant and inadmissible, because the record was devoid of evidence connecting the petitioner's alleged consciousness of guilt demonstrated by his resistance to the blood test to a consciousness of guilt of the murder of Ms. Mitchell. *Id.* at 358.

In *Copeland v. State*, the appellant assaulted Ms. Nesmith, his girlfriend, and was charged with second-degree assault and related crimes. 196 Md. App. 309, 311 (2010). Approximately four months after the assault occurred but two months in advance of trial for the assault and the related charges, the appellant threatened to kill Ms. Nesmith and her family if he received a prison sentence for charges pending against him. *Id.* at 312-13. A few days in advance of trial, the appellant threatened Ms. Nesmith again. *Id.* at 313. At trial, both Ms. Nesmith and the officer who arrested the appellant testified regarding the appellant's threats. *Id.* at 312-13. The arresting officer testified that Ms. Nesmith initially did not cooperate with the investigation because she was afraid that the appellant would retaliate against her. *Id.* at 313-14. The jury found the appellant guilty of second-degree

assault of Ms. Nesmith. *Id.* at 314.

On appeal, the appellant contended that Ms. Nesmith's and the arresting officer's testimony regarding the threats were inadmissible evidence of other crimes and bad acts. *Id.* at 314–16. While this Court recognized that evidence of a defendant's prior bad acts is generally inadmissible, such evidence may be admissible if its use falls within a special relevancy exception pursuant to Rule 5-404(b). *Id.* at 316. We concluded that the testimony regarding the appellant's threats to Ms. Nesmith amounted to witness intimidation and was admissible under the consciousness of guilt exception to Rule 5-404(b). *Id.* at 317. We reasoned that the appellant's "attempt[] to intimidate Ms. Nesmith from aiding in his prosecution by threatening to kill her and her family[] . . . shows that [the] appellant was conscious of his guilt with respect to the assault [of Ms. Nesmith.]" *Id.*

In *Decker, supra*, the Court of Appeals addressed whether the trial court erred in admitting evidence that Decker walked out of the courthouse on a previously scheduled trial date just before the case was called for trial in order to establish a consciousness of guilt. 408 Md. at 638. The Court applied the four-part special relevancy test adopted in *Thomas*, 372 Md. at 352, for determining whether the evidence was admissible to support an inference of flight as evidence of consciousness of guilt. 408 Md. 641-42. The Court held that Decker's "departure from the courthouse . . . was prompted by a concern that the trial would not conclude well for the defense." *Id.* at 646. Therefore, the Court concluded that Decker's flight from the courthouse after trial had begun was properly considered by the jury as circumstantial evidence of consciousness of guilt concerning the crime charged.

Id. at 648.

b. Probative/Prejudicial Balancing Test

Even if the evidence sought to be admitted is relevant, the inquiry as to whether to admit the prior bad acts evidence is not at an end. The court must "decide whether the accused's involvement in the other crimes is established by clear and convincing evidence." *Faulkner*, 314 Md. at 634 (citations omitted). Appellate courts "review this decision to determine whether the evidence was sufficient to support the trial judge's finding." *Id.* at 635. Finally, the trial court must carefully weigh the "probative value of the 'other crimes' evidence . . . against any undue prejudice likely to result from its admission. This segment of the analysis implicates the exercise of the trial court's discretion." *Id.* at 635 (citations omitted). The reason for the usual exclusion of prior bad acts, and the importance of the trial court engaging in an earnest weighing of the need for the evidence versus its inflammatory nature, is the "risk presented by a jury's tendency to improperly infer from past criminal conduct that the defendant committed the crime for which the defendant is currently charged." *Streater v. State*, 352 Md. 800, 810 (1999).

In *Faulkner*, the respondent, who was awaiting trial on charges of robbing a Safeway store, moved *in limine* to exclude evidence of three other robberies that occurred at the same store. 314 Md. at 632. The State sought to introduce evidence of the other robberies to demonstrate that each crime was conducted with a similar *modus operandi* and would, therefore, establish Faulkner's agency in the robbery with which he was charged. *Id.* Faulkner challenged this evidence, arguing that the other crimes evidence was not

necessary; the State could not establish Faulkner's role in the other crimes by clear and convincing evidence; and the prejudicial value outweighed the probative value. *Id.* at 632–33. Despite Faulkner's challenges, the trial court denied Faulkner's motion and the evidence was admitted at trial. *Id.* at 633. This Court reversed the trial court's ruling and the State appealed. *Id.*

The Court of Appeals established the three-part inquiry for admitting evidence of prior bad acts, *supra*, and concluded that the prior robberies established Faulkner's identity—an exception to the general exclusionary—because the robberies were committed with a distinctive *modus operandi*. *Id.* at 639-40. Next, the Court determined that Faulkner's involvement in the other robberies was established by clear and convincing evidence through witness testimony of his voice, physical characteristics, his clothing, a handgun found near his house, and his possession of a large quantity of cash in the same denominations requested by the perpetrator of the robberies. *Id.* at 640.

With respect to the third inquiry, the Court interpreted the meaning of the "necessity" for the "other crimes" evidence and concluded that, in Faulkner's case, the other crimes evidence was necessary because the only other evidence linking him to the robbery was circumstantial evidence of an accomplice. *Id.* at 642–43. Because a conviction cannot rest on uncorroborated accomplice evidence, the other crimes evidence was necessary. *Id.* at 642. Therefore, the Court held that the circuit court did not abuse its discretion for admitting the evidence of other crimes for the limited purpose of establishing Faulkner's identity. *Id.* at 643.

Returning to the case on appeal, the trial court was required to conduct the three-part inquiry as explained in *Faulkner* and subsequently in *Page*, *supra*. Additionally, *Thomas* and *Copeland* discuss the four inferences that must be met to establish the special relevancy of the other crimes evidence under the consciousness of guilt exception. *Thomas* elaborates that "there must be evidence to support an inference from petitioner's conduct to a consciousness of guilt *for the particular crime charged*." 372 Md. at 357-58 (emphasis added). In this case, the trial court failed to make *any* relevancy determination on the record, or, give *any* indication that the court weighed the probative value of the Lincoln letters against any undue prejudice that could result from their admission. Indeed, the court stated, "They say what they say. I have no idea. I haven't seen what the content of the letters are."

We agree with the State that we review whether the prior bad acts evidence sought to be admitted is relevant under a *de novo* standard of review. *Bellard v. State*, 229 Md. App. 312, 342 (2016), *aff'd*, 452 Md. 467 (2017). However, because in this case the threshold determination is whether the Lincoln Letters were relevant to the underlying prosecution in this case to prove consciousness of guilt, the evidence must demonstrate a causal link between the following four inferences: (1) from McDonald's writing and sending the letters to Adrian Lincoln, a desire to conceal evidence; (2) from a desire to conceal evidence, a consciousness of guilt; (3) from a consciousness of guilt, a consciousness of guilt of the murder of Mr. Curtis; and (4) from a consciousness of guilt of the murder of Mr. Curtis, actual guilt of the murder. *See Thomas*, 372 Md. at 356. Even

if we could get past this first hurdle under *de novo* review, we would have to embark on an analysis under the second prong as to whether the evidence was sufficient in this case to deduce, by clear and convincing evidence, that McDonald solicited Lincoln to engage in the murder of Carlos. We are tasked with reviewing the record "to determine whether the evidence was sufficient to support the trial judge's finding." *Faulkner*, 314 Md. at 634–35 (citations omitted).[9] Here, there was no finding to review.

Finally, we review the third prong of the prior bad acts evidence test—the court's weighing of the probative value of the evidence against its prejudicial effect—for abuse of discretion. *Id.* at 641. As we have now stated repeatedly, the record before us is bare as to any weighing that the court may have engaged in before admitting the letters into evidence. The trial summarily denied the objection and specific request to "make a weighing to determine whether or not [the letters are] more prejudicial than probative" under Maryland Rule 5-404(b). Not only did the trial court neglect to place any reasoning on the record as to why the probative value of the letters outweighed their prejudicial nature,[10] it failed to

[9] We are not stating or implying that the evidence presented was not sufficient to support a decision that there was clear and convincing evidence that McDonald solicited Lincoln to murder Carlos.

[10] In *Streater v. State*, 352 Md. 800 (1999), the Court of Appeals instructed that

> should the trial court allow the admission of other crimes evidence, it should state its reasons for doing so in the record so as to enable a reviewing court to assess whether Md. Rule 5-404(b), as interpreted through the case law, has been applied correctly.

Id. at 810.

make an independent review of the contents of the letters. The failure to exercise discretion where discretion is necessary has been held to be an abuse of discretion. *See Gray v. State*, 368 Md. 529, 565 (2002). Accordingly, we hold that the trial court abused its discretion in failing to evaluate the need for and the probative value of the Lincoln Letters weighed against their prejudicial value.

The Court of Appeals has articulated the standard for harmless error in *Dorsey v. State*, 276 Md. 638 (1976). In cases of established error, that error will be deemed harmless if 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. *Id.* at 657-58. We cannot say that the letters—admitted to show that McDonald asked Lincoln to brutally murder Carlos so that he would be unable to testify against him in the underlying case—in no way influenced the verdict in this case.

JUDGMENTS OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED. CASE REMANDED FOR A NEW TRIAL. COSTS TO BE PAID BY ANNE ARUNDEL COUNTY.