UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2343

September Term, 2014

DARREN LEE

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Wright,
Nazarian,

JJ.

Opinion by Nazarian, J.

Filed: November 30, 2015

Darren Lee was convicted, after trial by jury in the Circuit Court for Baltimore City, of second-degree murder and use of a handgun in the commission of a crime of violence. He appeals the conviction on three grounds, claiming *first* that he was denied his Sixth Amendment right to self-representation; *second* that the trial court should have dismissed the charges against him because his constitutional right to a speedy trial was violated; and *third*, that the court erred by allowing evidence of a prior incident of domestic violence. We disagree with all three contentions and affirm.

I. BACKGROUND

Mr. Lee begins his brief by arguing that "[t]he State's case against Mr. Lee was entirely circumstantial[, and n]o one identified Mr. Lee as the shooter." But the story begins several days before the victim, Antoine Mason, was shot and killed on January 30, 2013. At trial, Towanda McCraw testified that Mr. Lee—her ex-boyfriend—assaulted her on January 27, 2013. She testified about the details of the assault, and the State introduced photographs of her injuries along with (over Mr. Lee's counsel's objection) the transcript of her call to 911 during the assault.

Ms. McCraw told Jonathon Thymes, her "friend with benefits," about the incident, and asked Mr. Thymes to get Mr. Lee to stop calling and texting her. She gave him Mr. Lee's phone number and he contacted Mr. Lee in order to have "a man to man conversation" with him. He called the number, the men argued for a time, and they set a time to meet at a home where Mr. Thymes was doing rehab work, ostensibly to "settle it like men." Mr. Lee then texted Ms. McCraw, first asking her "who's the clown-assed

n***** you gave my phone number to?," then declaring in a second text, "clown gonna come with a knife. Dead wrong."

Reluctant to show up at the scene without knowing more, Mr. Thymes called his brother, Mr. Mason, and asked him to drive by the rendezvous point on the afternoon of January 30 to "see if anybody was outside." The prosecution's theory was that Mr. Lee shot Mr. Thymes when he got to the home, as Mr. Mason told his brother a short while later in a phone call, "this bitch shot me." Mr. Thymes went to Sinai Hospital to see his brother, who later died from the gunshot wound.

The trial took place from September 29, 2014 through October 6, 2014, after a number of postponements that we discuss in greater detail below. After Mr. Lee was convicted, the trial judge sentenced him to thirty years in prison for the murder, and twenty years, to be served consecutively, for the handgun conviction. He filed a timely notice of appeal.

II. DISCUSSION

Mr. Lee's trial didn't go forward as quickly as it could have, and he wasn't pleased that the case was postponed for a seventh time on July 25, 2014 because his counsel could not appear. But his dissatisfaction does not rise to a violation of his constitutional rights to represent himself or to a speedy trial. And the testimony from Ms. McCraw in no way prejudiced him, other than for the obvious reason that his assault on her suggested a motive

for the shooting several days later—relevant information with probative value that more than justified its introduction at trial.[1]

A. Mr. Lee Did Not Seek To Discharge Counsel.

On July 25, 2014, when Mr. Lee's trial was (re)scheduled to begin, his appointed counsel from the Office of the Public Defender was unavailable. So another attorney from that office appeared and explained that Mr. Lee's lawyer was in another trial and therefore unavailable:

> [STAND-IN COUNSEL]: Good morning, Your Honor, [stand-in counsel] standing in for [assigned counsel] on behalf of Mr. Lee, he's standing to my right. Your Honor, [assigned counsel] is in trial before His Honor Judge Geller—
>
> THE COURT: All right.
>
> [STAND-IN COUNSEL]: —so he's unavailable for trial. Mr. Lee is not happy about any postponements but [assigned counsel] is not available today.
>
> THE COURT: Right. Well that actually was an older case than Mr. Lee's case. I'm sure that doesn't help him any,

[1] Mr. Lee presents the questions as follows:

1. Did the trial court violate Md. Rule 4-215(e), and in turn, deny Mr. Lee his Sixth Amendment right of self-representation?

2. Did the trial court err in denying Mr. Lee's motion to dismiss for violation of his constitutional right to a speedy trial?

3. Did the trial court err in allowing the State to present evidence of an alleged prior instance of domestic violence by Mr. Lee against Towanda McCraw?

but all right. I will find good cause and charge it to the defense. The new trial date is October 7. . . .

[STAND-IN COUNSEL]: Thank you, Your Honor.

MR. LEE: Your Honor, may I raise an objection?

THE COURT: Sure, no, you're objecting what, because your attorney isn't available?

MR. LEE: *I'm objecting to the postponement*.

THE COURT: Okay.

MR. LEE: I don't want a postponement. *I would like to choose 12 jurors today*.

THE COURT: Okay. I'll note that you're objecting, sir. But that's still unfortunately—and I apologize, but he's not available.

MR. LEE: Why don't somebody else from the Public Defender's Office, sir?

THE COURT: Well I think unfortunately this was—

MR. LEE: It's like the seventh postponement in a year.

THE COURT: You're right, it shouldn't happen. I agree. Unfortunately, I'm still going to have to postpone it. You're absolutely right.

(Emphasis added.)

Beyond objecting to the postponement, Mr. Lee claims that in the course of this exchange he expressed a desire to proceed to trial that day without counsel, and thus that the court violated Maryland Rule 4-215(e), along with the Sixth Amendment, when it declined to inquire further or to allow him to discharge his assigned public defender. We

review *de novo* the trial court's application of the Rule, *Gutloff v. State*, 207 Md. App. 176, 180 (2012), a Rule that applies strictly. *Webb v. State*, 144 Md. App. 729, 741 (2002).

Rule 4-215(e) lays out how the court should proceed when a criminal defendant seeks to discharge counsel:

> *If a defendant requests permission to discharge an attorney whose appearance has been entered*, the court shall permit the defendant to explain the reasons for the request. If the court finds that there is a meritorious reason for the defendant's request, the court shall permit the discharge of counsel; continue the action if necessary; and advise the defendant that if new counsel does not enter an appearance by the next scheduled trial date, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds no meritorious reason for the defendant's request, the court may not permit the discharge of counsel without first informing the defendant that the trial will proceed as scheduled with the defendant unrepresented by counsel if the defendant discharges counsel and does not have new counsel.

Id. (emphasis added).

Mr. Lee's argument lives or dies at the threshold of the Rule, and we disagree that he requested permission, or even hinted, that he wanted to discharge his counsel or try the case *pro se*. The colloquy he cites arose in the context of the impending postponement, not in response to any expressed concerns about his counsel. The court asked Mr. Lee whether he objected to the postponement because his attorney was not able to appear, and he answered simply that "I'm objecting *to the postponement*." (Emphasis added.) He argues now that the trial court should have interpreted his statement that "I would like to choose 12 jurors today" to emphasize the "I"—that *he* wanted to proceed to trial *that day*

without a lawyer—and that the court erred when it didn't start the Rule 4-215(e) inquiry on its own.

We decline to read his statement that way, or to require trial judges to anticipate a defendant's desire to fire his counsel or proceed *pro se* from an otherwise unrelated objection. We read Mr. Lee's exchange with the court to convey not that Mr. Lee wanted new *counsel* (or no counsel), but that he didn't want to wait any longer to go to trial with the counsel he *already had*. In that regard, this case is distinguishable from *Gambrill v. State*, 437 Md. 292 (2014), in which the defense sought a postponement based on the defendant's stated desire to hire private counsel. The Court of Appeals reversed the trial court decision to deny the postponement, and held that an expressed intent to hire alternative counsel sufficed to trigger Rule 4-215(e):

> In the present case, the statements made by Gambrill's attorney, "Your Honor, on behalf of Mr. Gambrill, I'd request a postponement. *He indicates he would like to hire private counsel in this matter*," have been determined by our intermediate appellate court to embody only a request for a continuance, but we disagree. Although Gambrill's request to hire a new attorney was coupled with a request for a postponement and may not have been a paradigm of clarity, its inherent ambiguity did not relieve the judge of his obligation to comply with Rule 4–215(e); its ambiguity mandated judicial inquiry followed by a determination. To hold otherwise would be to thwart the very purpose of Rule 4–215(e), which is to give practical effect to Gambrill's constitutional options. In the absence of inquiry of Gambrill, his reasons for requesting a discharge of counsel were not elucidated so that the judge could not give practical effect to Gambrill's constitutional choices.

Id. at 304-05 (emphasis added). The test, as the *Gambrill* Court articulated, is that "a request to discharge counsel is 'any statement from which a court could conclude reasonably that the defendant may be inclined to discharge counsel.'" *Id.* at 302 (quoting *Williams v. State*, 435 Md. 474, 486-87 (2013)).

We see no way that the trial court here could or should have "concluded reasonably" that Mr. Lee was "inclined to discharge counsel." In *Gambrill*, counsel said defendant "indicate[d] that he would like to hire private counsel in this matter." 437 Md. at 294. There was no similar statement here, not even an "ambiguous request" like in *Gambrill.* In fact, Mr. Lee's follow-up suggestion that another attorney from the Public Defender's Office take the case could not be taken as a request that a *better* counsel step in, but that an *available* counsel step in. And that in no way raises issues with the Sixth Amendment right to self-representation, as in *Snead v. State*, 286 Md. 122, 130-31 (1979). In that case, the defendant, *dissatisfied* with his representation, sought a continuance so he could find another attorney, and then, upon the trial court's denial of his request, stated, "I don't want no attorney then," 286 Md. at 126—a declaration that the Court deemed "sufficient to require an inquiry to ascertain whether he truly wanted to represent himself." *Id.* at 130. But here, Mr. Lee inquired only about whether a different public defender (whom he presumably believed could step in and begin the trial right then and there) could take his counsel's place. His understandable complaints about the seventh postponement of the trial in no way implicated his attorney or suggested any desire on his part to get a new attorney. *See Wood v. State*, 209 Md. App. 246, 286 (2012), *aff'd*, 436 Md. 276 (2013)

(holding that defendant's complaint about "problems" with his public defender was not the equivalent of a request to discharge the attorney, and that his "specific complaint concerned a 'lack of discovery' rather than an attempt to discharge counsel"); *see also State v. Hardy*, 415 Md. 612, 623 (2010) (permitting a defendant some leeway and deeming a request satisfactory when it is "a declaration of dissatisfaction with counsel [rather] than an explicit request to discharge").

There is, of course, no one magic phrase that defendants must utter in order to invoke Rule 4-215(e). The key is whether the court reasonably should have interpreted Mr. Lee's actual words as evincing dissatisfaction with his lawyer or a desire to proceed without one, and we disagree that the court should have, or reasonably could have, inferred either sentiment from his objection to the latest postponement. Moreover, the rule contemplates that if new counsel *is* made available, the next step is *still* a continuance, since the rule directs the court to "advise the defendant that if new counsel does not enter an appearance by the *next scheduled trial date*, the action will proceed to trial with the defendant unrepresented by counsel." Md. Rule 4-215(e) (emphasis added). We understand Mr. Lee's frustration, on the date that this issue came up, that his counsel's inability to appear necessitated another postponement. But the issue that came up—delay in moving forward—wasn't actually a question or complaint about counsel. We address his real concern, the continuing delay, next.

B. The Trial Court Did Not Err In Denying Mr. Lee's Motion To Dismiss Based On A Speedy Trial Violation.

We review *de novo* the trial court's decision to deny Mr. Lee's motion to dismiss based on a violation of his constitutional right to a speedy trial, and we undertake "our own independent constitutional analysis." *Glover v. State*, 368 Md. 211, 220 (2002). "We perform a *de novo* constitutional appraisal in light of the particular facts of the case at hand; in so doing, we accept a lower court's findings of fact unless clearly erroneous." *Id.* at 221 (citations omitted). *Barker v. Wingo*, 407 U.S. 514 (1972), lays out the constitutional standard. There, the United States Supreme Court rejected the notion that a speedy trial can be measured against a rigid or mechanical deadline, holding instead that courts should apply "a balancing test, in which the conduct of both the prosecution and the defendant are weighed." *Id.* at 530; *State v. Kanneh*, 403 Md. 678, 687-88 (2008); *see also Brown v. State*, 153 Md. App. 544, 556 (2003) (noting that "the review of a speedy trial motion should be 'practical, not illusionary, realistic, not theoretical, and tightly prescribed, not reaching beyond the peculiar facts of the particular case'" (citation omitted)).

Barker identified four factors that we must balance: the "'length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.'" *Kanneh*, 403 Md. at 688 (quoting *Barker*, 407 U.S. at 530). After assessing each, we conclude that despite the seven postponements, Mr. Lee was not deprived of his right to a speedy trial.

We start with a chronology, focusing on the continuances the court granted and the reasons for each:[2]

- *February 12, 2013*. Charges filed.

- *June 27, 2013*. First trial date. The State sought a postponement due to the unavailability of the prosecutor. It doesn't appear that Mr. Lee's counsel opposed it or assented to it. ("I just want the Court to be clear that I'm not requesting a postponement, we're asserting our rights to a speedy trial[.]") The case was continued to September 10, 2013, and the trial court charged the delay of seventy-five days to the State.

- *September 10, 2013*. Second trial date. It appears that both parties joined in this request—the administrative judge explained that "the parties still are completing their investigation and preparing for trial so that this is an unrealistic time to try and get things done." Although Mr. Lee suggested to the trial judge during the hearing on his motion to dismiss that this postponement should be charged to the State, it doesn't appear that any such objection was raised at the postponement hearing. The trial judge later assessed the request as joint when considering the motion to dismiss and deemed the subsequent sixty-nine day delay neutral.

- *November 18, 2013*. Third trial date. It's not altogether clear why the request was made at this time, but it appears there were still some issues with discovery or the pace of trial preparation on one or both sides. At one point the administrative judge addressed Mr. Lee directly:

  > And, Mr. Lee, before you came up we talked about the situation to see if there was a way to resolve it today. There is not but the parties hope to resolve it soon . . . and if it can't be resolved then, the solution is go to trial. . . . . But the parties should actively work in getting ready to go to trial or negotiating a settlement.

[2] We refer to the various judges who presided over the postponement hearings as the "administrative judge," and the judge who presided over the speedy trial hearing and Mr. Lee's trial as the "trial judge."

The administrative judge characterized the request as joint, and the trial judge saw it no differently.

- *January 3, 2014*. Fourth trial date. The court was closed because of snow. The eighty-three day delay that followed was not charged to either side.

- *March 27, 2014*. Fifth trial date. The State requested a postponement because a "critical witness" had been hospitalized and the State could not go forward without the witness. The administrative judge found good cause and postponed the case, and the trial judge charged the seventy-one day delay to the State.

- *June 5, 2014*. Sixth trial date. The State requested this postponement due to the unavailability of the prosecutor. Counsel explained that the case that called the prosecutor away had been postponed more than Mr. Lee's case had. The trial judge charged the forty-nine day delay that followed to the State.

- *July 25, 2014*. Seventh trial date. Mr. Lee's attorney was unavailable due to another trial. The sixty-six day postponement that followed was charged to Mr. Lee.

1. Length of the delay.

The State concedes that the delay of nearly twenty months between the date charges were filed (February 12, 2013) and trial (September 29, 2014) is presumptively prejudicial, and that we must perform the more in-depth analysis mandated by *Barker*. But the length of delay is not itself a "weighty factor," *Kanneh*, 403 Md. at 689:

> As one of the four factors on the ultimate merits, it is heavily influenced by the other three factors, particularly that of "reasons for the delay." It may gain weight or it may lose weight because of circumstances that have nothing to do with the mere ticking of the clock.

Ratchford v. State, 141 Md. App. 354, 359 (2001). So the eighteen-month delay in *Ratchford*, while "more than enough to spark further analysis, is not on the ultimate merits

particularly remarkable," and was "not a weighty factor, one way or the other." *Id.* at 360. The same is true here—the delay was only slightly longer than the delay in *Ratchford*, but fell far short of the five-year delay in *Barker*, 407 U.S. at 533-36, that the Supreme Court ultimately deemed acceptable. *See, e.g., Wheeler v. State*, 88 Md. App. 512, 517-26 (1991) (twenty-three month delay not a violation); *Marks v. State*, 84 Md. App. 269, 281-86 (1990) (twenty-two month delay not a violation).

2. Reason for the delay.

The delays here were all of the same magnitude (four to five months) and were caused by similar, unremarkable circumstances—less significant for speedy trial purposes than a longer single delay. *Jones v. State*, 279 Md. 1, 7 (1976) (explaining that "delays must be examined in the context in which they arise and therefore a lengthy uninterrupted period chargeable to one side will generally be of greater consequence than an identical number of days accumulating in a piecemeal fashion over a long span of time").

Some of the delays in this case were "accorded neutral status" because they were "necessary for the orderly administration of justice." *Howell v. State*, 87 Md. App. 57, 82 (1991). Generalized administrative delays carry less weight than delays relating to this particular case. Differently put, a delay because the court system is bogged down does not raise the concerns that a prosecutor's tactical or negligent delays would:

> Unintentional delays caused by overcrowded court dockets or understaffed prosecutors are among the factors to be weighed less heavily than intentional delay, calculated to hamper the defense, in determining whether the Sixth Amendment has been violated but . . . they must "nevertheless . . . be considered

> since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant."

Strunk v. United States, 412 U.S. 434, 436 (1973) (quoting *Barker*, 407 U.S. at 531). A delay by the State relating to a particular case would weigh heavily in the final analysis and differs markedly from the delays here. *See Brady v. State*, 291 Md. 261, 266-67 (1981) (reversing conviction where fourteen-month delay was caused by prosecutorial neglect, first in dismissing charges and then indicting defendant again on the same charges, second, in making no attempt to find him within the prison system, and third, in asking for a postponement when the case did finally come to trial). Along the spectrum, any intentional or negligent delays by the State weigh heavily against it. *See, e.g.*, *Davidson v. State*, 87 Md. App. 105, 111-12 (1991) (five-year delay demonstrated that the case "fell through the cracks" and would be given substantial weight against the State, as "[t]he degree of weight to be attributed to a delay resulting from negligence increases in direct proportion to the length of the delay"); *see also Divver v. State*, 356 Md. 379, 391-92 (1999) (although delay was attributable to the State where largely due to district court's lacking a full complement of judges, it was weighted "not as heavily as it would were this a case in which the delay was purposeful, in order to hamper the defense"). At the opposite end of the spectrum are delays occasioned by a defendant, which cannot form the basis for a violation. *Ratchford*, 141 Md. App. at 362-63 (defendant could not claim speedy trial violation where he sought postponement based on delays due to his changes in counsel).

None of the delays here demonstrates any negligence or gamesmanship on the part of the State. To the contrary, the problem the prosecutor faced twice—unavailability due to another trial—is one that Mr. Lee's counsel also had to confront at the last postponement, and so everyone (even Mother Nature) shared blame for the overall delay. And the unavailability of the prosecutor, while chargeable to the State, does not constitute an intentional delay, nor could the trial court fairly deny the request in a case involving a murder prosecution. *See State v. Toney*, 315 Md. 122, 135 (1989) (noting that "prosecutors are not 'fungible' and are not readily able to trade off serious cases"). A missing witness also "serve[s] to justify appropriate delay." *Barker*, 407 U.S. at 531. This factor weighs against the State because it ultimately was charged with about six-and-a-half months of delay, but tips the balance only slightly in Mr. Lee's favor.

3. Assertion of the right.

A defendant must assert his right to a speedy trial, and whether he does so, and *how* he does so, factors into our analysis: "It would . . . allow a court to weigh the frequency and force of the objections as opposed to attaching significant weight to a purely *pro forma* objection." *Barker*, 407 U.S. at 529. Put another way, "[t]he more serious the deprivation, the more likely a defendant is to complain." *Id.* at 531.

There's no doubt that Mr. Lee asserted his right to a speedy trial; indeed, as we have just explained in Part II.A., he expressed palpable dissatisfaction with the latest postponements of his trial. But that specific complaint came only at the last postponement, and was due to his *own* counsel's unavailability, not the State's. So again, while this factor

weighs in Mr. Lee's favor, it does so only slightly. We defer to the lower court's finding that there he asserted his right to a speedy trial at times, but not to an extent that significantly tips the balance.

4. Prejudice to the defendant.

This factor requires that the defendant be able to show that the delays caused him direct prejudice. So, for example, in *Epps v. State*, 276 Md. 96, 121 (1975), the Court of Appeals found actual prejudice where an alibi witness had been prepared to testify at the time of the first trial, but was inducted into the armed forces and was not in the country at the time of trial. In that instance, any possible defense available to the defendant "was obliterated when by reason of the postponement . . . he was denied the opportunity of presenting the testimony of his alibi witness." *Id.* at 120; *see also Barnett v. State*, 8 Md. App. 35, 41 (1969) ("Certainly, if a witness *who could substantiate a valid defense*, and who would have been available but for the delay, became unavailable as the result of the delay, such unavailability would be a most compelling showing of prejudice." (Emphasis added)).

In the course of the hearing on Mr. Lee's motion to dismiss, he stated that he was prejudiced by the inability to get a witness to testify. But the prosecutor actually produced the witness at that time, and so no prejudice resulted (a concession made by Mr. Lee's counsel at the time). Although his counsel raised generally the "oppressive pre-trial incarceration" and "the conditions in the Baltimore City jail," these issues did not create any specific prejudice that impaired Mr. Lee's ability to present his case.

5. Balancing the *Barker* factors.

There's no doubt that Mr. Lee has a few components leaning in his favor. The length of the delay brings *Barker* into play, and the reasons for the delay weren't attributable *directly* to him, even though his own counsel's unavailability caused one postponement. And we do not diminish the effect of remaining in jail for this length of time (although his convictions ultimately resulted in a much longer sentence). But under *Barker*, these sorts of delays do not compel dismissal of a case on constitutional grounds. The delays here were overwhelmingly administrative ones, Mr. Lee suffered no serious prejudice, and we agree that the trial judge weighed these factors appropriately.

C. The Trial Court Did Not Err In Permitting Evidence Of Mr. Lee's Assault Upon Ms. McCraw.

Mr. Lee argues that the trial court should not have allowed Ms. McCraw to testify about his assault on her three days before the murder. He claims that the testimony and evidence regarding past acts of domestic violence was irrelevant and highly prejudicial, and should have been excluded under Maryland Rules 5-403 and 5-404(b). The State counters *first*, that Mr. Lee waived this argument because he failed to renew his objection at trial after his motion *in limine* was denied, and *second*, that the information was both relevant (to motive and identity) and was more probative than unfairly prejudicial.

We agree with the State. We note preliminarily that although the State may have some colorable claim that defense counsel's objection at trial was untimely, we assume for present purposes that Mr. Lee properly preserved his objection by making the motion *in*

limine at the outset and then by objecting to the introduction of the evidence of the attack over the *course* of the trial, even if counsel didn't object at the beginning of Ms. McCraw's testimony. Preservation issues aside, the trial court properly analyzed the question and did not abuse its discretion in admitting the testimony.

The court began by framing the question as one under Rule 5-404(b), and described the testimony as "being offered to show either motive and/or identity in this particular case. . . . Mr. Lee allegedly murdered the victim here either sort of as a retribution for having some sort of involvement with his relationship with Ms. McCraw or some involvement or jealously over their involvement with [Ms.] McCraw." He went on to look at whether Mr. Lee's involvement in the incident was proven by clear and convincing evidence:

> [I]t is important that this incident occurred three days before.
>
> * * *
>
> And I find, at least what's been proffered to me, you're going to have a witness who's going to testify under oath to an assault by a person that she knows very well and give the details of it. So I find . . . that there has been—will be a showing of clear and convincing evidence.

Finally, the court looked at whether the probative value of the evidence was "substantially outweighed by its potential for unfair prejudice" under Md. Rule 5-403. He concluded that because that Mr. Lee was on trial for murder, testimony about conduct of a lesser degree did not cause a potential for prejudice that outweighed the probative value.

Citing *State v. Watson*, 321 Md. 47, 52 (1990), Mr. Lee states correctly that it is a "basic principle of our legal system, requiring no citation of authority, that the State may

not offer, as proof of guilt, evidence that the defendant is a person of bad character and, therefore, likely to commit the offense charged." But that principle doesn't create a blanket bar against evidence of prior bad acts that relate to the crime before the court. Md. Rule 5-404(b) provides the rule, and the exception[3]:

> Evidence of other crimes, wrongs, or acts including delinquent acts . . . 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.

Id. (emphasis added). The evidence still might not be admissible if it doesn't overcome Md. Rule 5-403, which provides that certain *relevant* evidence can still be excluded: "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

[3] We don't agree with the State that the assault on Ms. McCraw was so closely related to the crime on January 30 that it arose "during the same transaction and [is] intrinsic to the charged crime or crimes." *Odum v. State*, 412 Md. 593, 611 (2010). This test, effectively a carve-out from Rule 5-404(b), permits a party to introduce evidence of a crimes(/wrongs) "that arise during the same transaction and are intrinsic to the charged crime or crimes." *Id*. The assault here was not "intrinsic," because it was not, as the *Odum* Court defined that term, "so connected or blended in point of time or circumstances with the crime or crimes charged that they form a single transaction." *Id.* The second prong of that definition, that "the crime or crimes charged cannot be fully shown or explained without evidence of the other crimes," might have been met here, but the assault and the murder were separate transactions—related, but separate.

cumulative evidence." *Id.* We review the court's finding of relevance under Md. Rule 5-403 *de novo. Wynn v. State*, 351 Md. 307, 317-18 (1998).

To determine whether evidence of a prior bad act is admissible, we must review the trial court's three findings blending the two rules: *first*, that the act is admissible for one of the purposes of Md. Rule 5-404(b); *second*, that it has been proven by clear and convincing evidence; and *third*, that the probative value of the evidence is not outweighed by the danger of prejudice. *See State v. Faulkner*, 314 Md. 630, 634-35 (1989).

Mr. Lee's argument to us, in which he claims the evidence of the assault was not connected to the crime, explains neatly why the evidence *was* admissible to show motive and identity. As he put it, "[Ms.] McCraw only knew [Mr.] Mason peripherally, through [Mr.] Thymes. [Ms.] McCraw had never seen Mr. Lee talk to [Mr.] Mason or [Mr.] Thymes." But that's *exactly* why the evidence became relevant—it connected the dots for the jury in a way that gave Mr. Lee's conduct special relevance that would not have been at all clear to the jury otherwise. That there was more than one way it came in—through both Ms. McCraw and the 911 call—only helped to satisfy the second requirement, that the information be proven by clear and convincing evidence.

As to the third point, that the evidence was not more prejudicial than probative, of course it was prejudicial. Information about conduct that falls within the definition of a "prior bad act" is always likely to be prejudicial. But here the probative value was far more weighty: the evidence explained Mr. Lee's conduct on the day of the murder and, as the trial court pointed out, the gravity of the assault paled in comparison to the gravity of the

murder of which Mr. Lee was accused. The trial court properly concluded that the evidence could, and should, come in.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.