Circuit Court for Harford County
Case No. 12-K-18-000209

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2357

September Term, 2018

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GLENN JOSEPH RAYNOR

v.

STATE OF MARYLAND

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Beachley,
Wells,
Gould,

JJ.

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Opinion by Wells, J.

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Filed: April 24, 2020

Appellant, Glenn Joseph Raynor, was indicted in the Circuit Court for Harford County and charged with kidnapping and multiple sex offense. He was tried and convicted by a jury of sexual offense in the first degree, sexual offense in the second degree, and sexual offense in the third degree. After merging the sexual offense in the second degree, Raynor was sentenced to life imprisonment for sexual offense in the first degree, and 10 years consecutive for sexual offense in the third degree. On this timely appeal, Raynor asks us to address the following questions:

1. Did the trial court err or abuse discretion by admitting evidence of other sexually assaultive behavior under Section 10-923 of the Courts and Judicial Proceedings Article?

2. Did the trial court abuse its discretion by failing to ask defense counsel's proposed voir dire question number 24?

3. Did the trial court abuse its discretion by permitting impeachment with 2009 convictions of burglary and rape?

4. Is the evidence legally insufficient to sustain Appellant's convictions?

For the following reasons, we shall affirm.

## BACKGROUND

Motion in Limine (Part 1)[1]

This case involves Raynor's conviction for sexual offenses of the victim, S.S., on

[1] As will become evident, the court's evidentiary ruling, which is the primary issue on appeal and was not final until later during trial, was informed by the State's case-in-chief. Thus, we shall discuss the background of the proceedings chronologically.

the evening of July 30, 2005.[2] Prior to trial, the State moved in limine to admit evidence of other sexually assaultive behavior by Raynor upon an unrelated victim in a prior case. According to the State's proffer,

> what happened in that particular case was M.W. was asleep in her home when the Defendant broke into her home and sexually assaulted her. And during that particular assault her testimony would be and testimony was at trial that he had tied a T-shirt around her face in order to obscure his identity and had also taken pillows and attempted to suffocate her in order to gain her compliance with what he was doing with the sexual assault which eventually she did in order to - well, in which she eventually did.

*See Raynor v. State*, 201 Md. App. 209 (2011) (affirming Raynor's numerous convictions for multiple degrees of rape, assault, burglary, and sexual offense, as well as malicious destruction of property), *aff'd*, 440 Md. 71 (2014), *cert. denied*, 135 S. Ct. 1509 (2015).

After Raynor's DNA was placed in the CODIS system, the Harford County Sheriff's Office compared that evidence with older cases and was able to determine that Raynor's DNA matched evidence retrieved in this case.[3] According to the State's proffer, the victim here, S.S., was approached outside her residence at night, and was "dragged into a car where she was sexually assaulted and during the assault the T-shirt was tied over her face in order to obscure the identity of her assailant." The State informed the court that it had notified the defense, pursuant to statute, that it wanted to admit evidence of the earlier sexually assaultive behavior against M.W. in this case involving S.S. in order to prove a

[2] It is unnecessary to name the victims in these cases. *See State v. Mayer*, 417 Md. 449, 451 (2010) (identifying an 18-year-old sexual assault victim by her initials).

[3] The CODIS database is the Federal Bureau of Investigation's "Combined DNA Index System" of DNA records submitted by federal, state, and local labs. S*ee Allen v. State*, 440 Md. 643, 651 n.5 (2014).

lack of consent, based on the recent passage of the "Repeat Sexual Predator Prevention Act of 2018." 2018 Md. Laws Chs. 362-63 (eff. July 1, 2018), codified at Maryland Code (1973, 2013 Repl. Vol., 2019 Supp.) Courts and Judicial Proceedings Article § 10-923. That statute provides that, after notice by the State and a hearing before the court outside the presence of the jury, "evidence of other sexually assaultive behavior by the defendant occurring before or after the offense for which the defendant is on trial may be admissible." § 10-923(b). The statute specifically provides:

> (e) The court may admit evidence of sexually assaultive behavior if the court finds and states on the record that:
>
> (1) The evidence is being offered to:
>
> (i) Prove lack of consent; or
>
> (ii) Rebut an express or implied allegation that a minor victim fabricated the sexual offense;
>
> (2) The defendant had an opportunity to confront and cross-examine the witness or witnesses testifying to the sexually assaultive behavior;
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> (3) The sexually assaultive behavior was proven by clear and convincing evidence; and
>
> (4) The probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

§ 10-923(e).

The State further noted that, even if the defense theory of the case was not that this was a consensual encounter, lack of consent remained an element of the offenses that the State was required to prove in any event. *See Merzbacher v. State*, 346 Md. 391, 411 (1997) ("regardless, the State was still under an affirmative legal obligation to prove each

and every element of the offense charged beyond a reasonable doubt—including lack of consent."). Therefore, the State sought to admit this evidence of other sexually assaultive behavior by Raynor in its case-in-chief.

In response, Raynor argued that Section 10-923 was a "narrowly tailored" statute that did not simply permit admission of any prior sexual assault. Instead, counsel contended that the legislature "circumscribed two very specific reasons that evidence of prior or subsequent sexual offenses could be admissible, one of which does not apply today, the other of which is consent." Raynor's argument was, because the prior case involving victim M.W. did not involve a defense theory of lack of consent, but instead was based on identification of Raynor as the assailant, the statutory requirements were not met in this case. Raynor also cited *Hurst v. State*, 400 Md. 397, 406 (2007), as support for his argument for exclusion. Moreover, Raynor's counsel informed the court that he did not know, at this point, whether he would rely on the theory that the victim, S.S., consented in this case. Raynor further argued that the prior sexually assaultive behavior was "not connected" to this case and would be unfairly prejudicial. And, consistent with the argument being raised on appeal, Raynor asserted that application of the law in this case to behavior that occurred years before the enactment of Section 10-923 was prohibited as ex post facto.

In rebuttal, the State maintained that the court need not wait until there is evidence of consent before ruling that the other sexual assault is admissible because consent "is not an affirmative defense, it is rather a burden of the State to prove lack of consent against the will" of the victim beyond a reasonable doubt. The State also countered that the plain

language of the statute did not require that the other sexual assault must have involved a claim that the offense was consensual. The State further suggested that a limiting instruction could be crafted to address any allegation that Raynor was unfairly prejudiced by the other evidence. And, as for the ex post facto argument, the State asserted that the statute was not a substantive change in the law or penalty for sexual assault cases but was an evidentiary change that was not subject to the prohibition. The court reserved ruling on the Section 10-923 arguments until later during trial.[4]

After trial commenced, specifically after jury selection but prior to opening statements, the court ruled on certain aspects of the motion. Relying on the principle that statutory changes in procedure or remedy, as opposed to substantive rights, are given retrospective effect unless a contrary intention is evidenced, *see Wyatt v. State*, 149 Md. App. 554, 563-64 (2001), the court found that Section 10-923 concerned the admission of evidence and was a procedural change in the law. The court concluded that there was no prohibition of the admission of the evidence under ex post facto principles of law.

The court then made two technical rulings that are not at issue on appeal. It found that the fact that the incident in this case occurred prior to the incident involving M.W. was not prohibitive because Section 10-923(b) made no such distinction.[5] The court also found

[4] The court instructed the parties not to mention the other evidence in opening statements, pending a forthcoming ruling by the court.

[5] The case involving S.S. occurred on or around July 31, 2005, and the case involving M.W. occurred approximately eight months later, on or around April 1, 2006.

that the State had met the notice requirements of Section 10-923(c) and that the court had held a hearing pursuant to Section 10-923(d).

Turning finally to Section 10-923(e), the court reserved on the question of whether the evidence was being offered to prove lack of consent, under subsection (e)(1), and on the issue of the balancing of probative value versus unfair prejudice, under subsection (e)(4). As for Section 10-923(e)(2), the court found that counsel had a prior opportunity to cross-examine the victim/witness from the prior case and that, according to the State's proffer, that same witness would be testifying in this case as well. The court also found that the prior sexually assaultive behavior was established at the prior proceeding by clear and convincing evidence, as required by subsection 10-923(e)(3). After directing that counsel refrain from mentioning the prior sexually assaultive behavior until the court made its final ruling, the court also noted that it was reserving on the question of whether, in the alternative, the other evidence was admissible under Maryland Rule 5-404(b).

Trial (Part 1)

S.S. testified, on the night of July 30-31, 2005, she left the townhome she shared with her husband and her then three-year-old daughter to go out to a bar/restaurant known as Big Daddy's, located in Hickory, Maryland, to meet her friend D. L. S.S. socialized and danced at Big Daddy's until around 1:45 a.m. when the bar closed for the evening. As S.S. drove herself home, she noticed that there was a black, two-door car, with tinted windows,

that appeared to be following her. Although she thought about going to the police, S.S. decided to continue to drive home.

When she arrived home, the black car continued down the street. Thinking she was safe, S.S. grabbed her belongings and proceeded towards her front door. At around that time, the black car returned and parked outside her residence. As she was taking out her keys to get inside, a man ran up behind her, grabbed her around the neck, spun her around and told her she was coming with him. S.S. struggled and tried to get away, telling him "don't" and "stop," but the man dragged her down the steps and took her behind a tree in a nearby neighbor's yard, where he told her to be quiet.

The man told her to get down and that if she listened to him he would let her go. When she told him she was not going to comply, the man, who was behind her the entire time up to this point, put his hand over her mouth and nose and told her that "if you do not listen to me, I'm going to stop your breathing." S.S. was scared and then nodded her head affirmatively. The man then took a t-shirt and tied it around her eyes to blindfold her. She was unsure where the t-shirt came from but testified that "[i]t was damp" and had a "body odor" associated with it. He then led her to his car, put her in the passenger seat, and then got in and drove her away from her home. S.S. testified that she contemplated her options at that point but decided the best course of action was to "just sit here and try to survive[.]"

After driving a short distance, the man parked and told her to put the seat back. Although she repeatedly told him "no," S.S. followed the man's subsequent demands and took off her pants and underwear. The man touched her vagina and told her that he wanted her "to get wet for him[.]" He licked his fingers and put them inside of her vagina. He

then leaned over her and ordered her, by threat of injury, to place his penis in her mouth. S.S. complied. Although the man did not ejaculate in her mouth, S.S. testified that she tasted "pre-cum" and that there was a "strange odor" about the man, that was "almost a metallic like when you bite the inside of your lip and you bleed a little bit, the metallic taste." After he removed his penis from her mouth, the man instructed her to use her hands and S.S. believed that he subsequently ejaculated, but she was not sure.

S.S. maintained that she did not consent to these actions. She also testified that she was scared that the man was "going to kill me or hurt me or rape me or leave me for dead. I had my daughter to think about."

After this, the man helped her get dressed and drove her home. When she got out of the car, he told her to lay on the ground until he left. After a few minutes, S.S. got up, found a neighbor who was outside at that time getting ready to deliver newspapers, and they called the police to report the incident.[6] The police arrived and transported S.S. to the hospital, where she underwent a sexual assault forensic examination.

Defense counsel questioned S.S.'s account during cross-examination, and S.S. admitted that she had several mixed drinks at the bar on the night in question. She also agreed that, when she was driving home and concerned that she was being followed, there were a number of public places along the way where she could have stopped, including a

[6] Sterling Willis confirmed that S.S., a woman he did not know, approached him, upset and crying, and asked for his assistance, which he provided. Willis testified that S.S. told him she had been raped. She also told him she was held down and ordered to engage in oral sex on her assailant.

Waffle House and a 7-Eleven. When she got out of the car at home and walked up to her front door with her keys in her hand, S.S. admitted that her key fob had a panic button and that she did not press it to alert anyone. She also agreed that her husband and neighbors in adjacent townhomes were likely home, but she never cried for help nor otherwise alerted them. S.S. confirmed that she never saw a weapon. And, after she reported the event in 2005, she did not inquire any further about the investigation until 2017 when a detective contacted her after the case had been reopened.

Further, still on cross-examination, S.S. also agreed that she may not have told the investigating detective that she was choked and had difficulty breathing during the incident. This issue of whether S.S. reported being choked during the assault was explored further, prior to the court's ultimate ruling on the admissibility of the prior evidence of sexually assaultive behavior, during the testimony of the responding officer, retired Deputy Sheriff Brendan Hopkins. Deputy Hopkins testified that although S.S. reported details about the sexual assault at the scene, including that her assailant forcibly placed his fingers in her vagina and his penis in her mouth, she did not tell him that her assailant placed his hand over her nose and mouth.

Returning to the aforementioned sexual assault forensic examination, the victim's clothing, pubic hair combings, and evidence swabs from her mouth, hands, and leg were collected. After further examination, mixtures containing the victim's DNA as well as the DNA from the same unidentified man were present on the swabs from the victim's underwear, her hands, her lower left leg, and her pubic hair combings. Raynor's counsel cross-examined the State's forensic nurse expert, Phyllis Harden, and Harden agreed that

she could not definitely testify that S.S.'s injuries were the result of non-consensual sexual activity. And, Harden agreed that trauma to a victim could be caused by consensual sexual activity or intercourse.

Thereafter, after the police obtained a DNA sample from Raynor, that evidence was submitted to be compared to the DNA evidence previously collected and examined in this case. Raynor's DNA matched the evidence collected from S.S. 'underwear and lower left leg and pubic hair combings and was consistent with DNA found on her hands. Upon further inquiry on cross-examination, the DNA expert, Amy Kelly, agreed that "DNA analysis does not tell us if an act was consensual or not."

Motion in Limine (Part 2)

Near the end of the State's case-in-chief, the court heard additional argument on the State's request to introduce evidence of the other sexual assault, which essentially mirrored the arguments previously raised. The court ultimately granted the State's motion to admit the other evidence of sexually assaultive behavior under Section 10-923.[7] In so ruling, the court reiterated and adopted its earlier findings, as set forth herein. The court then addressed the question it had reserved, namely, whether the evidence was being offered to prove lack of consent. The court found that the issue was sufficiently generated, noting that defense counsel's opening statement and cross-examination "quite skillfully planted the seed with the jury that this is a question of consent in this case." The court noted that

[7] The court denied the State's alternative grounds that the evidence was admissible under Rule 5-404(b). Although the parties mention that rule tangentially in their briefs, it is not the subject of this appeal and we shall not address it further. *See McCracken v. State*, 429 Md. 507, 516 n.6 (2012) (declining to address an abandoned argument on appeal).

defense counsel called into question: her fear upon leaving the bar; her failure to alert anyone who might have been nearby; the fact that no weapon was ever displayed; and the fact that S.S. never mentioned that her face and nose were covered at the beginning of the incident. The court also observed that the forensic nurse, as well as the DNA expert, were examined as to whether similar injuries could be caused by consensual sexual activity. The court stated, "these are all questions which create in -- which bring to the jury's mind the evidence in the case which could raise an inference of consent." Accordingly, based on this, as well as the fact that it remained the State's burden to prove beyond a reasonable doubt that the acts were done without the victim's consent, the court found that consent was generated for purposes of Section 10-923.

The court then disagreed with defense counsel's argument that consent needed to be an issue in the other sexually assaultive behavior, involving victim M.W., before evidence could be admitted, based on the plain language of the statute. The court found that the other evidence must have been "against the will and without the consent" of the other victim and there was no dispute that such was the case. *See Raynor*, 201 Md. App. at 214.

The court finally turned to the required balancing of probative value versus unfair prejudice. Looking to the legislative history and intent, the court considered a number of factors that were included in the first reading of the bill that would become Section 10-923 but were deleted from the final bill.[8] The court found that identity was not at issue, but that

[8] The first reading of Senate Bill 270 from the 2018 Session required a court to consider the following factors during this balancing: "(1) whether the issue for which the evidence of the sexually assaultive behavior is being offered is in dispute; (2) the similarity

whether S.S. consented was in dispute and was "crucial" under the facts of this case. The court also found that there were similarities between the evidence in this case and the prior incident, including: "an initial show of force"; "a cutting off of the ability to breath by covering the nose and mouth" or "suffocation"; "a shirt was tied around the face of each victim to obscure the perpetrator"; assurances made to the victims; and, a change of shirts by the perpetrator in both cases. The court then observed that the two incidents were close in time, as the assault on S.S. occurred on July 31, 2005, and the assault on M.W. occurred on April 1, 2006. The court also found that the incidents were independent of one another. The court concluded that the other sexually assaultive behavior had "strong probative value" in this case.

As for the weighing of this evidence against the danger of unfair prejudice, the court recognized, based on federal case law, that it should weigh "whether the facts of other conduct are so appalling as to be likely to incite the jury to an emotional decision, particularly in comparison to the facts of the instant case." The court noted that a limiting instruction, as well as a limited presentation of the facts from the other case, would alleviate those concerns.[9] The court then observed that the order of proof in this case, with the State

between the sexually assaultive behavior and the sexual offense for which the defendant is on trial; (3) the closeness in time of the sexually assaultive behavior and the sexual offense for which the defendant is on trial; and (4) the independence of the sexually assaultive behavior from the sexual offense for which the defendant is on trial." *See* https://bit.ly/2VNDy04

[9] For purposes of further guidance, the court suggested the State limit its presentation from M.W. to the "event itself," with emphasis on the lack of consent, and to avoid any "emotional impact" from M.W. "beyond the event, if you understand what I'm

presenting the evidence of the assault upon S.S. first, informed its weighing of whether to admit evidence of the assault upon M.W. The court concluded as follows:

> All right. So the Court's finding with regard to Section 10-923[e] of the Courts and Judicial Proceedings article is that I do find the evidence is being offered to prove lack of consent and that that issue has been generated. [M.W.] will be available for cross-examination and the ability to prove the other sexually assaultive behavior via the docket entry of the conviction as well as the victim's testimony establishes - meets the necessity of proof by clear and convincing evidence and the Court finds that the probative value of the evidence of the sexually assaultive - other sexually assaultive behavior is not substantially outweighed by the danger of unfair prejudice having considered and weighed all of the factors which the Court has discussed in detail.
>
> Now, with regard to the timing of the offering of this evidence, as I previously noted, the State has the obligation of proving in its case in chief that these acts were committed against the will and without the consent of the victim. The defense has clearly been generated at this point. The issue as being an issue of contention has been clearly demonstrated at this point and so I think it is appropriate for the State to be able to offer this evidence at this point.
>
> That is the Court's ruling with regard to the Courts and Judicial [P]roceedings Article 10-923.
>
> Trial (Part 2)

Thereafter, and prior to hearing from the other witnesses, M.W., the court instructed the jury as follows:

> THE COURT: Ladies and gentlemen of the jury, please listen carefully to the following instruction: In a criminal case the State bears the burden of proving beyond a reasonable doubt each and every element of the offenses charged. One element of each of the sexual offenses charged in this case requires the State to prove that the alleged sexual conduct was committed without the consent of the alleged victim, [S.S.]. You are about

saying. That would simply be a description of what happened and the fact that there was a lack of consent."

> to hear evidence that the Defendant, Glenn Raynor, committed other sexually assaultive behavior against a different person, [M.W.], on a different occasion. The Defendant is not on trial in the current case for any offense involving [M.W.] You may consider the evidence of the case involving [M.W.] in your evaluation of the case involving [S.S.] only on the issue of whether or not the sexual conduct alleged in the current case was committed without the consent of [S.S.]. [10]

M.W. then testified for the jury that, on the night of April 1, 2006, she went to bed, by herself, at around 11:00 p.m. She woke when she heard someone walking up the stairs. A man appeared in her bedroom doorway, and then "jumped on top of me and started shoving pillows on my face, using his hands to cover my mouth" and telling her "Do you want to die? Do you want to die?" M.W. was struggling to breathe and fight him off, and, in fact, thought she was going to die. M.W. then made a choice that she was going to submit to this man because she was "choosing to live."

The man told her to flip over on her stomach and take her shirt off. He then tried to tie that shirt around her head, but because it was too small, he took off his own shirt and used it to blindfold her. He took off all her clothes and stood over her. M.W. lay on the bed, with her knees in the air, and the man "licked his right hand and rubbed my vagina and my anus." She then was able to see the man take off his pants and start masturbating. He then used some sort of lubricant on M.W.'s vagina and inserted his penis into her vagina. As he was raping her, his face got close to M.W.'s face and she could smell something "metallic." At one point, the man stopped, licked her vagina, and then raped her again.

[10] The court granted a continuing objection to the entirety of M.W.'s trial testimony.

When he finished, he got dressed, found a belt, and tied M.W.'s hands behind her back. He then retrieved his shirt, which was still tied around her head, pushed her down on the bed and covered her with a comforter, and then fled. M.W. testified that she did not consent to these acts and only complied because she "thought I was going to die if I didn't." M.W. did not know S.S. She also testified that she had never spoken to S.S. in any way. As stipulated, Raynor subsequently was convicted of multiple offenses involving this incident:

> On June 9th, 2009, the Defendant, Glenn Raynor, was found guilty of the following crimes against [M.W.] that occurred on April l, 2006: Rape in the first degree; rape in the second degree; two counts of sex offense in the first degree; two counts of sex offense in the second degree; and sex offense in the third degree.

After the State rested, Raynor testified on his own behalf at trial and it was apparent that his theory of the case was that the encounter between S.S. and himself was consensual. Raynor admitted that he went to Big Daddy's bar on the night in question in his two-door black Honda Accord where he met S.S. Raynor and S.S. talked at the bar and she appeared to be having a good time and did not express any concerns for her safety while she was around him. In fact, Raynor claimed that he and S.S. were being "flirtatious" with each other, and, at one point, shared a "French kiss" inside the bar. They then decided to leave together, according to Raynor.

Outside, they agreed that Raynor would follow her home. When they arrived at her house, S.S. got out of her car and voluntarily got into the passenger side of Raynor's car, holding a t-shirt she won from the bar that evening, and the two then drove to a nearby secluded area. According to Raynor, the two then started to kiss and he rubbed "on the

outside of her vagina on her pants and she was rubbing while kissing me, she was massaging me in my crotch area." Raynor asked her to take her pants and underwear off, and S.S. complied. He then started to rub inside and outside her vagina while S.S. started to rub his genitals. Raynor believed they were about to have sex. But, because S.S. was "not wet," she offered to engage in oral sex with him.

After about ten minutes of oral sex, S.S. suddenly stopped and put her head down. She then stated, "oh, my God, oh, my God, oh, my God. My husband is going to kill me. My husband is going to find out" and that he would take her baby away from her. Raynor tried to assure her that he was not going to tell anyone, but S.S. remained upset. They both got dressed and Raynor drove her home, telling her to calm down along the way. Raynor then instructed S.S. to get out of his car and go home. He then drove away and went straight home.

Raynor maintained that he did not force S.S. to do anything against her will and that the encounter was consensual. He denied that he tied S.S. up with the t-shirt. He denied choking her or covering her mouth. On cross-examination, Raynor agreed that, on June 9, 2009, he was previously convicted of second-degree rape of M.W. and burglary in the first degree for entering M.W.'s house on April 1, 2006.

We shall include additional facts as necessary

## DISCUSSION

### I.

Raynor contends that the trial court erred by admitting evidence of his other sexually assaultive behavior against M.W. under Section 10-923. Raynor challenges the application

of Section 10-923 in his case on four grounds: (a) that consent was not raised prior to the court's ultimate ruling at trial; (b) that the other sexually assaultive behavior was inadmissible because it was both irrelevant and needed to involve an issue of consent; (c) that the probative value of the other sexually assaultive behavior was substantially outweighed by the danger of unfair prejudice; and, (d) that the statute as applied violates ex post facto prohibitions.[11] The State responds that the other evidence was properly admitted by the court pursuant to the new statute. We concur.

Generally, "[s]ubject to several exceptions, evidence of other crimes or bad acts is not admissible in Maryland." *Hurst v. State*, 400 Md. 397, 406 (2007) (citing cases); *see also Burris v. State*, 435 Md. 370, 385 (2013) ((citations omitted) observing that Rule 5-404 (b) is a rule of exclusion). Maryland Rule 5-404(b) reflects this principle by "restrict[ing] the admissibility of evidence of 'other crimes, 'unless that evidence has special relevance to the case." *Odum v. State*, 412 Md. 593, 609 (2010) (citation omitted). In short, the "plain language of Md. Rule 5404 (b) does not permit the admissibility of propensity evidence." *Hurst*, 400 Md. at 417. Evidence of other crimes may be admissible, however, if the evidence has '"special relevance, i.e. is substantially relevant to some

[11] The motions court found that the prior conviction qualified as "sexually assaultive behavior" under the statute and was established by docket entries and sworn testimony and a statement to the police provided by the victims. There is no dispute in this case that the other sexually assaultive behavior was proven by clear and convincing evidence. *See Raynor*, 201 Md. App. at 213-14. We also not that not only did both victims testify at this trial, but M.W. also testified at appellant's prior trial. *See Raynor*, 201 Md. App. at 225; *see also Merzbacher*, 346 Md. at 410-11; *Travis*, 218 Md. App. at 415.

contested issue in the case and is not offered simply to prove criminal character.'" *Hurst*, 400 Md. at 408 (quoting *Harris v. State*, 324 Md. 490, 500 (1991)).

One exception to the general prohibition of other crimes evidence is sexual propensity evidence. Admission under that exception has met with a variety of results. For instance, in *Vogel v. State*, 315 Md. 458 (1989), the Court ruled such evidence was admissible when: "(1) the prosecution is for sexual crimes, (2) the prior illicit sexual acts are similar to that for which the accused is on trial, and (3) the same accused and victim are involved." *Id.* at 465. However, in *Hurst, supra*, the Court ruled that testimony involving the lack of consent of a prior rape victim was inadmissible to prove another person's lack of consent because it "shows propensity of criminal activity rather than demonstrating a subsequent complainants lack of consent[.]" *Id.* at 408, 410-11.

In 2018, the Maryland General Assembly clarified the law in this regard when it enacted. § 10-923. As indicated, and pertinent to the facts in this case, that statute provides that, after notice by the State and a hearing before the court outside the presence of the jury, "evidence of other sexually assaultive behavior by the defendant occurring before or after the offense for which the defendant is on trial may be admissible" where the evidence is being offered to "[p]rove lack of consent" and other requirements are met, including the opportunity for confrontation of the witnesses, that the prior behavior was shown by clear and convincing evidence, and that the probative value of the other evidence is not substantially outweighed by the danger of unfair prejudice. § 10-923 (b) and (e).

The legislative history explains the background and purpose of the law:

> Under current law, the State cannot introduce prior allegations of sexual abuse unless the evidence meets the strict requirements of the 'common plan or scheme 'exception to the prohibition against other crimes evidence. The evidence can never be admitted to rebut a claim that the victim fabricated the charges or consented to the sexual contact.
>
> SB 270 creates an opportunity for this relevant, probative evidence to be admitted while still protecting the defendant's rights. By limiting the circumstances under which the evidence of other sexual assaults are admissible and allowing the trial court to perform its gatekeeper function and assess the potential for unfair prejudice, SB 270 strikes the appropriate balance between public safety and ensuring the defendant a fair trial.

Letter from Office of the Attorney General of Maryland to Honorable Joseph F. Vallario, Chair, Senate Bill 270, Judiciary Committee (March 27, 2018).

As has been explained, "this statute does not allow the prosecutor to present relevant evidence of a defendant's past sexually assaultive behavior in all cases; instead it only applies to prove lack of consent or to rebut an express or implied allegation that a minor victim fabricated the sexual offense." Mickey, *A Positive First Step, but Maryland's New "Evidence of Other Sexually Assaultive Behavior" Statute Does Not Go Far Enough*, 49 U. Balt. L.F. 129, 132 (2019) (generally explaining history and background of the statute, and proposing that Maryland expand the statute to cover all sex crimes, similar to the federal rules of evidence, and not just the ones based on lack of consent or fabrication of a minor defense) (footnote omitted). Further, "SB 270 provides that if the prosecution meets certain requirements and after an evidentiary hearing with specific finding[s] by the court, the court may allow evidence of prior sexual assault[s] to be introduced into evidence." Women's Law Center of Maryland Memorandum in Support to House Judiciary (March 29, 2018).

The intent of the law was to "help address a critical imbalance in Maryland's criminal justice system" whereby "a defendant's past predatory sex acts with different victims are not admitted as evidence during a trial – even if a clear pattern of assault or abuse can be established." Women's Legislative Caucus, Maryland General Assembly to Senator Zirkin, Chair and Members of Senate Judicial Proceedings Committee in support of SB 270/HB 301 (March 29, 2018); *see also* Letter from SurvJustice, Inc. to Maryland Senate Judiciary Committee (February 7, 2018) ("Not only do repeat offenders commit sexual violence, they often commit other violent and criminal acts to affect the community at large") (citing Lisak and Miller, "*Repeat Rape and Multiple Offending Among Undetected Rapists*," Violence and Victims, Vol. 17, No. 1 (2002)); Testimony in Support of HB 301 from the Honorable Vanessa E. Atterbeary, Deputy Majority Whip, Legislative District 13, Howard County to Judiciary Committee (January 30, 2018) (contrasting current law in Maryland to that in Michigan, where prosecutors were able to admit evidence of prior sexual assaults by USA Gymnastics 'doctor, Larry Nassar, in order "to tell the jury about Nassar's pattern of predatory behavior"). *But see* Memorandum from State of Maryland, Office of the Public Defender, opposed to SB 270 (February 7, 2018) (asserting that sexual propensity evidence should only be admitted "if the evidence bears out that individuals who commit these crimes are more likely to commit similar crimes in the future").

A. Evidence of Consent

Addressing Raynor's contentions sequentially, he first asserts that consent was not an issue when the court ruled during trial on admission of the prior sexually assaultive

behavior. The State responds that the statute does not require lack of consent to be alleged prior to admission; and that, even so, there was sufficient evidence that this was the defense theory of the case.

When interpreting a statute, "[w]e assume that the legislature's intent is expressed in the statutory language and thus our statutory interpretation focuses primarily on the language of the statute to determine the purpose and intent of the General Assembly." *Phillips v. State*, 451 Md. 180, 196 (2017). Thus, "we begin 'with the plain language of the statute, and ordinary, popular understanding of the English language dictates interpretation of its terminology.'" *Blackstone v. Sharma*, 461 Md. 87, 113 (2018) (quoting *Schreyer v. Chaplain*, 416 Md. 94, 101 (2010)).

We concur with the State that the statute does not restrict admission of prior sexually assaultive behavior solely to cases where lack of consent was previously established. Furthermore, as will be set forth in more detail in the last issue presented, lack of consent is an element of all three sexual offenses that were at issue in this case. *See Merzbacher, supra*, 346 Md. at 410-11 (despite suggestion that consent was not at issue, "the State was still under an affirmative legal obligation to prove each and every element of the offense charged beyond a reasonable doubt -- including lack of consent"); *Travis v. State*, 218 Md. App. 410, 415 (2014) ("Lack of consent on the part of the victim is an indispensable element of the crime of rape and of the various degrees of sexual offense. Proof of lack of consent will routinely consist of a negative response, either explicit or implicit, on the part of the victim.").

Nevertheless, we are also persuaded that there were sufficient indicia that consent was the defense theory of the case, even as early as opening statement. At that time, defense counsel informed the jury that "the State has to prove to you that what [S.S.] has said, that this event was a nonconsensual sexual assault, matches up with her behavior that night." Counsel noted that S.S. went to the bar that night without her husband for a "girl's night," but that she did not stay with her friends at the bar and left before anyone else. Counsel then did not dispute that S.S reported a sexual assault later that evening but that the question before the jury was "whether that was true at the time that this happened, whether she was actually sexually assaulted at the moment this happened or whether that was what she chose to say afterwards."

In addition, during cross-examination, defense counsel examined S.S. and elicited that she did not stop at several public places when she thought she was being followed; she did not alert anyone or use the panic button on her key fob when she got home; she never saw a weapon; she may not have told the police that her face and nose were covered by her assailant's hand; and, she did not inquire further about this incident in the twelve years before Raynor's DNA tested positive. Given this, we conclude that consent was at issue as required by Section 10-923. *See generally, Johnson v. State*, 408 Md. 204, 226 (2009) (observing that "the State's case-in-chief may include 'rebuttal 'evidence to which the defense has 'opened the door, 'either during opening statement, or through cross-examination of a State's witness").

B. Other Sexually Assaultive Behavior and Consent

Raynor next maintains that the evidence of the other "sexually assaultive behavior" (from the other victim, M.W.) must also have involved issues of consent. The State responds that the definition of "other sexually assaultive behavior" does not support Raynor's reading of the statute.

We set forth the facts from Raynor's prior convictions from our reported opinion as follows:

> The record, when reviewed in a light most favorable to the State, as the prevailing party, shows that, early on the morning of April 2, 2006, after cutting the victim's telephone line, appellant gained entry to the victim's home by chiseling open the basement door. After entering her bedroom, he pressed a pillow against her face and threatened to kill her if she moved. Then, tying a shirt over the victim's face as a blindfold, he raped her and fled.

*Raynor*, *supra*, 201 Md. App. at 214.

According to Section 10-923(a), other "sexually assaultive behavior" includes:

> (1) A sexual crime under Title 3, Subtitle 3 of the Criminal Law Article;
>
> (2) Sexual abuse of a minor under § 3-602 of the Criminal Law Article;
>
> (3) Sexual abuse of a vulnerable adult under § 3-604 of the Criminal Law Article;
>
> (4) A violation of 18 U.S.C. Chapter 109A; or
>
> (5) A violation of a law of another state, the United States, or a foreign country that is equivalent to an offense under item (1), (2), (3), or (4) of this subsection.

There can be no dispute that Raynor's other "sexually assaultive behavior" qualified under the statute as Raynor was previously convicted of, among other things, multiple

degrees of rape and sexual offenses. *Raynor*, 201 Md. App. at 213. Further, we discern nothing in the plain language that suggests that admission of the other "sexually assaultive behavior" requires proof that consent was contested in the prior case. And regardless, as we indicated, lack of consent is an element of the offenses and was at issue in both cases.

Nor are we persuaded by Raynor's reliance on *Hurst, supra*. Notably, that case, which held that admission of the lack of consent of a prior rape victim was inadmissible, *see* 400 Md. at 410-11, was decided approximately eleven years before Section 10-923 was enacted and made effective. Simply put, our reading of the legislative intent for Section 10-923 runs counter to the holding in *Hurst.*

C. Probative Value versus Danger of Unfair Prejudice

Raynor next contends that the probative value of the other sexually assaultive behavior involving M.W. was substantially outweighed by the danger of unfair prejudice. Section 10-923(e)(4), like Maryland Rule 5-403, allows exclusion where the probative value of the evidence is "substantially outweighed" by the danger of unfair prejudice. *See* Md. Rule 5-403. "An appellate court reviews for abuse of discretion a trial court's determination as to whether evidence is inadmissible under Maryland Rule 5-403." *Ford v. State*, 462 Md. 3, 46 (2018). "Evidence is prejudicial when 'it tends to have some adverse effect . . . beyond tending to prove the fact or issue that justified its admission.'" *Snyder v. State*, 210 Md. App. 370, 39495 (quoting *Hannah v. State*, 420 Md. 339, 347 (2011)), *cert. denied*, 432 Md. 470 (2013). However, under the rule:

> [E]vidence is never excluded merely because it is "prejudicial." If prejudice were the test, no evidence would ever be admitted. The parties have a right to introduce prejudicial evidence. Probative value is outweighed by the

> danger of "*unfair*" prejudice when the evidence produces such an emotional response that logic cannot overcome prejudice or sympathy needlessly injected into the case. The line is not always easy to draw.

Murphy, *Maryland Evidence Handbook* § 506(B), at 209 (4th ed. 2010) (emphasis in original).

We discern no abuse of discretion here. The issue of admission of evidence concerning the prior sexual assault involving M.W. was thoroughly litigated in this case, and the court properly considered all of the required factors under Section 10-923. And, this other evidence had significant probative value in this case involving a defense that the victim, S.S., consented to the encounter with Raynor. Moreover, we are unable to conclude that, given the legislative intent, that admission of the evidence was unfair, much less that the probative value was substantially outweighed by the danger of unfair prejudice. As one federal circuit court of appeals, discussing the federal rules, has observed:

> Rule 404(b) identifies the propensity inference as improper in all circumstances, and Rule 413 makes an exception to that rule when past sexual offenses are introduced in sexual assault cases. Congress has said that in a criminal trial for an offense of sexual assault, it is not improper to draw the inference that the defendant committed this sexual offense because he has a propensity to do so.

*United States v. Rogers*, 587 F.3d 816, 822 (7th Cir. 2009).[12]

[12] The Maryland Senate Floor report, and the Fiscal Notes, compared Section 10-923 to federal law, noting that the Maryland statute is narrower:

> As part of the Violent Crime Control and Law Enforcement Act of 1994, Congress passed FRE 413 and 414. Under FRE 413, in a criminal case in which a defendant is accused of a sexual assault, as defined under the rule, a court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant. Under FRE 414, in a criminal case in which the defendant is

D. An Ex Post Facto Law?

Raynor finally argues that Section 10-923 is an ex post facto law. The State disagrees and responds that this case is controlled by *Wyatt v. State*, 149 Md. App. 554 (2003). Generally, the Court of Appeals has explained:

> Article 1, Section 10 of the Constitution of the United States provides in part that "[n]o State shall . . . pass any . . . ex post facto Law. . . ." Article 17 of the Maryland Declaration of Rights, in more specific terms, also prohibits the passage of ex post facto laws: "That retrospective Laws, punishing acts committed before the existence of such Laws, and by them only declared criminal, are oppressive, unjust and incompatible with liberty; wherefore, no ex post facto Law ought to be made; nor any retrospective oath or restriction be imposed, or required.

*Khalifa v. State*, 382 Md. 400, 424-25 (2004).

For a statute to be ex post facto, "'it must apply to events occurring before its enactment and it must disadvantage the offender affected by it '. . ." "by altering the definition of criminal conduct or increasing the punishment for the crime[.]" *Lynce v. Mathis*, 519 U.S. 433, 441 (1997) (quoting *Weaver v. Graham*, 450 U.S. 24, 29 (1981), and citing *Collins v. Youngblood*, 497 U.S. 37, 50 (1990)); *see also Cal. Dept. of Corrections v. Morales*, 514 U.S. 499, 506 n.3 (1995) (focus of inquiry is not on whether the offender has been "disadvantaged," but whether "any such change alters the definition of criminal

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> accused of child molestation, as defined under the rule, a court may admit evidence that the defendant committed any other child molestation. Both rules contain disclosure requirements.

Floor Report, Senate Bill 270, Senate Judicial Proceedings Committee. *Accord* Fiscal and Policy Notes, Senate Bill 270, House Bill 301 (2018 Session).

conduct or increases the penalty by which a crime is punishable"). "It is undisputed that, "[t]o prevail in an ex post facto claim, [appellant] must first show that the law that [he is] challenging applies retroactively to conduct that was completed before the enactment of the law in question." *Quispe del Pino v. Maryland Dep't of Pub. Safety & Corr. Servs*., 222 Md. App. 44, 49 (2015) (citing *Dep't of Pub. Safety & Corr. Servs. v. Demby*, 390 Md. 580, 593 n.10 (2006)).

In *Wyatt, supra*, Wyatt was convicted by a jury of driving while under the influence of alcohol. 149 Md. App. at 557. The State introduced evidence that Wyatt refused to submit to a breathalyzer test under § 10-309. *Id*. That statute was amended between the time of Wyatt's offense and his trial date to permit an inference or presumption concerning guilt or innocence due to a driver's refusal to submit. *Id*. at 562. Wyatt raised an ex post facto challenge, and this Court explained the law with respect to statutory changes such as the one at issue:

> As a starting point, we recognize that "[t]here is 'no absolute prohibition against retroactive application of a statute.'" *Langston v. Riffe*, 359 Md. 396, 406, 754 A.2d 389 (1999) (quoting [*State Comm'n on Human Relations v. Amecom Division*, 278 Md. 120, 123 (1976)]). In fact, the determination of whether prospective or retroactive application is warranted focuses primarily on legislative intent. *Id*. In general, there is a presumption in favor of prospective application such that, in the absence of clear legislative intent to the contrary, a statute will not be given retroactive effect. *Id*. There are exceptions to the general presumption, however. *Id*.
>
> One important exception to the general rule concerns statutes that constitute procedural, rather than substantive, changes to the law. *Id*. at 406-07, 754 A.2d 389. "When a statute affects only a procedure or remedy, and not a substantive right, the presumption in favor of prospective application does not apply." *Tyrone W. v. Danielle R*., 129 Md. App. 260, 278 (1999) Instead, the statute will be given retrospective effect unless a contrary intention is expressed. *Tyrone W*., 129 Md. App. at 278.

*Wyatt*, 149 Md. App. at 563-64 (some citations omitted).

This Court concluded that the change in Section 10-309 "constituted a procedural change in the law, rather than a substantive change, suggesting that retroactive application is appropriate." *Wyatt*, 149 Md. App. at 564. Further, "we perceive no clear expression suggesting that the legislature intended to limit the amendment's application to prospective only." *Id*. This Court continued: "contrary to appellant's suggestion, the amended statute in the present case does not change the quantum of evidence necessary to sustain a conviction, but instead relates to the admissibility of evidence[.]" *Id*. at 569. Thus, we held that the amended statute, as applied retroactively, did not violate the prohibition against ex post facto laws. *Id*. at 570.

We are persuaded that a similar result applies here. The change in Section 10-923 was an evidentiary one and did not alter the degree or lessen the amount or measure of the proof necessary to establish the underlying offenses. Moreover, we have thoroughly examined the legislative history and have not found, as the motions court aptly stated, "any clear legislative expression which would show that the legislature intended to make Courts and Judicial Proceedings Article Section 10-923 prospective only." We hold that Section 10-923 does not violate the prohibition against ex post facto laws.

**II.**

In his next issue presented, Raynor asserts that the court erred by not asking a proposed question during *voir dire* of the prospective jurors concerning his prior sexual offense conviction. The State responds that the court properly declined to ask a question

that was a "hypothetical question[] aimed at determining in advance [that] juror's opinion concerning the weight of certain evidence." (citations omitted). We concur.

Prior to jury selection, and before the court had ruled on the admissibility of Raynor's prior sexually assaultive behavior, discussed above, Raynor's trial counsel asked the court to inquire as to its question number 24, namely, "Would you be more likely to convict a defendant if you were shown evidence that he had previously committed a sexual offense[?]" Raynor equated the question to questions asking jurors in drug and gun cases whether they had any "strong feelings" about the underlying crime. *See generally*, *State v. Shim*, 418 Md. 37, 54 (2011), *abrogated in part by Pearson v. State*, 437 Md. 350, 363 (2014). After hearing from the State, the court ruled that it would not ask the question. The court reserved ruling on the evidentiary issue until it could make further findings on the matter. However, the court found, among other things, that the purpose of the question was not cause for disqualification, but instead, was "to assist the defense in exercising peremptory challenges in this case to attempt to locate jurors who would be more likely to disregard the evidence which may be admitted under 10-923."

The court continued that the question, asking whether the jurors would be more likely to convict if certain evidence was admitted, requires the prospective juror "to make a commitment that they would or they wouldn't find -- they would or wouldn't basically find this evidence to be probative." The court then stated,

> I believe that is an improper question. It asks jurors -- it places jurors in an impossible situation, prospective jurors, where they are asked to focus on one tiny part of the case without having heard the rest of it and they are being asked to predict how this particular piece of evidence would affect them.

The court noted that "[o]bviously this would be a disastrous question to ask, as [defense counsel] has already noted if ultimately the 10-923 evidence doesn't come in." The court then concluded by observing that, if it did ultimately find that the evidence of Raynor's prior sexually assaultive behavior was admissible, then, proposed *voir dire* question number 24 "would be somehow implying to the prospective juror that it would be inappropriate for them to consider evidence which the Court had found it legally correct to admit and to give that evidence the probative weight that they felt it should have." Therefore, the court declined to ask the question.[13]

The right to an impartial jury is guaranteed by the Sixth Amendment of the United States Constitution as made applicable to the States through the Fourteenth Amendment, and Article 21 of the Maryland Declaration of Rights. *See Wright v. State*, 411 Md. 503, 507 (2009). And the "overarching purpose of *voir dire* in a criminal case is to ensure a fair and impartial jury." *Id.* at 508 (quoting *Dingle v. State*, 361 Md. 1, 9 (2000)); *see also Drake and Charles v. State*, 414 Md. 726, 733 (2010) ("The primary purpose of voir dire is to ensure a fair and impartial jury."). In fact, "the only purpose of *voir dire* in Maryland is to illuminate to the trial court any cause for juror disqualification." *Wright*, 411 Md. at 508. *Accord Washington v. State*, 425 Md. 306, 312 (2012). "Without an adequate *voir*

[13] Although we conclude that appellant did not renew this objection when he accepted the jury as selected, and instead raised a different objection as to specific jurors that the court declined to excuse, this issue is properly before us. *See Hayes v. State*, 217 Md. App. 159, 166 n.3 (2014) (noting that defendant "could accept the jury as selected without waiving his prior objection to the court's failure to ask Question 8 during *voir dire*") (citing *State v. Stringfellow*, 425 Md. 461, 471 (2012) and *Marquardt v. State*, 164 Md. App. 95, 143 (2005)).

*dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Stewart v. State*, 399 Md. 146, 158 (2007).

Maryland has adopted a "limited *voir dire*," in which the "sole purpose of *voir dire* is to ensure a fair and impartial jury by determining the existence of cause for disqualification." *Washington*, 425 Md. at 312. *Accord Pearson*, 437 Md. at 350, 356 (2014). And, in contrast to most other jurisdictions, "the intelligent exercise of peremptory challenges" is not a purpose of *voir dire* in Maryland. *Washington*, 425 Md. at 312 (citing *State v. Logan*, 394 Md. 378, 396 (2006)). "[A] trial court need not ask a *voir dire* question that is not directed at a specific [cause] for disqualification [or is] merely 'fishing 'for information to assist in the exercise of peremptory challenges[.]" *Pearson*, 437 Md. at 357 (quoting *Washington*, 425 Md. at 315). There are two areas that may reveal cause for disqualification: "(1) examination to determine whether the prospective juror meets the minimum statutory qualifications for jury service, and (2) examination to discover the juror's state of mind as to the matter in hand or any collateral matter reasonably liable to have undue influence over him." *Washington*, 425 Md. at 313 (citing *Davis v. State*, 333 Md. 27, 35-36 (1993)).

Raynor argues his proposed question was equivalent to the requested non-compound "strong feelings" questions required by the Court of Appeals and recently summarized as follows:

> [O]n request, a trial court is required to ask a properly-phrased - i.e., non-compound - "strong feelings" question. In other words, under *Pearson*, during *voir dire*, on request, a trial court must ask: "Do any of you have

> strong feelings about [the crime with which the defendant is charged]?" We reiterate that, during *voir dire*, on request, a trial court must ask the "strong feelings" question in the form set forth above, and it is improper for a trial court to ask the "strong feelings" question in compound form, such as: "Does any member of the jury panel have such strong feelings about [the charges in this case] that it would be difficult for you to fairly and impartially weigh the facts?"

*Collins v. State*, 463 Md. 372, 379 (2019); *see also Shim*, 418 Md. at 54 (observing that the "strong feelings" question "is a question targeted at uncovering a bias directly related to a crime, even if 'the question does not involve any of the mandatory areas of inquiry that this Court has already identified").

We believe this line of cases is not controlling because, here, Raynor's proposed question number 24 did not ask the jury whether they had any strong feelings about sex offense crimes; it asked an evidentiary-based question regarding they would be more likely to convict depending on the possible, but as yet uncertain, admission of, essentially, other crimes evidence. We are not aware of a case in Maryland concerning the questioning of prospective jurors about other crimes evidence. However, *Charles & Drake v. State*, 414 Md. 726 (2010) is instructive. There, the Court of Appeals concluded that the trial judge "erred in propounding a *voir dire* question asking whether the jury could not 'convict 'the defendants[]" in the absence of "CSI type" scientific evidence. *Id.* at 729. Over objection, that trial court stated the following during *voir dire*:

> I'm going to assume that many of you, from having done a few of these, watch way too much TV, including the socalled realistic crime shows like CSI and Law and Order. I trust that you understand that these crime shows are fiction and fantasy and are done for dramatic effect and for this dramatic effect they purport to rely upon, "scientific evidence," to convict guilty persons. While this is certainly acceptable as entertainment you must not allow this entertainment experience to interfere with your duties as a juror.

> Therefore, *if you are currently of the opinion or belief that you cannot convict a defendant without "scientific evidence*," regardless of the other evidence in the case and regardless of the instructions that I will give you as to the law, please rise. . .

*Charles & Drake*, 414 Md. at 730 (emphasis in original).

The emphasized language was of particular concern because the *voir dire* question at issue here "suggested that finding the defendant 'guilty 'was a foregone conclusion." *Charles & Drake*, 414 Md. at 737. Further, the *voir dire* question at issue here suggested that the jury's only option was to convict, regardless of whether scientific evidence was adduced." *Id.* Similarly, in *Stringfellow v. State*, 199 Md. App. 141, 152-53 (2011), *rev'd on other grounds*, 425 Md. 461 (2012), this Court was asked to review a similar *voir dire* inquiry, and held that the trial court erred by posing the following question over defense counsel's objection:

> Does any member of the panel believe that the State is required to utilize specific investigative or scientific techniques such as fingerprint examination in order for the defendant to be found guilty beyond a reasonable doubt?

*Id.* at 144.[14] *But see Corens v. State*, 185 Md. 561, 563-64 (1946) (affirming where the court asked the jury, in a capital case, whether they had "any such conscientious scruple or opinions as would prevent or preclude you from rendering a verdict of guilty in a case where the penalty prescribed by law may be death upon what is commonly called circumstantial evidence?").

[14] The Court of Appeals reversed on the grounds that Stringfellow's objection to the question was waived and that, under the circumstances, any error was harmless beyond a reasonable doubt. *Stringfellow*, 425 Md. at 473-74.

We note that some states have concluded that it is reversible error not to ask an "other crimes" question during *voir dire*. For example, in *State v. Fortin*, 843 A.2d 974 (N.J. 2004), a capital murder case involving the murder of a woman who had been sexually assaulted, *id*. at 984-85, the trial court declined to propound Fortin's question that asked the jurors about an unrelated, but similar, case where it was alleged that the defendant had brutally sexually assaulted a law enforcement officer in Maine during a traffic stop. *Id*. at 986, 990-91. The Supreme Court of New Jersey reversed, explaining that "in this case, the introduction at trial of that other crime was not a possibility, but a certainty. Indeed, the other-crime evidence was central to the State's case." *Id*. at 996. The court continued:

> Reason and experience tell us that prospective jurors have varying thresholds for processing and reacting to evidence. Most prospective jurors, even when confronted with shocking evidence related to a brutal crime, presumably will be able to follow the court's instructions and render a fair and impartial verdict. Some jurors, however, will be so disturbed or repulsed by the gruesome details of a crime that they will lose their ability to be objective and will be incapable of dispassionate consideration of the evidence. For the most part, those jurors will be honest and forthcoming in response to direct questions by the court. Our courts must not be fearful of asking those questions out of concern that jury selection will be protracted.

*Fortin*, 843 A.2d at 996.[15] *See also Hobbs v. Lockhart*, 791 F.2d 125, 129-30 (8th Cir. 1986) (recognizing that, although jurors could not be questioned about certain facts to be proved at trial, they could be asked hypotheticals whether they could convict based on circumstantial evidence); *People v. Catlin*, 26 P.3d 357, 378 (Cal. 2001) (observing

[15] Unlike the present case, where the defense concerned whether the victim consented to the sexual assault, identity was the primary issue in *Fortin*. *See, e.g., Id.* at 987.

generally, that defense counsel could *voir dire* prospective jurors in a bifurcated capital murder case about their attitudes about other crimes), *cert. denied*, 535 U.S. 976 (2002).

By contrast, in *State v. Schad*, 633 P.2d 366 (Arizona 1981) (in banc), *cert. denied*, 455 U.S. 983 (1982), also a capital murder case, the defendant wanted to ask the venire "whether the prospective juror would have convicted defendant because of his involvement in other crimes." *Id*. at 376. The Court found no error in the trial court's refusal to ask this question because the "question constitutes an attempt to 'condition 'the jurors by forewarning them of unfavorable facts concerning defendant." *Id*. at 376-77. *See also Com. v. Kater*, 734 N.E.2d 1164, 1174-75 (Mass. 2000) (concluding that the trial judge's ultimate decision not to individually *voir dire* prospective jurors about their attitudes about the defendant's prior convictions was not an abuse of discretion); *Com. v. Bronshtein*, 691 A.2d 907, 915 (Pa. 1997) (holding that court did not abuse discretion in declining to ask a *voir dire* question about a specific prior crime); *Cf. State v. Graham*, 486 So. 2d 1139, 1142 (La. Ct. App.) (affirming trial court's decision to decline to ask specific questions about the jurors 'attitudes about the voluntariness of a defendant's statements, and observing that "[a] defendant will not be allowed to attempt to elicit from a juror in advance his opinion concerning the weight of certain evidence that might be introduced at trial or to argue his case"), *writ denied*, 493 So. 2d 633 (La. 1986).

We are persuaded that, under the circumstances, the trial court in this case properly exercised its discretion by not asking Raynor's question whether any of the prospective jurors would be likely to convict based on the admission of other crimes evidence, namely, evidence that he had previously committed a sexual offense in this case involving similar

allegations. Notably, the court did not make its ultimate ruling on the admissibility of the evidence until later during trial. And, the Court of Appeals has already disapproved of similar phrasing of the question, *i.e.*, whether the jurors were likely to convict, in earlier cases. *See Charles & Drake*, 414 Md. at 739 (concluding that "the judge abused his discretion by suggesting to the panel that 'convict[ing] 'Drake and Charles was the only option in the present case; this suggestive question poisoned the venire, thereby depriving Drake and Charles of a fair and impartial jury"). Finally, although we tend to concur with Raynor that his proposed question number 24 was not fairly covered by a similar question, we do note that the court arguably asked the jury something akin to the "strong feelings" questions inquiring whether there was anything about the nature of the charges of sexual offenses that would make it difficult for any of them to sit as a juror.[16] Ultimately, we hold that the court properly exercised its discretion by declining to ask Raynor's proposed question during *voir dire* examination of the venire.

**III.**

Raynor next contends the circuit court erred by admitting evidence of his prior convictions for first-degree burglary and second-degree rape. Specifically, Raynor argues that the danger of unfair prejudice outweighed any probative value of these prior convictions. In response, and noting that Raynor testified on his own behalf, the State asserts that any prejudice was not "unfair." We agree.

[16] Twenty-four prospective jurors responded affirmatively and were individually questioned thereafter.

The Court of Appeals has explained:

> Maryland has long recognized the importance of preserving a defendant's right to testify. This right is guaranteed both federally and in Maryland by the Fourteenth Amendment Due Process Clause, the Sixth Amendment Compulsory Process Clause, the Fifth Amendment right against compelled testimony (with the Sixth and Fifth Amendment being applied to the states by the Fourteenth Amendment), and in Articles 21 and 22 of the Maryland Declaration of Rights. A defendant's right to testify "is a significant one and must be made with a basic appreciation of what the choice entails." That choice entails and ensures a defendant's right to "present his own version of events in his [or her] own words." "A defendant's opportunity to conduct his own defense, [however] ... is incomplete if he may not present himself as a witness." Given the constitutional nature of a defendant's right to testify, the decision whether to testify must be made knowingly and voluntarily.

*Burnside v. State*, 459 Md. 657, 669 (2018) (internal citations omitted).

Moreover:

> A competing set of interests exists between this "fundamental constitutional right" to testify in one's own defense and the State's right to impeach a defendant by introducing prior criminal convictions. Maryland Rule 5-609 was promulgated with the purpose of limiting the danger of prejudice by "impos[ing] limitations on the use of past convictions in an effort to discriminate between the informative use of past convictions to test credibility, and the pretextual use of past convictions where the convictions are not probative of credibility but instead merely create a negative impression of the defendant." *Cure v. State*, 195 Md. App. 557, 575 (2010), *aff'd*, 421 Md. 300 (2011) (quoting *Jackson v. State*, 340 Md. 705, 715-16 (1995)).
>
> The rule was crafted with the understanding that, absent those limitations, a jury could potentially convict a defendant based on the defendant's criminal history or simply "because [it] thinks the defendant is a bad person." *Id*. (quoting *Jackson v. State*, 340 Md. 705, 715 (1995)). . . .

*Burnside*, 459 Md. at 669-70 (some citations omitted); *see* Md. Rule 5-609 (setting forth that prior convictions may be admitted if they are: infamous or relevant to credibility; less

than 15 years old; and if the "probative value of admitting this evidence outweighs the danger of unfair prejudice").

Here, the State sought to impeach Raynor with his prior convictions for multiple rapes, sexual offenses and burglaries within fifteen years of trial and that were either infamous crimes or relevant to his credibility. The State explained:

> A case such as this one where the issue of consent versus lack of consent has been generated by the defense, a case such as this one is one in which the credibility of the witness is of utmost importance and really it is the sole deciding factor for the consent issue in this case. Therefore, Mr. Raynor's credibility is of very high importance and the State's ability to impeach his credibility by use of these prior convictions is made much more important by the fact that this case really boils down to, as the Court called it, a he said, she said and again, the credibility issue is extremely important.

Thereafter, and immediately prior to Raynor testifying in his own defense, the State proffered that it specifically would seek to impeach him with his June 9, 2009 convictions for first degree burglary and second-degree rape, from the case involving victim M.W. Raynor has not disputed that the two prior convictions qualified under Rule 5-609 as infamous crimes and were within the fifteen-year limitation. *See, e.g., Tilghman v. State*, 117 Md. App. 542, 552 n.3 (1997) (noting that burglary is an impeachable offense), *cert. denied*, 349 Md. 104 (1998); *Robinson v. State*, 4 Md. App. 515, 523 n.3 (1968) ("The common law felonies were murder, manslaughter, robbery, rape, burglary, larceny, arson, sodomy and mayhem."). Instead, Raynor maintains that the trial court erred by improperly balancing the probative value of his prior convictions against the danger of unfair prejudice.

Generally, prejudice means "an undue tendency to persuade the jury to decide the case on an improper basis, usually an emotional one." *Parker v. State*, 185 Md. App. 399, 439 (2009). And, "evidence is considered unfairly prejudicial when 'it might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which [the defendant] is being charged.'" *Burris v. State*, 435 Md. 370, 392 (2013). The Court of Appeals has suggested five factors courts might consider when balancing this type of evidence:

> These factors are (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the defendant's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the defendant's credibility.

*Jackson v. State*, 340 Md. 705, 717 (1995).

As for the impeachment value of the prior rape and burglary convictions, the circuit court here stated:

> They are crimes of such seriousness, of such an infamous nature, that just the fact that an individual had been convicted of either of these would have an impact on the believability of that person. In addition, Court has made further observations about the specific conduct which usually goes into a burglary scenario which shows additional secretiveness or deceit.

We concur with this assessment. A noted treatise explains that "[a]t common law, a person convicted in a court of record of a crime that rendered him 'infamous 'was incompetent to be a witness." 2 Wharton's Criminal Evidence § 7:6 (15th ed.) "The underlying theory was that a person convicted of an infamous crime was devoid of truth and insensible to the obligations of an oath." *Id.* Prior convictions of burglary and rape have a significant impeachment value when assessing credibility.

As for the second factor, the court indicated that the offenses occurred twelve years ago, in 2006, and the prior convictions were from nine years ago, in 2009. The court observed that the "thrust of this second factor" is the situation where the prior conviction is close to "the edge of the 15 years" and that, in the intervening years, the individual "had lived a blameless life" such as to favor exclusion. Recognizing the age of the prior convictions, the court noted that Raynor had been incarcerated in the ensuing years and that "we don't have a situation where we have some stellar track record that the Defendant has demonstrated because he has been in custody that entire time." Although Raynor's convictions were older than most, we agree that this factor weighs in favor of admissibility.

Turning to the third factor, or the similarities between the prior crimes and the instant offense, the court agreed that, under the circumstances, this could be a determinative factor standing alone because "the Defendant is faced with the decision of either putting into evidence the fact that he was convicted of a similar offense or electing not to take the witness stand." Although this factor weighs against admission, Maryland does not recognize a *per se* exclusion of similar prior crimes. For instance, in *Jackson, supra*, the defendant was convicted of felony theft. *Jackson*, 340 Md. at 708. The Court of Appeals considered whether prior convictions for offenses that are similar or identical to the charged crime are inadmissible *per se*, and whether the introduction of same-crime evidence for impeachment constituted an abuse of discretion. *Id.* at 707-08. A majority of the Court determined that the prosecution may use such evidence on cross-examination of the defendant. In rejecting the defendant's contention that the trial court's decision to allow same-crime impeachment constituted an abuse of discretion *per se*, the Court explained:

> Under Rule 5-609, prior convictions for the same or similar offenses as the charge offense are not automatically excluded. The similarity between the prior conviction and the current charge is only one factor the trial court should consider in determining whether to admit the conviction.

*Id*. at 711.

The Court then held:

> Thus, we conclude that a prior conviction that is the same as or similar to the crime charged is not *per se inadmissible*, but is subject to the probative-prejudice weighing process under Rule 5-609. The balancing prong of the rule contains no language prohibiting the use of similar prior crimes. Furthermore, we believe a per se rule barring same-crime impeachment would deny trial judges needed flexibility. Establishing such a per se rule would have the additional undesirable effect of shielding a defendant who specializes in a particular crime from cross-examination regarding his specialty crimes. We therefore reject Appellant's contention that same-crime impeachment evidence is per se inadmissible.

*Jackson*, 340 Md. at 714 (citations omitted).

The Court also recognized:

> We adopted Rule 5609 to minimize this danger of prejudice. The Rule is designed to prevent a jury from convicting a defendant based on his past criminal record, or because the jury thinks the defendant is a bad person. The Rule therefore imposes limitations on the use of past convictions in an effort to discriminate between the informative use of past convictions to test credibility, and the pretextual use of past convictions where the convictions are not probative of credibility but instead merely create a negative impression of the defendant.

*Id*. at 715016 (citations omitted). *Accord King v. State*, 407 Md. 682, 700 (2009).

As for the fourth factor, the circuit court recognized that the Raynor's testimony was important and that he had a right to testify on his own behalf, but noted that, at this point in the trial, "the rape conviction has already come in under a separate analysis for an evidentiary purpose which has been limited by the Court." The court later observed that,

through the testimony of M.W., the jury had also heard details that supported the prior burglary conviction. We are persuaded that this factor also weighed in favor of admissibility.

Finally, the court considered the fifth factor: the centrality of the credibility of the Raynor. Considering that the defense was based on a theory that the encounter was consensual, the court opined that Raynor's "credibility is crucial on this point," and that, based on that, it was "fair" for the State to elicit evidence of the prior convictions. The court concluded as follows:

> So when I weigh everything that I have discussed, the Court finds that the probative value of admitting the evidence is not outweighed by the danger of unfair prejudice, particularly given the fact that the jury has already heard much of this evidence for different purpose and simply is only lacking at this point the label for the burglary.
>
> So the Court will grant the State's request to use both the rape conviction and the burglary conviction as impeachment should Mr. Raynor choose to take the witness stand.
>
> I absolutely direct that it must be made clear to the jury in some neutral way that we are talking about the same offense which they heard about described this morning, that it is not some additional -- you are not talking about some additional event or additional trial.
>
> I recognize that the case law says that you are really only supposed to put in evidence the name of the offense and the timeframe, however in this case unless the defense strenuously objects, I think it is appropriate to make sense that we are talking about one event.

Credibility of the witnesses was central in this case because, whereas identity was not in dispute, the element of consent was contested. Based on the foregoing, we conclude that the trial court properly exercised discretion when it weighed the probative value of

Raynor's prior convictions against the danger of unfair prejudice and ruled that the evidence was admissible.

**IV.**

Finally, Raynor challenges the sufficiency of the evidence to sustain his convictions. His contentions are essentially twofold: (1) that there was insufficient evidence of a threat; and, (2) that the acts between him and S.S. were consensual. The State responds that Raynor's arguments all go to the weight of the evidence, not its sufficiency. We agree.

In considering a challenge to the sufficiency of the evidence, we ask '"whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Grimm v. State*, 447 Md. 482, 494-95 (2016) (quoting *Cox v. State*, 421 Md. 630, 656-57 (2011)). *Accord Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "[W]e defer to the fact finder's 'resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Riley v. State*, 227 Md. App. 249, 256 (quoting *State v. Suddith*, 379 Md. 425, 430 (2004)), *cert. denied*, 448 Md. 726 (2016). In doing so, the jury is free to "accept all, some, or none" of a witness's testimony. *Correll v. State*, 215 Md. App. 483, 502 (2013), *cert. denied*, 437 Md. 638 (2014). Moreover, the evidence of a single eyewitness is sufficient to sustain a conviction. *See Branch v. State*, 305 Md. 177, 184 (1986) ("The issue of credibility, of course, is one for the trier of fact"); *Braxton v. State*, 123 Md. App. 599, 671 (1998) (citing *Branch*, *supra*) ("Maryland courts have long recognized that an 'identification by the victim is ample evidence to sustain a conviction.'"); *see also Owens v. State*, 170 Md. App. 35, 103 (2006) ("[A] witness's

credibility goes to the weight of the evidence, not its sufficiency."), *aff'd*, 399 Md. 388 (2007), *cert. denied*, 552 U.S. 1144 (2008).

Based on the 2005 date of the offense, Raynor was charged with sexual offense in the first degree, under former Criminal Law § 3-305 (repealed), sexual offense in the second degree, under former Criminal Law § 3-306 (repealed), and sexual offense in the third degree, under current Criminal Law § 3-307. *See* Md. Code (2002), §§ 3-305, 3-306, 3-307 of the Criminal Law Article ("Crim. Law").[17] Pertinent to our discussion, to establish that a person had committed sexual offenses in the first and second degree, it is necessary to show that the person engaged in a sexual act with another by force, or the threat of force, and without the consent of the other. Also pertinent to the facts in this case, first-degree sexual offense requires, *inter alia*, that the person suffocate, strangle, or inflict serious physical injury on the victim, or threaten that the victim be subject to death, suffocation, strangulation or kidnapping. *See* Crim. Law § 3-305(a)(2) (repealed). And, a "sexual act" includes fellatio and digital penetration of the genitals of another. *See* Crim. Law § 3-301(d).

To be guilty of sexual offense in the third degree, it is necessary to show that person engaged in sexual contact with another without the consent of the other; and, again, pertinent to this case, suffocate, strangle or inflict serious physical injury, or threaten that victim be subject to death, suffocation, strangulation or kidnapping. *See* Crim. Law § 3-

[17] Effective October 1, 2017, the crimes formerly delineated as sexual offense in the first degree and sexual offense in the second degree have been recodified as subsections of first-degree rape and second-degree rape, respectively. *See* Criminal Law §§ 3-303(a)(1)(ii), 3-304(a); *see also* 2017 Md. Laws Ch. 162 (H.B. 647).

307(a)(1). "Sexual contact" includes "an intentional touching" of the victim's genitals for purposes of sexual arousal, gratification or abuse. *See* Crim. Law § 3-301(e).

Here, S.S. testified that Raynor grabbed her around the neck and dragged her to his car. He placed his hand over her mouth and nose and told her that "if you do not listen to me, I'm going to stop your breathing." He then licked his fingers and placed them in S.S.'s vagina. Then, he forced her to engage in fellatio. He also required her to place her hands on his penis. S.S. maintained that she did not consent to these actions. She also testified that she was scared that the man was "going to kill me or hurt me or rape me or leave me for dead. I had my daughter to think about." We conclude that the evidence was more than sufficient to sustain Raynor's convictions.

**JUDGMENTS OF THE CIRCUIT COURT FOR HARFORD COUNTY AFFIRMED. APPELLANT TO PAY THE COSTS.**