Circuit Court for Wicomico County
Case No. 22-K-16-000347

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2635

September Term, 2016

MICHAEL RAYNE

v.

STATE OF MARYLAND

Berger,
Arthur,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: May 23, 2018

After a jury trial in the Circuit Court for Wicomico County, appellant Michael Rayne was found guilty of second-degree assault, two counts of malicious destruction of property having a value of less than $1,000, theft of property having a value of less than $100, reckless driving, failure to control the speed of a vehicle on a highway to avoid a collision, eluding a police officer, and negligent driving. The court sentenced Rayne to incarceration for ten years for second-degree assault and concurrent terms of 60 days for each conviction for malicious destruction, 90 days for theft, and one year for eluding a police officer. The court imposed no sentences for the remaining convictions. This timely appeal followed.

QUESTIONS PRESENTED

Rayne presented two questions,[1] which we have consolidated for concision as follows: Did the trial court err in allowing evidence of other crimes?

For the reasons set forth below, we answer in the affirmative. Hence, Rayne's convictions shall be reversed and the case remanded for a new trial.

[1] Rayne's questions were:

> I. Did the trial court err in allowing the prosecutor to cross-examine Mr. Rayne about prior bad acts?
>
> II. Did the trial court err or abuse its discretion in admitting rebuttal testimony concerning prior bad acts?

FACTUAL BACKGROUND

On June 8, 2015, Rayne had just returned home to Salisbury from an inpatient drug-rehabilitation center in Baltimore. He and his girlfriend were in the process of moving out of their apartment.

In the late afternoon, Rayne picked up a prescription for the generic version of Serax, an anti-anxiety medication that would assist in curbing his withdrawal symptoms. In spite of the directions stating that the medication should be taken at bedtime, Rayne, who claimed to have never taken it before, immediately swallowed one pill before returning home.

At about 9:00 p.m. Rayne left his residence again. It is unclear where he went or what he did, but he denied drinking alcohol or using illegal drugs during that time.

At around 1:00 a.m. on the morning of June 9, 2015, Rayne went into a Wawa convenience store. Because he was behaving suspiciously, he attracted the attention of the manager. When the manager had to go to the back of the store, Rayne left, with a shopping basket, through an alarmed door at the side of the building. The manager called the police. When an officer arrived, the manager gave him a copy of a surveillance video and a still photograph that depicted Rayne entering the store.

By about 4:00 a.m., Rayne had returned to his apartment, where he got into an argument with his girlfriend and threw some Wawa hot dogs at her. When his downstairs neighbors complained about the disturbance, Rayne damaged some of their property. The neighbors called the police.

Shortly after 4:00 a.m., Officer Logan Hallowell arrived at Rayne's residence in a marked police cruiser. The officer saw Rayne climb through the passenger side of a Ford Taurus, over the center console, and into the driver's seat. The officer, who was standing by the car's right front bumper, ordered Rayne to show his hands and get out; Rayne did not comply. When the officer walked around to the driver's side, Rayne drove off at a high rate of speed. Rayne had notice that all four tires were down to 2/32 of an inch of tread and needed to be replaced.

The roads were wet from light rain or mist, but Rayne floored the Taurus, quickly reaching a speed of 81 miles per hour on a residential street. Less than 1,200 feet from his residence, Rayne began hydroplaning, lost control of the car, crossed the center line, and collided with an oncoming car. The driver of that car, Officer Zachary Converse, was responding to the reported disturbance at Rayne's residence. Officer Converse suffered extremely serious injuries; Rayne suffered serious injuries as well.

The State's accident reconstruction expert initially thought that Rayne might have intentionally rammed Officer Converse's vehicle. The expert later learned, however, that Officer Converse had not activated his lights or sirens at the time of the collision. Consequently, the State's expert ultimately concluded that Rayne did not intentionally cause the collision.

The principal charge against Rayne was second-degree assault, relating to the collision with Officer Converse. At the close of the State's evidence, the trial court denied a motion for judgment of acquittal as to the form of second-degree assault that entails a reckless or grossly negligent battery. The court, however, granted Rayne's

motion for judgment of acquittal on the intent-to-frighten form of second-degree assault. The court said that it would not instruct the jury about the intent-to-frighten form of the crime, and it directed the State not to mention that form of the crime to the jury.[2]

The issue of other-crimes evidence came to a head when Rayne took the stand. On direct examination, Rayne testified that he had never taken Serax before June 8, 2015. Apparently because of the allegedly unanticipated effect of the drug, Rayne claimed to remember little of what occurred over the course of the evening. He specifically claimed not to recall the collision with Officer Converse, but (a bit incongruously) he also denied that he had had any intention to harm a police officer.

On cross-examination, the State began to explore Rayne's previous experiences with anti-depressants. When defense counsel objected on the ground that the questions were irrelevant and more prejudicial than probative, the court excused the jury.

Outside the presence of the jury, Rayne testified about his experiences with opioids and prescription drugs. He conceded that he had never previously had a black-out similar to the one that he claimed to have experienced after taking Serax on the evening before he collided with Officer Converse. When asked whether he had "harmed the police before, on every prior interaction [he had] ever had with them[,]" Rayne responded, "No."

After hearing argument, the court ruled that the State could introduce evidence that Rayne had been combative in prior interactions with the police when he was not

[2] The trial judge also granted the defense's motion for judgment of acquittal as to a second-degree assault on Rayne's girlfriend.

under the influence of an anti-anxiety medication. The court reasoned that this evidence was relevant to show absence of mistake or accident, an exception to Md. Rule 5-404(b), which generally prohibits the admission of evidence of other crimes or wrongs to prove "the character of a person in order to show action in conformity therewith."

When the jury returned, the State questioned Rayne about his dependence on opioids and his abuse of prescription drugs such as Vicodin. The State established that Rayne had never experienced a black-out similar to the one that he claimed to have experienced on June 9, 2015. The court then permitted the State to question Rayne about four prior encounters with the police in 2011 and 2012.

In the first, Rayne barricaded himself in his house, got into a fight with the officers, injured an officer, and was injured himself when the police responded to a call about a domestic dispute. In the second, Rayne fought the officers, resisted arrest, and was injured when the police responded to another call about a domestic dispute. In the third, Rayne tried to barricade himself in the house, punched an officer in the face, and scuffled with the officer when the police responded to yet another call about a domestic dispute. In the fourth, Rayne grabbed a cell phone out of his mother's hand after she tried to call 911 and damaged the backseat of a police car (apparently after he had been arrested).

Rayne testified that he could not recall those events. In response, the court permitted the State to elicit rebuttal testimony concerning the first and third incidents.

Detective Adam Walter testified about the first incident. According to the detective, he responded to a report of a domestic dispute involving Rayne. Rayne had

barricaded himself inside the residence and used his body weight to keep the door shut. The officers ordered Rayne to open the door, show his hands, and come outside, but he did not initially comply. After a lengthy back-and-forth, Rayne ultimately opened the door.

Officer Jesse Kissinger testified about the third incident. According to the officer, he was called to Rayne's residence because of a report of a "domestic situation," and Rayne failed to comply with an order to exit. When the officer and his colleagues heard a woman inside the residence scream for help, they made a forced entry. Once the officers were inside, Rayne punched Officer Kissinger and another officer. The police used pepper spray to subdue Rayne, who also suffered a laceration on the top of his head. According to Officer Kissinger, Rayne did not obey the officers for the duration of the event.

DISCUSSION

Whether the trial court properly admitted evidence of Rayne's other wrongs during cross-examination or during rebuttal turns on the application of Maryland Rule 5-404(b), which provides:

> 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.

"The primary concern underlying the Rule is a 'fear that jurors will conclude from evidence of other bad acts that the defendant is a "bad person" and should therefore be

convicted, or deserves punishment for other bad conduct and so may be convicted even though the evidence is lacking.'" *Hurst v. State*, 400 Md. 397, 407 (2007) (quoting *Harris v. State*, 324 Md. 490, 496 (1991)); *accord Winston v. State*, 235 Md. App. 540, 562 (2018). Rule 5-404(b) is designed to protect the person who committed the "other crimes, wrongs, or acts" from an unfair inference that he or she is guilty not because of the evidence in the case, but because of a propensity for wrongful conduct. *Hurst v. State*, 400 Md. at 407; *see also Wynn v. State*, 351 Md. 307, 317 (1998) (stating that the "rationale underlying the exclusion of other crimes evidence is that a jury, confronted with evidence that a defendant committed another crime, may utilize improperly the evidence to conclude that the defendant is a 'bad person' and, therefore, should be convicted of the charges for which he is on trial"); *Sessoms v. State*, 357 Md. 274, 281 (2000) (stating that Rule 5-404(b) is "designed to ensure that a defendant is tried for the crime for which he or she is on trial and to prevent a conviction based on reputation or propensity to commit crimes, rather than the facts of the present case"); *accord Winston v. State*, 235 Md. App. at 562.

Rule 5-404(b) does, however, recognize several exceptions. Specifically, a court may admit evidence of other crimes, wrongs, or acts "for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident." *Id.*

"Before evidence of prior bad acts or crimes may be admitted, the trial court must engage in a three-step analysis." *Hurst v. State*, 400 Md. at 408 (citing *State v. Faulkner*, 314 Md. 630, 634-35 (1989)). "First, the court must decide whether the evidence falls

within an exception to Rule 5-404(b)." *Id.* (citing *State v. Faulkner*, 314 Md. at 634). "Second, the court must decide 'whether the accused's involvement in the other crimes is established by clear and convincing evidence.'" *Id.* (quoting *State v. Faulkner*, 314 Md. at 634). "Finally, the court must balance the necessity for, and the probative value of, the other crimes evidence against any undue prejudice likely to result from its admission." *Id.* (citing *State v. Faulkner*, 314 Md. at 635).

Our focus is solely on the first step in the analysis: whether the evidence falls into one of the recognized exceptions. "This determination does not involve discretion; on review by this Court, it 'is an exclusively legal [question], with respect to which the trial judge will be found to have been either right or wrong.'" *Page v. State*, 222 Md. App. 648, 661 (2015) (quoting *Oesby v. State*, 142 Md. App. 144, 159 (2002)).

To satisfy the first step in the analysis, the evidence of another crime or wrong must have "special relevance" to the case, meaning that it must be "'substantially relevant to a contested issue in the case,'" and "'must not be offered merely to prove criminal character.'" *Page v. State*, 222 Md. App. at 662 (quoting *Terry v. State*, 332 Md. 329, 334 (1993)). To overcome this "'initial hurdle,'" the evidence of another crime or wrong must be more than just "'technically or minimally relevant to some formal issue in the case other than criminal propensity'"; it must also be substantially relevant "'to a *genuinely contested issue* in the case.'" *Id.* (quoting *Emory v. State*, 101 Md. App. 585, 602 (1994)) (emphasis in original).

In permitting the State to question Rayne about his previous, violent encounters with the police and to introduce rebuttal testimony about those events, the circuit court

relied on the exception for absence of mistake or accident. Absence of accident entails evidence that the defendant acted intentionally; absence of mistake entails evidence that the defendant acted knowingly. *See* 5 Lynn McLain, *Maryland Evidence: State and Federal*, § 404:5(i), at 768 (3d ed. 2013).

"In order for the exception [for absence of mistake] to apply, the defendant generally must make some assertion or put on a defense that he or she committed the act for which he or she is on trial, but did so by mistake." *Wynn v. State*, 351 Md. at 330-31. In addition, "the crime or bad act allegedly committed by mistake must be the same crime or bad act for which the defendant is on trial." *Id.* at 332.

Thus, for example, in *Cousar v. State*, 198 Md. App. 486 (2011), the defendant was charged with committing an "unnatural or perverted sexual practice" after he defecated in the victim's mouth while holding her at gunpoint. *Id.* at 494. The defendant admitted that he may have defecated in the victim's mouth, but claimed to have done so accidentally, in the course of a consensual sexual encounter. *See id.* at 502. In response, the State called another woman, who testified that the defendant had defecated in her mouth as well while holding her at gunpoint. *Id.* at 494-95. This Court affirmed the introduction of the second woman's testimony, because it refuted the defense of mistake or accident and concerned the same crime as the one for which the defendant was on trial. *Id.* at 503-04.

The exception for absence of accident or mistake may apply when the State attempts to refute a defendant's assertion that he or she did not act knowingly or intentionally. In this case, however, there was simply no basis to contend that Rayne

knowingly or intentionally crashed into Officer Converse's patrol car. In its opening statement, the State twice referred to the collision as an "accident." The State's expert testified that Rayne did not intentionally ram the officer's vehicle. In response to Rayne's motion for judgment of acquittal at the end of the State's case, the court agreed that the evidence would not support a conviction for the "intent to frighten" variety of second-degree assault, allowed the assault charge to go forward only the theory that Rayne had been reckless or grossly negligent, and prohibited the State from arguing to the jury that Rayne had acted intentionally. In addition, the court instructed the jury on the unintentional battery form of second-degree assault, under which a defendant may be convicted for reckless or grossly negligent conduct. Finally, in closing argument, the prosecutor repeatedly asserted that Rayne had been "reckless," but did not argue that he had acted intentionally. In the absence of any evidence that Rayne had knowingly or intentionally assaulted Officer Converse, the exception for absence of accident or mistake had no conceivable application: it was not substantially relevant to a contested issue.

The issue of accident or mistake was similarly irrelevant to the charges of theft or malicious destruction. Rayne did not contend that he accidentally or mistakenly shoplifted from the Wawa or that he accidentally or mistakenly destroyed his neighbor's property. Instead, he contended that he was unable to form the specific intent to commit those crimes, because of the alleged effect of the new medication that had taken earlier in the evening. Again, the exception for absence of accident or mistake did not apply.

Even if the exception for absence of accident or mistake could somehow apply in this case, the court would still have erred in introducing evidence of Rayne's other

crimes, because the other crimes were not "the same crime or bad act for which the defendant [was] on trial." *Wynn*, 351 Md. at 332. Here, the crimes for which Rayne was on trial were assaulting Officer Converse by crashing into the officer's patrol car while driving recklessly on bald tires, at 80 miles per hour, on a residential street, in the rain; shoplifting from a convenience store; and maliciously destroying his neighbor's property. The other crimes involved resisting arrest, fighting with police officers, barricading himself in his house to avoid arrest, damaging the upholstery in a police car after one of his arrests, and grabbing a cell phone from his mother to prevent her from calling the police. One need only describe the other offenses in order to show that they are obviously not the "same" crimes as those for which Rayne was on trial. As Rayne puts it in his reply brief, "The only common denominator between the incident involving Officer Converse and Rayne's previous interactions with the police was the fact that the victim in each case was a police officer."

In defending the circuit court's ruling, the State cites *Estelle v. McGuire*, 502 U.S. 62, 69-70 (1991). In that case the Supreme Court held that even if the defendant does not claim that a victim was injured by accident, the prosecution may introduce evidence of other crimes or wrongs in order to dispel any inference of accident and to discharge its burden of proving criminal intent. *Estelle v. McGuire* does not assist the State in this case, because the jury had no evidentiary basis on which to conclude that Rayne injured Officer Converse intentionally (as opposed to recklessly or negligently).

Recognizing that this case involves at most a reckless or grossly negligent act, the State also cites *Duckworth v. State*, 323 Md. 532 (1991). In that case Duckworth shot

and seriously wounded his fiancée's three-year-old daughter (*id.* at 535-36), but claimed that the gun went off by accident and that he had forgotten that it was loaded. *Id.* In response, the State established that a week earlier Duckworth had shot the child with a BB gun. *Id.* at 538-39. The jury convicted him of battery and child abuse, on the theory that he had wounded the child by recklessly handling a firearm. *See id.* at 544.

On appeal, the Court of Appeals rejected Duckworth's contention that evidence of the earlier shooting was "irrelevant" (not that it was inadmissible under the common-law principles that preceded the formal adoption of Rule 5-404(b)). *Id.* The Court of Appeals held the evidence to be relevant, because the jury could have concluded "that the accidental discharge of the BB gun in the earlier incident was a warning to Duckworth that should have reinforced the need for substantial caution when handling firearms." *Id.* Hence, Duckworth's "failure, on the occasion of the shooting charged in the indictment, to heed that warning exacerbated the recklessness involved in the crime charged." *Id.*

Duckworth adds nothing to the analysis in this case. Unlike the earlier shooting incident in *Duckworth*, Rayne's other crimes (principally, assaulting police officers) did not serve as a warning that he needed to exercise substantial caution when driving on bald tires on residential streets in the rain. The other-crimes evidence had nothing to do with proving that Rayne was reckless when he fled from the police at 80 miles per hour, on wet streets, in a car whose tires had little traction.

In summary, the other-crimes evidence in this case did not, in our judgment, fit into the exception for absence of accident or mistake. The State, therefore, has not satisfied the first of the three necessary conditions for the admissibility of that evidence.

See Wynn v. State, 351 Md. at 324. Accordingly, we must reverse Rayne's convictions and remand the case for a new trial.[3]

JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY REVERSED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY WICOMICO COUNTY.

[3] Because the State does not argue that the erroneous admission of the other-crimes evidence was harmless beyond a reasonable doubt, we do not consider that possibility.