Circuit Court for Baltimore City
Case No. 816279001

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2726

September Term, 2016

ALMINEO PETERSEN

v.

STATE OF MARYLAND

Eyler, Deborah S.
Wright,
Graeff,

JJ.

Opinion by Wright, J.

Filed: August 22, 2018

Almineo Petersen, appellant, appeals his conviction from the Circuit Court for Baltimore City for failure to comply with a Protective Order in violation of Md. Code (1980, 2012 Repl. Vol.), § 4-509 of the Family Law Article ("FL").[1]

On September 6, 2016, police arrested Petersen and charged him with one count of failure to comply with a Protective Order. On January 6, 2017, a jury trial was held. At the close of the State's case, defense counsel moved for judgment of acquittal. The court denied the motion. On January 9, 2017, a jury found Petersen guilty of violating a

[1] **§ 4-509. Penalties.**

(a) *In general*. -- A person who fails to comply with the relief granted in an interim protective order under § 4-504.1(c)(1), (2), (3), (4)(i), (7), or (8) of this subtitle, a temporary protective order under § 4-505(a)(2)(i), (ii), (iii), (iv), (v), or (viii) of this subtitle, or a final protective order under § 4-506(d)(1), (2), (3), (4), or (5), or (f) of this subtitle is guilty of a misdemeanor and on conviction is subject, for each offense, to:

(1) for a first offense, a fine not exceeding $1,000 or imprisonment not exceeding 90 days or both; and

(2) for a second or subsequent offense, a fine not exceeding $2,500 or imprisonment not exceeding 1 year or both.

(b) *Prior conviction under § 3-1508 of the Courts Article*. -- For the purpose of second or subsequent offender penalties provided under subsection (a)(2) of this section, a prior conviction under § 3-1508 of the Courts Article shall be considered a conviction under this section.

(c) *Arrest*. -- An officer shall arrest with or without a warrant and take into custody a person who the officer has probable cause to believe is in violation of an interim, temporary, or final protective order in effect at the time of the violation.

Protective Order and sentenced him to one-year imprisonment.[2] Petersen filed a timely notice of appeal.

Petersen asks this Court two questions that we have re-worded and consolidated for clarity:[3]

> 1. Did the trial court properly exercise its discretion in allowing testimony about prior bad acts?
>
> 2. Did the trial court properly exercise its discretion when it declined Petersen's request for instructions regarding *mens rea* and the defense of mistake of fact.

For the reasons below, we answer both questions in the affirmative and affirm the judgment of the court.

[2] Petersen was sentenced to one year because under FL § 4-509(a)(2) "a fine not exceeding $2,500.00 or imprisonment not exceeding 1 year or both" is permissible for a second or subsequent offense. Petersen was convicted for violating the Protective Order twice prior to this case.

[3] In his brief, Petersen asks:

> 1. Did the trial court abuse its discretion by allowing Ms. Harcum to testify about prior bad acts that had no special relevance to a contested issue and were substantially more prejudicial than probative?
>
> 2. Did the trial court abuse its discretion by failing to instruct the jury on mistake of facts because some evidence was generated that Mr. Petersen mistakenly believed Ms. Harcum did not reside, and was not present, at her mother's house?
>
> 3 Did the trial court abuse its discretion by failing to instruct the jury on the *mens rea* required for Violation of Protective Order because violating a protective order is not a strict liability offense?

BACKGROUND

The following evidence was presented by the State at trial. Ms. Harcum and Petersen dated each other for a year and a half before ending their relationship in December 2015. On December 22, 2015, the District Court for Baltimore City issued a Final Protective Order ("Protective Order") against Petersen. The Protective Order, effective through December 21, 2016, ordered Petersen not to abuse, threaten to abuse, and/or harass, or contact Ms. Harcum. The Protective Order further prohibited Petersen from entering Ms. Harcum's residence and ordered that Petersen stay away from her place of employment.

On September 9, 2016, Ms. Harcum called 911 from her mother's home and stated that Petersen was outside the home "knocking and kicking" on the door, but left before police arrived. Around 2:00 a.m., two Maryland State Police Officers, Huy Dinh and Michael Levasseur, responded to the 911 call. The Officers located and arrested Petersen less than a mile away from Ms. Harcum's mother's home.

Ms. Harcum testified about the events that occurred on September 9, 2016, after testifying about an alleged incident that occurred on September 7, 2016 (the "September 7th incident"), over Petersen's objection.

Ms. Harcum testified that on September 7, 2016, at about 10:00 p.m., Petersen approached her as she was "getting off the bus from the subway to [her] mom's house." Ms. Harcum testified that during that encounter with Petersen, he asked her to drop the restraining order. Ms. Harcum testified that after she told Petersen no, he grabbed her,

and began choking her "saying B I hate you. I hope you die. I should have killed you when I had the chance."

Ms. Harcum further testified that on September 9, 2016, around 2:00 a.m., she was sleeping on a couch downstairs near the door of her mother's home and was awakened when she heard knocks, bangs, and the twisting of the doorknob. She further testified that she heard a voice, which she recognized to be Petersen's stating, "open the door." Ms. Harcum testified that she did not open the door. She went upstairs to tell her mother she was going to call 911 and proceeded to make the call. A tape of the call was played for the jury, where Ms. Harcum told the operator that she had a Protective Order against Petersen but he was attempting to enter the home.

Officer Dinh testified that he responded to Ms. Harcum's call. Officer Dinh stated that Ms. Harcum told him that she identified Petersen by looking out the window of the home. Police units performed an area canvas search, using the description of Petersen, and found a man matching the description fifteen to twenty minutes later, less than a mile away from the home, at a convenience store. Officer Dinh confirmed it was Petersen and arrested him.

Officer Levasseur also responded to Ms. Harcum's call, but stayed in the vehicle when Officer Dinh spoke with her, and when Petersen was arrested. Officer Levasseur testified that Petersen told him that he went to Ms. Harcum's mother's home to bring his daughter cupcakes and that he could not believe he was being arrested. Officer

Levasseur testified that when Petersen was arrested he did not have any cupcakes on his person.

Following an off-the-record discussion about the jury instructions, the circuit court proposed the following instruction for the crime of violating a Protective Order:

> In order to convict the Defendant of violating a Protective Order the State must prove:
>
> 1) that there was a lawful protective order in place;
>
> 2) that the Defendant was served with a protective order and;
>
> 3) that the Defendant violated one of the conditions of the protective order on September 9, 2016, including but not limited to:
>
> A) that the Defendant shall not abuse, threaten to abuse or harass Ashley Har[cum];
>
> B) that the Defendant shall not contact (in person, by telephone, in writing or by any other means) or attempt to contact Ashley Har[cum] and;
>
> C) that the Defendant shall not enter the resident of Ashley Har[cum] at 5212 Bowleys Lane, Apartment . . . Baltimore, Maryland, 21206 or wherever the protective party resides (residence includes yards, grounds, outbuilding and common areas surrounding the dwelling).

Defense counsel requested that the circuit court instruct the jury: "Defendant is charged with the crime of knowingly violating a Protective Order." The State opposed the instruction, arguing that Petersen's proposed instruction would add an element to the crime, and that he had not elicited testimony regarding the mistaken belief that he was supposedly laboring under. The court reviewed the relevant statute and concluded that it did not require a knowing violation. In further support of that conclusion, the court

pointed to the fact that the offense was a misdemeanor and that there was no case law requiring the requested instruction.

Defense counsel also requested an instruction on the defense of mistake of fact. The circuit court paraphrased defense counsel's arguments as follows:

> [T]he argument seems to be that because either Ms. Har[cum's] mother was residing there, that the protective order didn't specifically state 1123 North Calhoun. It did state the Bowleys Lane address and the statement that's in evidence about Mr. Petersen telling one of the officers that he was delivering cupcakes to a daughter . . . that's the only testimony, at 2:00 in the morning that he had a right to be there.

According to the circuit court, Petersen's claim involved a mistake of law, not a mistake of fact:

> The argument, if you will, or the justification that because Mom was there or I thought the daughter was there, that to me is . . . more a mistake of law. I will concede that they're close and so forth but I think that's . . . an issue as to what the legal effect of the order, whether under all these circumstances he's barred from being at the door at her mother's where if she's in there or not to me is a matter of law and not as you know, I went to the wrong address or whatever.

Defense counsel did not take issue with the court's characterization of his argument, but disputed whether the supposed mistake was one of law or fact:

> And, Judge, I would just argue that this -- is we're not arguing that he was mistaken on the law. He knew the law. He knew he had to stay away from where she resides and the only notice of where she resides that he had was 5212 Bowley Lane . . . . And if it were true, it were true that his belief *that she did not live there*, and she stated that she only moved there the 7th, if it were true that his belief was correct, he would not be guilty. That is what a mistake of fact offense is.

(Emphasis added). Defense counsel did not argue that Petersen believed that Ms. Harcum was not present in the home, only that he did not *know* that she resided there.

The circuit court rejected defense counsel's argument because the Protective Order specified that it prohibited Petersen from going to "*wherever* the protect[ed] party resides." (Emphasis added). After instructions and deliberation, the jury convicted Petersen for violating the Protective Order.

Additional facts will be included as they become relevant to our discussion below.

DISCUSSION

Both issues before us require the application of nuanced standards of appellate review with respect to the abuse of discretion standard. As to Petersen's first issue, concerning the admissibility of Ms. Harcum's testimonial evidence, we described the nature of our review of a trial court's admission of evidence as follows:

> A ruling on the admissibility of evidence ordinarily is within the trial court's discretion. *Blair v. State*, 130 Md. App. 571, 592 (2000). This Court generally reviews such rulings for an abuse of discretion. *State v. Simms*, 420 Md. 705, 724-25 (2011). "An abuse of discretion occurs 'where no reasonable person would take the view adopted by the [trial] court,' or when the court acts 'without reference to any guiding rules or principles.'" *Brass Metal Prods. v. E-J Enters.*, 189 Md. App. 310, 364 (2009) (quoting *King v. State*, 407 Md. 682, 697 (2009)).

Hajireen v. State, 203 Md. App. 537, 552 (2012).

Because a court does not have discretion to misapply the law, we review the circuit court's rulings of law nondeferentially, even when the rulings are made in the course of deciding a discretionary matter. *Wilson–X v. Department of Human Resources*, 403 Md. 667, 675-76 (2008) ("trial judges do not have discretion to apply inappropriate legal standards, even when making decisions that are regarded as discretionary in nature"); *Ehrlich v. Perez*, 394 Md. 691, 708 (2006) ("[E]ven with respect to a

discretionary matter, a trial court must exercise its discretion in accordance with correct legal standards. We review *de novo* a trial judge's decision involving a purely legal question." (Citations and internal quotation marks omitted.)). With respect to the admission of "bad acts" or "other crimes" evidence, we have plenary review over the legal determination of whether the challenged evidence meets a "special relevance" exception. *Wilder v. State*, 191 Md. App. 319, 335 (2010) (citing *Streater v. State*, 352 Md. 800, 809 (1999)).

Similarly, when deciding whether a trial court abused its discretion in refusing to give a jury instruction, "we consider whether the requested instruction was a correct statement of the law, whether it was applicable under the facts of the case, and whether it was fairly covered in the instructions actually given." *Steward v. State*, 218 Md. App. 550, 565 (2014) (citations omitted).

A. Preservation of Petersen's appeal

As a preliminary matter, and because the State devotes a significant amount of ink to this claim in their brief, we address whether this issue is properly preserved for our review before discussing if the circuit court correctly found that Ms. Harcum's testimony about the September 7th incident was relevant evidence. Prior to the trial, at a pretrial hearing, Petersen moved *in limine* to exclude evidence that he assaulted and threatened Ms. Harcum on September 7, 2016, *inter alia*. At the hearing, the State argued that the September 7th incident was relevant to prove that Petersen had knowledge that the Protective Order was in effect before September 9, 2016. The State further argued that

the September 7th incident was relevant evidence because it helped establish harassment, one basis for the charged violation of the Protective Order as well as Ms. Harcum's state of mind on September 9, 2016.

At the pretrial hearing on January 5, 2017, Petersen argued that admitting evidence from the September 7th incident would adversely impact his decision to testify at trial and would cause a "chilling on [the] right against self-incrimination." Further, Petersen contended that the State could only introduce evidence of his knowledge of the Protective Order if he raised a lack of knowledge as a defense at trial. Finally, Petersen argued that the September 7th incident was not relevant to show a continuing course of action or pattern of harassment.

The circuit court found that the September 7th incident was relevant to show knowledge and harassment because of the temporal proximity between the two incidents, and it concluded that the evidence's probative value outweighed any undue prejudice from its admission.[4]

As to knowledge, the circuit court found that the September 7th incident was relevant to proving that Petersen had knowledge of the Protective Order and motive to come to Ms. Harcum's mother's home. The court further found that it was relevant evidence to counter Petersen's defense that he did not know Ms. Harcum was at her mother's home on September 9, 2016. Lastly, the court found that the evidence was

[4] During the pretrial hearing on January 5, 2017, relying on the clear and convincing evidence standard, the circuit court ruled to allow Ms. Harcum's testimony about the September 7th incident.

relevant to prove harassment because it occurred two days before the charged offense and because harassment was one of the acts prohibited by the Protective Order.

At trial, when the State offered evidence of the September 7th incident through the testimony of Ms. Harcum, there was the following colloquy:

> [THE STATE]: And was there anything in particular on the 7th that occurred that caused you to stay at your mother's house?
>
> [MS. HARCUM]: Yes.
>
> [THE STATE]: And what happened on that day?
>
> [MS. HARCUM]: I was getting off work about ten o'clock and I was getting off work, I was walking towards Eutaw and Mr. Petersen had approached at me [sic] to ask me to drop the restraining order. Once I had told him no, that I wasn't, he got verbally upset. He started cursing and saying rude things out of his mouth. Then he actually grabbed me from behind and started choking me. And he stated that, oh, you can write the jurors to get me off probation. Once I told him-

Petersen objected to Ms. Harcum's testimony and during a bench conference stated:

> [DEFENSE]: Judge, I understand it is the defendant's statements but the statements is [sic] more prejudicial than probative of any facts and issues here today. I know this Court ruled that the prior incident could but the contents of what she's alleging is more prejudicial than it has any probative value for what we're here for today.

In response to Petersen's objection, the following exchange occurred between the court and counsel:

> [THE COURT]: Well, just for the record. She testified to that yesterday, when I ruled the statement was coming in for the purposes of, you know, showing knowledge, if you will, of the protective order that he's charged with or violating, I mean, we know it's her testimony. If that's what she asked. I can direct them to-I'm not sure they know the difference, quite

> frankly, between probation and whatever as opposed to a protective order but we all know it is different.
>
> [THE COURT]: Yeah. I mean it is what it is. And I understand what the case law is this stuff and, you know, your about prejudicial value-
>
> [DEFENSE]: Yeah.
>
> [THE COURT]: -- but it is what it is. And if that's what she's saying is what happened then I'll direct them, you know, I'll give them a limited instruction that, you know, he's charged with a violation of a final protective order that's in evidence as State's 1. They are not to consider any references to probation or other, you know, at this point other criminal acts or court dispositions other than the final protective order. Is that-you know-
>
> [DEFENSE]: Sure.
>
> [THE COURT]: I mean I understand your objection but that's what I'll do.
>
> [DEFENSE]: *And my continuing objection to that.*
>
> [THE COURT]: I understand.

(Emphasis added).

After reading the record, it appears that Ms. Harcum misspoke during the trial when she made mention of Petersen's probation. Later during trial, when asked about the September 7th incident, Ms. Harcum made it clear that Petersen approached her about dropping the Protective Order and she refused. Relying on *Boyd v. State*, 399 Md. 457, 478 (2007), *Reed v. State*, 353 Md. 628, 638 (1999), and *Klauenberg v. State*, 355 Md. 528, 539 (1999), the State argues that Petersen did not preserve this issue for our review, because he failed to make a contemporaneous objection at trial to the relevance of the

evidence related to the September 7th incident, which is required by Md. Rule 4-323(a).[5] A more thorough and complete review of the record reveals that the State's preservation argument is meritless.

[5] **Md. Rule 4-323(a). Method of making objections.**

(a) Objections to evidence. An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived. The grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative, so directs. The court shall rule upon the objection promptly. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court may admit the evidence subject to the introduction of additional evidence sufficient to support a finding of the fulfillment of the condition. The objection is waived unless, at some time before final argument in a jury trial or before the entry of judgment in a court trial, the objecting party moves to strike the evidence on the ground that the condition was not fulfilled.

(b) Continuing objections to evidence. At the request of a party or on its own initiative, the court may grant a continuing objection to a line of questions by an opposing party. For purposes of review by the trial court or on appeal, the continuing objection is effective only as to questions clearly within its scope.

(c) Objections to other rulings or orders. For purposes of review by the trial court or on appeal of any other ruling or order, it is sufficient that a party, at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court. The grounds for the objection need not be stated unless these rules expressly provide otherwise or the court so directs. If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection at that time does not constitute a waiver of the objection.

(d) Formal exceptions unnecessary. A formal exception to a ruling or order of the court is not necessary.

Maryland Rule 8-131(a) governs our scope of review in considering issues on appeal. "Ordinarily, the appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." Md. Rule 8-131(a). Although this Court may "address the merits of an unpreserved issue," that discretion "is to be rarely exercised and only when doing so furthers, rather than undermines, the purposes of the rule." *Robinson v. State*, 410 Md. 91, 104 (2009); *Conyers v. State*, 354 Md. 132, 150 (1999). The purposes of Md. Rule 8-131(a) are furthered in "cases where prejudicial error was found and the failure to preserve the issue was not a matter of trial tactics." *Grandison v. State*, 425 Md. 34, 69-70 (2012) (quoting *Abeokuto v. State*, 391 Md. 289, 327 (2006)). In other words, if a party fails to raise a particular issue in the trial court, or fails to make a contemporaneous objection, Md. Rule 8-131(a) dictates that issue is waived.

Maryland Rule 4-323(a) provides that "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived. The grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative, so directs."

In addition, "[i]t is well-settled that when specific grounds are given at trial for an objection, the party objecting will be held to those grounds and ordinarily waives any grounds not specified that are later raised on appeal." *Klauenberg*, 355 Md. at 541

(citations omitted); *see also Gutierrez v. State*, 423 Md. 476, 488 (2011) (reiterating that "when an objector sets forth the specific grounds for his objection . . . the objector will be bound by those grounds and will ordinarily be deemed to have waived other grounds not specified") (citation omitted); *Robinson v. State*, 209 Md. App. 174, 202 (2012) ("Because [Hicks's] arguments were not raised below, they are not preserved for appellate review").

A contemporaneous general objection to the admission of evidence ordinarily preserves all grounds which may exist for the inadmissibility of the evidence for appellate review. The only exception is the ground to be stated, where the trial court requests that the ground be stated, and where the objector, although not requested by the court, voluntarily offers specific reasons for objecting to certain evidence. *Bazzle v. State*, 426 Md. 541, 561 (2012) (quoting *Boyd*, 399 Md. at 476).

The Court of Appeals addressed the preservation issues raised here in *Kang v. State*, 393 Md. 97 (2006), as follows:

> We recognized in some older cases that [t]o preserve an issue on appeal in regard to the admissibility of evidence, generally speaking there must be an objection made to the question eliciting the allegedly objectionable answer. Moreover, [g]enerally speaking, specific objection should be made to each question propounded, if the answer thereto is claimed to be inadmissible. Yet, as the Court of Special Appeals noted in its opinion here, *Kang v. State*, 163 Md. App. 22, 44 (2005), "trial advocates were oftentimes obligated to lodge repetitive and disruptive objections, over and over again, even though everyone in the courtroom knew that the objections were going to be overruled."
>
> Consequently, Md. Rule 4-323(b), adopted in 1984, was created to provide a trial judge with the discretion to grant a continuing objection and thus obviates the need to object persistently to similar lines of questions

> that fall within the scope of the granted objection: At the request of a party or on its own initiative, the court *may grant* a continuing objection to a line of questions by an opposing party. For purposes of review by the trial court or on appeal, the continuing objection is effective only as to questions clearly within its scope. As indicated by the test of the rule, this reprieve from the contemporaneous objection rule is obtained only through a discretionary grant by the trial judge.

Id. at 119-20. (Emphasis in original) (citations and internal quotation marks omitted).

After Petersen objected to the relevance of Ms. Harcum's testimony about probation, he made a continuing objection. The State has asked us to view this continuing objection in a vacuum and ignore the context in which the continuing objection was raised. It is abundantly clear to this Court (and to the circuit court) that Petersen was objecting to the relevance of the September 7th incident and that the mention of it was unduly prejudicial through his continuing objection. Based on the court's mention of the legal arguments about relevance and prejudicial value made during the pre-trial hearing, the presiding judge also recognized that Petersen was objecting to the relevance of Ms. Harcum's testimony. As such, this issue is properly preserved for our review.

Now we turn to the merits of Petersen's challenge to the testimonial evidence presented at trial.

B. The September 7th Incident

Petersen avers that Ms. Harcum's testimony about the September 7th incident was not admissible because it had not special relevance to a contested issue in the case and it was substantially more prejudicial than probative. We disagree.

Pursuant to Md. Rule 5-401, evidence is relevant when it has "any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without that evidence." Put another way, evidence is relevant when it is both material and probative. *See Snyder v. State*, 361 Md. 580, 591 (2000). "Evidence is material if it bears on a fact of consequence to an issue in the case[,]" *Smith v. State*, 218 Md. App. 689, 704 (2014) (citations omitted), whereas "[p]robative value relates to the strength of the connection between the evidence and the issue . . . 'to establish the proposition that it is offered to prove.'" *Id*. Even if evidence is deemed relevant, Md. Rule 5-402 provides that relevant evidence may also be excluded, "if its probative value is substantially outweighed by the danger of unfair prejudice confusion of the issues, or misleading the jury, or by the consideration of undue waste, delay, waste of time, or needless presentation of cumulative evidence."

We hold that Ms. Harcum's testimony regarding Petersen's conduct on September 7, 2016, prior to the September 9, 2016 incident when he came to Ms. Harcum's mother's home was relevant because it proved his knowledge of the Protective Order and his motive to go to the home. On September 7, 2016, Petersen accosted Ms. Harcum on the street and demanded that she drop the Protective Order, and two days later, he showed up at the home of Ms. Harcum's mother demanding that Ms. Harcum "open the door," and forcefully attempted to open the door. Given the temporal proximity between the two events, Petersen's actions on September 7, 2016, were at the very least, minimally relevant. *See Cook v. State*, 118 Md. App. 404, 417 (1997) (the temporality of an event

can be the basis for determining that the event is relevant).

In *Cook*, the appellant killed his significant other, apparently because she took a co-worker to and from work. *Id*. at 407-10. At trial, the victim's manager testified to a hostile confrontation two months prior to the murder, during which the appellant accused the manger of receiving a ride home from the victim. *Id*. at 414-16. Appellant contended his testimony was irrelevant, being too attenuated to demonstrate motive. We disagreed, holding that it was relevant because it showed that appellant "disapproved of and was upset with the victim driving [the co-worker]." *Id*. at 416-17.

Here, Ms. Harcum's testimony referred to Petersen's conduct two days before he was arrested for violating the Protective Order. The September 7th incident was related temporally even more closely than the testimony in *Cook* that this Court found to be relevant. Ms. Harcum's testimony went to Petersen's motive—demonstrating that he asked her to drop the restraining order and attacked her (verbally and physically) when she refused—days before he appeared at her mother's home knocking on the door and twisting the knob in an attempt to enter the property by force. Ms. Harcum's testimony was relevant because it tended to prove that Petersen was again attempting to violate the Protective Order when he showed up at Ms. Harcum's mother's home.

The testimony at trial was not excessively graphic. *Newman v. State*, 236 Md. App. 533, 550 (2018) (The prejudice that must be balanced against is unfair prejudice, which occurs when the evidence "produces such an emotional response that logic cannot overcome prejudice or sympathy needlessly injected into the case."). Ms. Harcum only

described the events as she remembered them from September 7, 2016, and the State only used that evidence in an attempt to prove that Petersen was aware of the Protective Order and had knowledge he was in violation of the order when he went to Ms. Harcum's mother's house demanding that Ms. Harcum open the door. The probative value of the evidence was not substantially unweighted by any prejudice to Petersen. *See Ware v. State*, 360 Md. 650, 672-73 (ruling that testimony of statements, including asking whether an individual was "bullet proof" made three hours before that individual was murdered, was probative of Ware's angry and violent frame of mind and not unfairly prejudicial).

Although we hold that the evidence is admissible, our inquiry does not end there, because even though we find that the evidence is relevant, Petersen avers that the evidence should be excluded because it was evidence of a prior bad act.

Evidence of a defendant's other crimes or bad acts are generally inadmissible. *See Wilder v. State*, 191 Md. App. 319, 343 (2010). Even if evidence of a prior bad act or crime is relevant, there is a well-grounded concern that evidence of such acts may predispose the jury to believe the defendant is guilty of the crime for which he is on trial. *Wynn v. State*, 351 Md. 307, 317 (1998). A defendant "should only be convicted 'by evidence which shows he is guilty of the offense charged, and not by evidence which indicates his guilt of entirely unrelated crimes.'" *Page v. State*, 222 Md. App. 648, 660 (2015) (quoting *Ross v. State*, 276 Md. 664, 669 (1976)).

The Court of Appeals has explained that evidence of other crimes may be admitted

if it has special relevancy, which means the evidence "is 'substantially relevant for some other purpose than to show a probability that he committed the crime on trial because he is a man of criminal character.'" *Ross*, 276 Md. at 669 (citation omitted). The *Ross* Court further clarified that its holding only applied if the prior bad acts of crimes evidence was introduced to prove "(1) motive, (2) intent, (3) absence of mistake, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, and (5) the identity of the person charged with the commission of a crime on trial." *Id*.

In 1993, the Court of Appeals adopted Title 5 of the Maryland Rules, which codified the *Ross* exceptions into Md. Rule 5-404(b), which states:

> **(b) Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts including delinquent acts as defined by Code, Courts Article, § 3-8A-01 is not admissible to prove the character of a person in order to show action in conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

The exceptions identified in Md. Rule 5-404(b) "are 'neither mutually exclusive nor collectively exhaustive.'" *Emory v. State*, 101 Md. App. 585, 616 (1994) (citation omitted). Additionally, the Court of Appeals has recognized additional exceptions including consciousness of guilt. *See Decker v. State*, 408 Md. 631, 640 (2009) (quoting *Thomas v. State*, 372 Md. 342, 351 (2002)) ("It is well established in Maryland that, '[i]f relevant, circumstantial evidence regarding a defendant's conduct may be admissible under Md. Rule 5-403, not as conclusive evidence of guilt, but as a circumstance tending

to show a consciousness of guilt.'").

To determine whether the evidence of the prior bad act is admissible, courts apply a three-part test. First, the trial court must decide if the evidence fits within one of the special relevancy exceptions as outline in Md. Rule 5-404(b). *Jackson v. State*, 230 Md. App. 450, 459 (2016) (citing *Ross*, 276 Md. at 664). As stated, *supra*, this determination is a question of law that does not involve the exercise of discretion. *Id*. at 458-59. Second, if an exception applies, then the court must determine whether the other crime is established by clear and convincing evidence. *Id*. at 459.[6] Finally, the court exercises its discretion by weighing the evidence "against any undue prejudice likely to result from its admission." *Id*.[7]

Turning to the first prong of the admissibility test, the admissibility of prior bad acts was relevant to prove Petersen's knowledge of the Protective Order. During the pre-trial hearing, the circuit judge made the following findings when he admitted the testimony concerning the September 7th incident:

> Oh, I - know, I think the statement " Bitch, I'll kill you," of "I hate you, bitch." I hope you die, f-ing bitch. I'll kill you right now," *et cetera*, is admission against - you know, it's an exception to the hearsay rule. It's also two days before - I mean, one, its an occasion of a violation of opening charge and in violation of the Final Protective Order in the 02 case. And it takes place two days before the alleged violation of mom's house two days later.
>
> Now the allegation here is as he was banging on the door, "I know you're

[6] Petersen does not challenge the fact that the September 7th incident was established by clear and convincing evidence.

[7] This prong of the three-part test was discussed *supra*.

> in there." Open the f-ing door. I need to talk to you," you know, if you violate the Order that says he's not supposed to have contact order and I don't know whether he did this or not, but there's another statement from him as he's banging on the door saying, "I know you're in there."
>
> I think it's very relevant to what's going on here in both cases. The admission against penal interest, a known subject to the hearsay rule under the circumstances and, you know, *I think it goes to the aspect of, you know, knowledge in a Protective Order and motive, et cetera . . . .*

(Emphasis added). During the trial, the judge reaffirmed the pre-trial ruling.

The State argues that testimony related to the September 7th incident was properly admitted and relevant to prove Petersen's knowledge, motive, and intent. The September 7th incident demonstrates that Petersen had knowledge of the Protective Order and to prove that offense the State must prove, beyond a reasonable doubt, that Petersen knew that the Protective Order was in effect.[8]

Petersen avers that the September 7th incident was not relevant because knowledge of the Protective Order was not a contested issue in the case. Additionally, Petersen protested that evidence adduced from Ms. Harcum's testimony, about the incident, was not relevant to prove that he knew Ms. Harcum would be at her mother's home or knew that she would be at the home when he went there in the wee hours of the morning. The State counters that the incident was relevant because Petersen confronted Ms. Harcum about the Protective Order while she was in route to her mother's house, and the September 7th incident showed that Petersen's motive and intent for the September 9,

[8] This is separate from the issue of whether the State had to prove that Petersen knowingly violated the Protective Order. We will discuss that issue *infra.*

2016 offense was to perpetrate the cycle of violence against Ms. Harcum in order to subdue her into rescinding the Protective Order she had lodged against him. *State v. Peterson*, 158 Md. App. 558, 589 (2004) ("Over time, the cycle becomes more intense, frequent, and violent, and the battered spouse, in a phenomenon termed 'learned helplessness,' becomes submissive, having come to believe that he or she lacks power to control the situation.").

Evidence of the September 7th incident had more significance than the knowledge component. We agree with the State that the evidence, that Petersen approached Ms. Harcum two days before at an address not listed in the Protective Order, tended to rebut Petersen's allegation of an innocent motive. It showed that Petersen's animosity towards Ms. Harcum for refusing to "drop the restraining order" culminated in Petersen just 28 hours later, banging and kicking on the door of the house where Ms. Harcum was staying.[9]

This evidence was important, as the defense Petersen put on was that he was not at Ms. Harcum's mother's house to abuse, threaten, harass, or contact Ms. Harcum but to deliver baked goods to his daughter at 2:00 a.m. Therefore, the jury had to decide what was Petersen's motive when he arrived on Ms. Harcum's mother's doorstep.

Jury Instructions

[9] In his brief, Petersen conceded that, to establish a violation of the Protective Order, the State only had to prove that Petersen either went to Ms. Harcum's "residence," or that regardless of where she resided, he contacted her or attempted to contact her.

At the close of all evidence, the circuit court instructed the jury of the law applicable to the case. As part of the jury instructions, the court proposed to give the following jury instruction regarding the elements of the offense of violating a Protective Order which we will repeat for ease of discussion:

In order to convict the Defendant of violating a protective order the State must prove:

> 1) that there was a lawful protective order in place;
>
> 2) that the Defendant was served with a protective order and;
>
> 3) that the Defendant violated one of the condition of the protective order on September 9, 2016, including but not limited to:
>
> A) that the Defendant shall not abuse, threaten to abuse or harass Ashley Har[cum];
>
> B) that the Defendant shall not contact (in person, by telephone, in writing or by another other means) or attempt to contact Ashley Har[cum] and;
>
> C) that the Defendant shall not enter the residence of Ashley Har[cum] at 5212 Bowleys Lane, Apartment . . . Baltimore, Maryland, 21206 or wherever the protective party resides (residence includes yards, grounds, outbuildings and common areas surrounding the dwelling).

FL § 4-509 states that a person who fails to comply with the relief granted by an interim protective order, a temporary protective order, or a final protective order is guilty of a misdemeanor and on conviction is subject to each offense, to one or the first offense, a fine not exceeding $1,000.00 or imprisonment not exceeding 30 days or both, and for a second and subsequent offense, a fine not exceeding $2,500.00 or imprisonment not exceeding one year or both.

Defense counsel requested that the circuit court instruct the jury as follows: "Defendant is charged with the crime of knowingly violating a Protective Order." The court declined to add this sentence to the proposed instruction.

The circuit court properly denied defense counsel's request because it obfuscates what *knowledge* meant with respect to a violating a Protective Order. Defense counsel's request in effect conflated the knowledge requirement necessary for a specific intent crime, where the State would have to prove that the defendant *knowingly* violated the protective order, with the level of knowledge required necessary to violate a protective order, which is simply *knowledge* that the order existed.

We are not persuaded that FL § 4-509 requires that a person knowingly violate an order of protection. The statute does not contain any language to that effect, and we may not read language into a statute that is not expressly stated or clearly implied, or embellish a statute to expand its meanings. *Park and Planning v. Anderson*, 164 Md. App. 540, 571 (2005) (quoting *Johnson v. Mayor & City Council of Baltimore City*, 371 Md. 1, 11 (2005)).

The legislature could have included the word "knowingly" if it so desired. *See Sambo v. State of Maryland*, 206 Md. App. 508, 537 (2012) (where the Court of Appeals discussed the knowledge requirement in a statute about transporting firearms); *Chow v. State*, 393 Md. 431, 463-66 (2006) (where the Court of Appeals discussed the knowledge requirement in a statute limiting the transfer of firearms); *Ishola v. State*, 404 Md. 155,

160 (2008) (where the Court of Appeals discussed the knowledge requirement in a statute about assuming the identity of another); *Jeandell v. State*, 395 Md. 556, 557 (2006) (where the Court of Appeals discussed the knowledge requirement in a statute requiring sex offenders notify the state if they change their residence); *Greenway v. State*, 8 Md. App. 194, 195-97 (1969) (where this Court discussed the knowledge requirement in a statute that prohibits the sale of a motor vehicle which has the engine serial number removed or defaced).

The offense of violating a Protective Order involves three elements: (1) the issuance and service of a Protective Order upon the respondent; (2) the viability of that Protective Order at the time of the charged conduct; and (3) the actions that violate the provisions of the order. The relevant statute does not state an explicit knowledge element.

We have said that "[a] general *mens rea* or intent 'includes those consequences which (a) represent the very purpose for which an act is done (regardless of the likelihood of occurrence), or (b) are known to be substantially certain to result (regardless of desire).'" *Thornton v. State*, 397 Md. 704, 727 (2007) (quoting *McBurney v. State*, 280 Md. 21, 29 (1977)). "By contrast, a specific intent requires more than the general intent to do the same *actus reus*." *Id*. (emphasis in original).

We conclude that the legislature intended to omit the word "knowingly" in FL § 4-509 and will not read such an element into the statute. We hold that FL § 4-509 does not require that a violation of a protective order have been "knowing." Therefore, the circuit

court properly instructed the jury regarding general criminal intent, absent a specific *mens rea* requirement in FL § 4-509.

Petersen's reliance on *Com. v. Shea*, 467 Mass. 788, 794 (2014), to argue that the circuit court should have provided an instruction that required the State to prove that the contact was not accidental, is misplaced. *Shea* is factually distinguishable, and to the extent that it has any application here, it is to reinforce the State's position.

Shea concerned an order of protection issued in New Hampshire. *Id*. at 789-90. After the protective order was issued, the defendant reciprocated and sought a temporary protection order against the victim. *Id*. at 789. Following a hearing on that request, the victim encountered the defendant, who was hiding behind an open door in the stairwell in the courthouse. *Id*. at 789-90. The defendant appeared to take a picture of the victim and made statements to her regarding the ineffectiveness of protective orders. *Id*. at 790. The case was transferred to the State of Massachusetts, and the defendant proceeded to a trial in that state for the violation, at which she testified that the encounter was accidental. *Id*. at 793. The defendant was convicted.

On appeal, the defendant argued that New Hampshire law, not Massachusetts law, governed the prosecution for the violation of a protective order. The difference was significant. New Hampshire law required that a defendant "knowingly violate[] a protective order." *Id*. at 793. By contrast, in Massachusetts, as in Maryland, "the Commonwealth need not prove a knowing violation of a protection order; instead, the Commonwealth bears the burden of proving, beyond a reasonable doubt, that the

defendant knew that the relevant terms of the order were in effect." *Id*. at 792. The Supreme Judicial Court held that Massachusetts law applied.

Next, the Supreme Judicial Court considered whether the trial judge adequately instructed the jury that the State had to prove that the "defendant's alleged contact with the victim did not occur by accident," where the trial judge provided an instruction that deviated from the Massachusetts Model Jury Instructions for District Court. *Id*. at 79. In Massachusetts, the instruction is required "where there is evidence that the alleged contact may have occurred by accident, or that it was incidental to a legitimate, lawful activity such as attending a court hearing." *Id*. at 794. The Supreme Judicial Court found that the trial judge's instruction was inadequate, but deemed the error harmless because "no reasonable jury would have found [the defendant's] contacts with the victim to be accidental." *Id*. at 796.

Shea is factually distinguishable because there was no evidence in this case that Petersen's contact with Ms. Harcum was accidental. Petersen's defense, based on his statement to police, was that he had a legitimate reason for being at that place and during that time, *i.e.*, bringing his daughter cupcakes. The only knowing requirement was that Petersen *knew* that the Protective Order was in effect. The contact with Ms. Harcum was not inadvertent.

Moreover, to read a knowledge requirement into this statute, akin to one often found in specific intent statutes, would run afoul of the legislative intent in passing the statute. In *Coburn v. Coburn*, 342 Md. 244 (1996), another case involving a violation of

a protective order, the Court of Appeals noted:

> Domestic violence is the leading cause of injury to women in this country. According to some estimates, there are approximately four million incidents of domestic violence against women annually. The problem of domestic abuse, however, remained largely ignored by our society until the last two decades, when national efforts toward legal and social reform began to surface. Since then, domestic abuse has gained widespread public attention. Social service agencies developed battered women's shelters and hotlines, and state legislatures recognized that domestic violence needed to be adequately addressed. It is against this background that in 1980 the Maryland General Assembly enacted the domestic violence statute (the statute). §§ 4-501 through 4-516. The statute grants courts the power to issue civil protection orders, which can prohibit a perpetrator of domestic violence from, among other things, abusing, contacting or harassing the victim. Through the statute, victims of domestic abuse are offered access to the judicial system to seek emergency relief and protection from their abusers. It has been reported that fourteen-thousand victims sought relief from abuse through filing petitions for temporary protective orders in the courts of this state in 1994 alone. *The purpose of the domestic abuse statute is to protect and aid victims of domestic abuse by providing an immediate and effective remedy.* The statute provides for a wide variety and scope of available remedies designed to separate the parties and avoid future abuse. Thus, the primary goals of the statute are preventive, protective and remedial, not punitive. The legislature did not design the statute as punishment for past conduct; it was instead intended to prevent further harm to the victim.

Id. at 252 (citations and quotations omitted) (emphasis added).

Additionally, we are persuaded that abstaining from imposing a knowing requirement into the statute is consistent with the national trend to protect victims of domestic violence.[10] If we were to read a knowledge requirement into the statute and

[10] "Over the past twenty years, all fifty states have enacted laws intended to rein in domestic violence. Despite these efforts, police estimate that for each of the more than one million domestic violence crimes reported each year, three more go unreported. *Id.* In all, there are an estimated 1.8 to 4 million incidents of domestic violence each year." *State v. Ramos*, 305 P.3d 921, 930 (2013) (Maes, C.J., dissenting)

require the State to prove that every defendant knowingly violated a protective order, we fear that in doing so we would frustrate the legislature's purpose in passing the domestic violence statute and make it more challenging to convict those that violate these court orders. This would endanger victims because most reported violations occur within the first three months after the issuance of an order. *See* Christopher T. Benitez, M.D., Dale E. McNiel, Ph.D. & Renée L. Binder, M.D., *Do Protection Orders Protect?*, 38 J. AM. ACAD. PSYCHIATRY L. 376, 382 (2010). We will not make it more difficult to prosecute violations of protective orders.

Mistake of Fact

As to the issue of whether the circuit court should have given a mistake of fact instruction,[11] we hold that the court did not err. Even viewing Petersen's statement to the

(quoting David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L.J. 1153, 1158-59 (1995)).

[11] The requested instruction as to mistake of fact, Maryland Pattern Jury Instructions, Criminal 5:06, in this case would be as follows:

> You have heard evidence that the defendant's actions were based on a mistake of fact. Mistake of fact is a defense and you are required to find the defendant not guilty if all of the following three factors are present:
> (1) the defendant actually believed (alleged mistake);
>
> (2) the defendant's belief and actions were reasonable under the circumstances; and
>
> (3) the defendant did not intend to commit the crime of (crime) and the defendant's conduct would not have amounted to the crime of (crime) if the mistaken belief had been correct, meaning that, if the true facts were what the defendant thought them to be, the [defendant's conduct would not have

officer in a favorable light, the court determined that it was Petersen's belief that he was free to deliver baked goods even if Ms. Harcum was temporarily residing with her mother. A necessary element of a mistake of fact defense is that Petersen's conduct would not have amounted to a crime had the circumstances been as he believed them to be. *Marquardt v. State*, 164 Md. App. 95, 139 (2005).

A mistake of fact occurs "when the actor does not know what the actual facts are or believes them to be other than they are." *General v. State*, 367 Md. 475, 484 (2002). A mistake of fact defense requires that the defendant's actual belief must have been reasonable and that, had the "mistaken belief" had been correct, the defendant would not have been criminally liable. MPJI-CR 5:06.

The best way to describe a mistake of law is that all we are all deemed to know what it is that is legal, and if we make a mistake that we find later about what is legal and illegal, we can't have our conduct excused by the fact of that mistake. *Hopkins v. State*, 193 Md. 489, 488 (1949); *Reisch v. State*, 107 Md. App. 464, 475 (1995).

As we explained in *Dykes v. State*, 319 Md. 206, 216-17 (1990), to be entitled to a particular instruction, the threshold is low, as a defendant needs only to produce "some evidence" that supports the requested instruction:

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been criminal] [defendant would have the defense of (defense)].

> In order to convict the defendant, the State must show that the mistake of fact defense does not apply in this case by proving, beyond a reasonable doubt, that at least one of the three factors previously stated was absent.

> Some evidence is not strictured by the test of a specific standard. It calls for no more than what it says - "some," as that word is understood in common, everyday usage. It need not rise to the level of "beyond reasonable doubt" or "clear and convincing" or "preponderance." The source of the evidence is immaterial; it may emanate solely from the defendant.

That Petersen was there to deliver cupcakes does not amount to "some evidence" that Petersen's conduct would not have amounted to a crime if he sought out Ms. Harcum as long as he had some other motive. That evidence would not support a claim that he was *not* in violation of the Protective Order. Petersen was precluded from attempting to contact Ms. Harcum or being at her residence. Delivery of baked goods to a place where Ms. Harcum was temporarily residing is not some evidence of innocent or mistaken conduct. There is not even a hint of testimony that Petersen did not know Ms. Harcum had taken refuge in her mother's home.[12] The circuit court's reasonable interpretation of the evidence, of "I thought the daughter was there," was that Petersen was not entitled to a mistake of fact instruction. We agree with the State that Petersen's defense, which centered on his one statement, made no sense. There was no evidence that Petersen shared a child in common with Ms. Harcum and the Protective Order did not list a child. A requested instruction is not a substitute for evidence.

We agree with the State. To prevent a conviction once a Protective Order is in effect, the onus is on the defendant to be cautious in order to ensure that he or she not

[12] Petersen's statement to the arresting officer was no more than an excuse to avoid arrest after being confronted less than a mile from Ms. Marcum's mother's house.

violate it. *State of Maryland v. Malcomb D. McCallum*, 321 Md. 451, 456 (1991), in determining whether an offense or element requires a particular *mens rea*, courts look to the purpose of the statute. The heightened protection of the statute will be considerably weakened if respondents could avoid criminal liability by willful ignorance.

Even if Petersen and Ms. Harcum had a daughter, it would be reasonable to assume they would be together at 2:00 a.m., which further supports the circuit court's interpretation of Petersen's defensive statement that regardless of the presence of Ms. Harcum, an alternative reason to visit would suffice.

The circuit court correctly determined that Petersen was not entitled to request an instruction on the defense of mistake of fact.

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