UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0769

September Term, 2016

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TREY MURDUCK

v.

STATE OF MARYLAND

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Wright,
Graeff,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Wright, J.

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Filed: May 17, 2017

Appellant, Trey Murduck, was convicted by a jury in the Circuit Court for Baltimore City of theft of goods valued between $1,000 and $10,000, second degree assault of Officer David Zovistoski, and resisting arrest.

The charges stemmed from events that occurred on May 20, 2015, between Murduck and his then-girlfriend, Kai Andrews. Murduck was sentenced to eighteen years imprisonment - five years on the theft count, ten years on the assault count, and three years on the resisting arrest count, to be served consecutively.

Murduck timely appealed, presenting two questions:

> I. Did the court err in allowing the prosecutor to cross-examine appellant about having been incarcerated prior to the events underlying this case as impeachment of his testimony that he had been on his own since the age of eighteen?
>
> II. Is the evidence sufficient to support appellant's conviction for theft of goods valued between $1,000 and $10,000, where almost all of the stolen items were electronics that were several years old and the State produced no evidence of their current market value at the time the items were taken?

Answering both questions in favor of Murduck, we reverse his convictions for assault and resisting arrest and remand the case to the circuit court for a new trial on these charges, and we vacate Murduck's theft conviction, enter a conviction for the lesser included offense of theft under $1,000, and remand for resentencing on this charge.

## Facts

Kai Andrews testified to the following:

Andrews met Murduck on a dating website in March of 2015, and she believed that they began a monogamous relationship a few weeks later. Murduck then moved into Andrews's apartment in May.

On May 10, 2015, Andrews and Murduck had an altercation, during which Murduck threw her on the bed when she tried to leave the room and then put his hands around her neck and choked her as he was laying on top of her. She testified that he followed her into the bathroom, pushed her into the bathtub, and "threatened to get his knife and kill [her]." Andrews described Murduck's knife as a silver and black pocket knife. Murduck got the knife but then stopped and asked Andrews to forgive him. Andrews said she would but that, "if it ever happened again," she would contact the police.

On May 20, 2015, Andrews and Murduck had a second verbal argument.[1] Andrews left the apartment to allow the situation to cool off. When she returned home, they continued to argue and the altercation became physical. Andrews testified that when she came out to the kitchen, Murduck began to choke her, and he then took one of the trash bags from the counter, put it over her head, and choked her with it.

Andrews further testified that she then left the apartment and Murduck briefly chased after her, but she made it to the lobby and called the police. When officers arrived, Andrews went up to her apartment with them and realized that the following items were missing: her driver's license, her debit card, her American Express card, her iPad, her laptop, and her charger. Andrews testified that she checked her credit card statement and saw that $160 had been withdrawn from her account while she was speaking with the officers.

[1] Andrews testified extensively regarding the May 20, 2015 events and her resulting injuries. Only the facts most relevant to Murducks's appeal are included here.

Andrews spoke to Murduck on the phone. He first denied taking anything but then said that he hid the items. One of the officers took the phone and told Murduck that he needed to return the items, that he would take Murduck to the District Court Commissioner's office, and charge him with theft. Andrews then received a text from the leasing agent in her apartment building stating that her things had been returned. Andrews testified that she paid $1,200 for her Apple Macbook in 2012 or 2013, $300 or $400 for her iPad in 2013 or 2014, and $75 for her laptop case.

Andrews further testified that while she was at the commissioner's office, Murduck showed up, and the officer spoke with him. Andrews saw the officer attempt to arrest Murduck, but Murduck "made a dash for the door" so the officer tasered him.

After numerous witnesses for the State,[2] Murduck testified as the sole defense witness. He testified as follows regarding being employed and supporting himself prior to moving in with Andrews:

[2] Along with Andrews, the following persons testified for the State: (1) Officer David Zovistoski of the Baltimore City Police Department testified that he and Officer Carlos Arias responded to Andrews's apartment building on May 20, 2015. (2) Keyur Patel testified that he operates the 7-11 at 529 North Charles Street and there is an ATM inside the store. Patel testified that he provided police with surveillance footage from May 20, 2015; the recording of the footage was entered into evidence. Patel identified an individual in a red shirt at the ATM in the store in the footage. (3) Oliver Phillips testified that he went to college with Ms. Andrews's father and, on May 20, 2015, Andrews's father called him and he went to Andrews's apartment. (4) Sarah Currie testified that she met Murduck in 2010 and they began a romantic relationship in February of 2015, and that she provided Murduck transportation on May 20, 2015. Currie further testified regarding Murduck's knife. (5) Marsha Utz, a Forensic Nurse at Mercy Medical Center, testified as an expert in forensic nurse examinations on victims over the age of 12 and strangulation, that people may sustain neck injuries from strangulation that sometimes are not visible. (6) Baltimore City Police Department Detective Ronald Bryant testified that he met with Andrews in her apartment on May 28,

[DEFENSE COUNSEL]: Were you working on May the 20th, 2015?

MURDUCK: I was. That day I just started a new job as a private contractor at SafeLink. It's basically, I work selling government's phones. On that day, I had been doing a urinalysis and started my job training. I had just got that job the day before.

[DEFENSE COUNSEL]: And before 2015, and during 2015, were you living on your own, and supporting yourself?

MURDUCK: Yes, I was.

[DEFENSE COUNSEL]: And how long had you been doing that?

MURDUCK: For the last six years.

Murduck recounted the altercations on May 20, 2015, stating that after Andrews put her hand on his throat, slammed him into a door and choked him, he grabbed his bag and left. Murduck testified that the cuts on his throat were caused by Andrews's nails when he removed her hands from his throat.

Murduck then called Sarah Currie[3] and she picked him up. He asked Currie to stop at a convenience store and he took money out from an ATM. Murduck testified that he was taking back the $160 he had given Andrews that morning. Shortly afterward, Murduck and Andrews spoke on the phone several times, and then he spoke with a police

2015; he collected a trash bag she provided, took screen shots of text messages, and recorded an interview with Andrews. (7) Serologist Dana Picco of the Baltimore Police Department Forensic Lab testified as an expert in serology that she received a plastic trash bag and oral swabs from Kai Andrews for testing. (8) DNA Analyst Thomas Herbert of the Baltimore City Police Department testified as an expert in DNA that he received two stain swabs and oral swabs from Andrews and appellant for testing.

[3] Murduck had a sexual relationship with Currie while he and Andrews were living together.

officer who called from Andrews's phone. Murduck testified that he then looked in his backpack and realized that he had some of Andrews's property so he turned around; he had not known that her laptop, iPad, and laptop cord were in his backpack.

Murduck testified that he left with Currie and, while driving down Calvert Street, he saw Andrews go into the commissioner's building so he stopped and went inside. He saw Andrews and an officer through the glass so he tapped on the glass and the officer came out and spoke with him. Murduck testified that he told the officer that the property had been returned and then started to walk away. At that time, the officer tried to grab Murduck's right hand, Murduck ripped it away, and started to run. Murduck testified that he did not push the officer or back into him. The officer then came after him, grabbed his right shoulder, and said, "you're under arrest." They both fell to the floor and Murduck got up and ran and, as he exited through the door, he got tasered and fell and hit his head. Murduck was taken to the hospital and his injuries were photographed.

Before he began his cross-examination, the prosecutor asked to approach the bench and said that he intended to impeach Murduck's direct examination testimony, that he had been living on his own since he was 18 by asking him about a period during which he was incarcerated from 2013 to 2014. Several bench conferences followed, during which defense counsel, the prosecutor, and the judge discussed and disagreed about if and how the prosecutor could impeach Murduck with the fact of his prior incarceration. Extensive questioning by the prosecutor regarding where appellant lived from July of 2013 to April of 2014 took place. Ultimately, Murduck testified, over objection, that he was "in Jessup" in 2013 and 2014.

The jury found Murduck guilty of theft of goods valued over $1,000, assault of Officer Zovistoski, and resisting arrest. The jury found Murduck not guilty of attempted first degree murder, attempted second degree murder, first degree assault of Andrews, and second degree assault of Andrews.

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

## Discussion

### I. Evidence of Murduck's Previous Incarceration

Murduck avers that evidence of his previous incarceration for a nine-month period, over a year prior to the events on May 20, 2015, should not have been admitted in response to his testimony that he had been living on his own for the past six years because it is irrelevant, constitutes inadmissible prior bad acts evidence, and is not proper impeachment evidence. Murduck further avers that, even if the evidence were minimally relevant, it should have been excluded because Murduck's credibility was critically important, and the evidence that he had a prior criminal record was extremely prejudicial. Murduck states that the admission cannot be considered harmless error because the prosecutor relied on it to encourage the jury to disbelieve Murduck's testimony, and Murduck asserts that the jury's not guilty verdict on several charges demonstrates that they rejected much of Andrews's testimony.

The State avers that the evidence was admissible under Md. Rule 5-404(b), Md. Rule 5-611, and Md. Rule 5-616.

On direct examination, the following exchange occurred:

> [DEFENSE COUNSEL]: *And before 2015, and during 2015, were you living on your own, and supporting yourself?*
>
> MURDUCK: Yes, I was.
>
> [DEFENSE COUNSEL]: And how long had you been doing that?
>
> MURDUCK: For the last six years.

(Emphasis added).

Following Murduck's testimony on direct examination, a bench conference occurred, where the prosecutor stated, "At this point, I'd want to (inaudible) the scope about the questioning with regard to his living situation the prior six years. We've not been give [sic] a true-tested copy of his records from Howard County that I was able ot get during my witnesses' examination." The court directs the prosecutor to "tread very carefully" and not to "mention anything about dates of incarceration and arrests" before returning to the bench.

On cross examination, the prosecutor then attempted to impeach Murduck's testimony that he was "on his own" and "supporting [himself]" based on the fact that he had spent nine months in prison.

> [PROSECUTOR]: Mr. Murdock [sic], it was your testimony on direct that you lived and supported yourself for the past six years?
>
> MURDUCK: Yes, sir.
>
> [PROSECUTOR]: So, you've lived on your own?
>
> MURDUCK: *I've been on my own since I was 18, yes, sir.*
>
> [PROSECUTOR]: But for the past six years, you've lived on your own?
>
> MURDUCK: *Yes, sir. I haven't lived with my family - -*

[PROSECUTOR]: Where were you living in 2014?

MURDUCK: I can't recall, sir.

(Emphasis added).

Murduck proceeded to testify that he lived in various apartments with different people over the past six years. During a bench conference, the parties and court discussed whether Murduck's testimony that he had been on his own since he was 18 was untruthful.

> THE COURT**:** I've given this a lot of thought. And I think it's only fair to phrase it in a certain way, because even when folks are incarcerated, you ask them for their address, and where do they live. And you always get their home address.
>
> [DEFENSE COUNSEL]: (Nods affirmatively.)
>
> [PROSECUTOR]: Okay.
>
> THE COURT: I'm not sure that this is an actual - -
>
> [DEFENSE COUNSEL]: Lie.
>
> THE COURT: - - that it's actually lying.

The judge stated "I don't think we can force him to say he was in jail," and instead instructed the prosecutor to ask Murduck if he was living in an apartment during the period of his incarceration. After stating that he may have been homeless during that time, another bench conference occurred. The judge agreed that Murduck was now "lying," and the prosecutor was granted permission to show Murduck a "document that might refresh his recollection."

MURDUCK: May I take back my statement? Because July of 2013, I was in PG County.

* * *

MURDUCK: Me and my ex were living together.

[PROSECUTOR]: Were living together in PG County in July of 2013?

MURDUCK: Yes, sir.

[PROSECUTOR]: Okay. And from when to when were you living with your ex in PG County in July of 2013?

MURDUCK: Now that, I can't give you that exact information.

[PROSECUTOR]: Okay.

MURDUCK: Because I know I'd come back to Baltimore - - well to Jessup, excuse me.

[PROSECUTOR]: Oh, so you were in Jessup - -

MURDUCK: Yes.

[PROSECUTOR]: - - in 2013, 2014?

MURDUCK: Yes, sir.

* * *

[PROSECUTOR]: So, when you were in Jessup, were you free to come and go as you please?

MURDUCK: No, Your Honor.

[PROSECUTOR]: So, that's a lot different living in Jessup than living on your own for the past six years, isn't it - -

DEFENSE COUNSEL: Objection.

[PROSECUTOR]: - - Mr. Murduck?

THE COURT: Overruled.

MURDUCK: Yes, it is.

[PROSECUTOR]: So, when you said on direct examination in front of that jury, that you were living on your own for six years, that wasn't true, was it - -

MURDUCK: No, I've been on - -

[DEFENSE COUNSEL]: Objection.

MURDUCK: - - own since I was 18 - -

THE COURT: Overruled.

[PROSECUTOR]: I didn't ask you for your interpretation of what I asked you. I said wasn't it a lie that you said that you were living on your own for six years?

MURDUCK: No - -

[DEFENSE COUNSEL]: Objection.

MURDUCK: - - because I worked. I paid. I worked. I did what I had to do by myself from 18 to 24.

[PROSECUTOR]: Okay. So, yet you were in Jessup?

MURDUCK: Yes, sir.

[PROSECUTOR]: That's not on your own, is it sir?

MURDUCK: It is - -

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

MURDUCK: - - *I got there by myself. I'm on my own. I didn't have no one else. It's by myself. It's on my own*. Is that not correct?

(Emphasis added).

[PROSECUTOR]: Were people watching you in Jessup, sir?

MURDUCK: People are always watching me.

[PROSECUTOR]: Were you in somebody else's custody in Jessup?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

MURDUCK: Yes, I was.

This testimony was also referenced during the State's rebuttal closing arguments as evidence of Murduck's lack of truthfulness.

**A. Standard of Review**

Trial judges have "wide discretion" when weighing the relevancy of evidence. *Young v. State*, 370 Md. 686, 720 (2002) (citation omitted). "[W]hether a particular item of evidence should be admitted or excluded is committed to the considerable and sound discretion of the trial court, and that the abuse of discretion standard of review is applicable to the trial court's determination of relevancy." *State v. Simms*, 420 Md. 705, 724 (2011) (quoting *Ruffin Hotel Corp. of Md. v. Gasper*, 418, Md. 594, 619 (2011)) (internal quotation marks and citation omitted).

However, "[w]hile trial judges are vested with discretion in weighing relevancy in light of unfairness or efficiency considerations, trial judges do not have discretion to admit irrelevant evidence." *Id.* (citation omitted). The Court of Appeals has stated that the standard of review on a relevancy question:

> depends on whether the ruling under review was based on a discretionary weighing of relevance in relation to other factors or on a pure conclusion of law. When the trial judge's ruling involves a weighing, [appellate courts]

> apply the more deferential abuse of discretion standard. When the trial judge's ruling involves a legal question, however, [appellate courts] review the trial court's ruling *de novo*.

*Parker v. State*, 408 Md. 428, 437 (2009) (citations and quotations omitted). "Thus, we must consider first, whether the evidence is legally relevant, and, if relevant, then whether the evidence is inadmissible because its probative value is outweighed by the danger of unfair prejudice, or other countervailing concerns as outlined in Maryland Rule 5-403." *Simms*, 420 Md. at 725 (citation omitted).

Whether relevant evidence is admissible under Md. Rule 5-403 is reviewed for abuse of discretion.[4] *Brooks v. State*, 439 Md. 698, 708-09 (2014). "Abuse of discretion has been said to occur 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." *Nash v. State*, 439 Md. 53, 67 (2014) (citing *North v. North*, 102 Md. App. 1, 13 (1994)). A ruling reviewed for an abuse of discretion will not be reversed "simply because the appellate court would not have made the same ruling." *Norwood v. State*, 222 Md. App. 620, 643 (2015) (citations omitted). Rather, a trial court's "decision is an abuse of discretion when it is well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Id.* (citations and quotations omitted).

**B. Threshold Issue**

[4] Md. Rule 5-403(b) provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

At oral arguments the State conceded that the "Jessup" testimony would have been understood by a Baltimore City jury to mean that Murduck was incarcerated, although in its brief the State asserted that the evidence did not establish a prior bad act on Murduck's part, and therefore Md. Rule 5-404(b) is inapplicable.[5]

Md. Rule 5-404(b) provides in part that, "[e]vidence of other crimes, wrongs, or acts . . . is not admissible to prove the character of a person in order to show action in conformity therewith."[6]

The State maintains that the prosecutor's questions sought "only that Murduck had not provided for himself during the entire six-year period as he had claimed on direct examination," and the State further claims that the evidence was not introduced to show conformity with a criminal past, but rather simply an inability to provide for himself.[7]

[5] Jessup Correctional Institution is a maximum security state prison located in Jessup, Maryland. https://www.dpscs.state.md.us/locations/jci.shtml. The prison is colloquially referred to simply as "Jessup" or the "CUT."

[6] Md. Rule 5-404(b) reads in full:

> Evidence of other crimes, wrongs, or acts including delinquent acts as defined by [Md.] Code [(1973, 2013 Repl. Vol.)], Courts [& Judicial Proceedings] Article [("CJP")], § 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.

[7] Murduck agrees that the State could have asked questions such as, "Did you pay rent every month for those six years?" in order to impeach Murduck's stated ability to provide for himself.

The record does not reflect this intention. The prosecutor's questions, including, "So, when you were in Jessup, were you free to come and go as you please?" and, "So, yet you were in Jessup?" and, "Were you in somebody else's custody in Jessup?" did not seek to question Murduck on if he "provided for himself." Rather, these questions established that Murduck was in incarcerated "in Jessup," a maximum security state prison.[8]

The State avers that the purpose of the prohibition is to keep prosecutors from using evidence of prior crimes to show that he acted in the same manner, and that here, because the jury was not presented with the specifics of Murduck's prior bad act, there was no attempt to suggest that he must have acted in the same manner. To support this position, the State relies only on *Brice v. State*, 225 Md. App. 666, 692 (2015), *cert.*

[8] Although conceded at argument, the State in its brief asks that we conclude that being in custody in a maximum security prison is not evidence of "prior bad acts." In any political entity with a respected judiciary -- and we believe Maryland to be such an entity -- it is understood that if a person was in prison, that person received due process of law and was convicted of a crime. In the State of Maryland, the Maryland Constitution, Declaration of Rights, Article 24 provides:

> That no man ought to be taken or imprisoned or dis-seized of his freehold, liberties or privileges or outlawed, exiled, or in any manner, destroyed, or deprived of his liberty or property, but by the judgment of his peers, or by the Law of the Land.

The elements of the "law of the land" equate with "due process of law." *Steed Mtg. Co. v. Arthur*, 37 Md. App. 592, 598 (1977) (citation omitted). Procedural due process imposes constraints on governmental decisions that deprive individuals of liberty or property interests within the meaning of the Due Process Clause. *Roberts v. Total Health Care, Inc.*, 109 Md. App. 636, 643-44 (1996) (citation omitted).

Prison incarceration is therefore certainly evidence of a conviction of a crime.

*denied,* 447 Md. 298 (2016) where we stated that "a mere reference to a 'domestic disturbance,' without more detail, does not come within the definition of other 'crimes, wrongs, or acts'" as prohibited by Md. Rule 5-404(b). However, in *Brice,* the mention of the domestic disturbance was not tied to any particular person, and the testimony given did not indicate that the defendant was in any way involved. *Id*. at 692. Additionally, a reference to a "domestic disturbance" does not infer criminality to the same degree that a prison incarceration does, as it must be undisputed that a prison incarceration requires a criminal conviction. Further, Md. Rule 5-404(b) does not merely disallow evidence of *similar* prior bad acts, as the State wants to read it, but rather it prohibits the use of *any* prior criminal behavior to indicate current criminal behavior. Evidence of the underlying crime for which Murduck was incarcerated did not need to be admitted in order to invoke the protections of the Rule.

To adopt the State's position would allow courts to admit evidence of a prison incarceration, so long as the details of the conviction were not shared in order to assert similarity and conformity. As this practice would be both against the spirit and letter of the Rule, and perhaps even more prejudicial to criminal defendants than full disclosure of the prior conviction, we fervently disagree with the State's position, and we move on to the issue of relevance. *Bells v. State*, 134 Md. App. 299, 310 (2000) ("Masking the nature of the prior offense . . . is more likely to affect the defendant unfairly than receipt in evidence of the unvarnished conviction") (quotation and citation omitted).

**C. Relevance**

As stated above, we must address whether the evidence in question, Murduck's prior incarceration, was relevant. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. Irrelevant evidence is inadmissible. Md. Rule 5-402. It is well settled that "[t]he real test of admissibility of evidence in a criminal case is 'the connection of the fact proved with the offense charged, as evidence which has a natural tendency to establish the fact at issue."' *Banks v. State*, 84 Md. App. 582, 589 (1990) (quoting *Dorsey v. State*, 276 Md. 638, 643 (1976)).

Murduck avers that evidence of his prior incarceration is not relevant because it does not have a tendency to make it any more or less likely that he assaulted and stole from Andrews or resisted arrest and assaulted the arresting officer almost two years later.

The State responds that the evidence was admissible as an exception because "it is relevant to the offense charged on some basis other than mere propensity to commit crime." *Harris v. State*, 324 Md. 490, 496 (1991). The State asserts that Murduck's incarceration was relevant here as motive evidence, because the State's theory of the case was that Murduck was "freeloading off of Andrews," attacked Andrews, and stole her belongings in response to her kicking him out of her apartment. The State contends that his incarceration is, therefore, relevant as to whether or not Murduck had lived "on his own" in the prior six years, and whether or not he could support himself without Andrews's assistance.

Proof of motive is a basis for evidence of prior bad acts to be admitted. *Harris*, 324 Md. at 501; Md. Rule 5-404(b). In order to admit prior bad acts evidence as an exception, it must satisfy a three-part test, where the trial court must (1) make a legal determination as to whether an exception applies, (2) decide whether the defendant's involvement in the prior bad act is established by clear and convincing evidence, and (3) weigh the probative value of the evidence against any undue prejudice likely to result from its admission. *Streater v. State*, 352 Md. 800, 807 (1999) (citation omitted).

Although the State now contends that this evidence was admitted as an exception to show motive, we agree with Murduck that this position is not reflected by the record or preserved as an assertion on appeal. This is our belief even though in conducting an analysis of whether or not to admit prior bad acts as an exception, the trial court is "not obliged to detail every step of their logic." *Jackson v. State*, 340 Md. 705, 717 (1995) (citation omitted).

Here, because there is no evidence that the State communicated a desire to admit the evidence as proof of motive, nor any reference to Md. Rule 5-404(b), the record is bare as to whether this analysis played a part in the court's decision to admit this evidence. Rather, the record reflects that the thrust of this evidence was admitted to impeach Murduck's testimony, in order to attack his credibility and capacity for truthfulness, and not to the issue of his capacity to provide for himself. The prosecutor's closing statement confirms this intent, as he stated:

> And I submit to you that the defendant has every motive to lie to you and he lied to you and he admitted to lying to you during the course of his testimony on at least three separate occasions.
>
> Not even a few questions were asked of the defendant when he told you about his living situation. How he had lived for six years on his own. When I got a chance to ask him those questions, he admitted that that was a lie. It took me a while to get him there but he hadn't told you he was in Jessup. He can't even be honest with you about the basic things that he does. He wasn't living on his own. He was living in custody with other people in Jessup.

Finding nothing in the record to show that this evidence was admitted to prove motive in the underlying crime, nor that this position was offered at the trial, nor that the defense had an opportunity to respond to this position, nor that the trial judge conducted the required analysis, we agree with Murduck that this position cannot be raised for the first time on appeal to support an affirmance. Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court"). Therefore, we now turn to whether the evidence was properly admitted as impeachment evidence.

**D. Impeachment Analysis**

The State avers that the evidence was proper impeachment evidence under Md. Rules 5-611 and 5-616(a) as evidence to contradict a witness's testimony. The State also avers that Murduck "opened the door" to the evidence.

Murduck responds that the evidence was improper impeachment evidence because his testimony that he had been "on his own" for the past six years is not inconsistent with having been incarcerated for a brief portion of that time.

It is an accepted principle that a "witness's credibility is always relevant." *Smith v. State*, 273 Md. 152, 157 (1974). However, credibility may only be attacked within the parameters set by the rules of evidence. Md. Rule 5-611(b)(2) provides that an accused who testifies "on a non-preliminary matter may be cross-examined on any matter relevant to any issue in the action." Md. Rule 5-616(a)(2) provides that "[t]he credibility of a witness may be attacked through questions asked of the witness, including questions that are directed at . . . [p]roving that the facts are not as testified to by the witness[.]" Additionally, the "opening the door" doctrine is "a rule of expanded relevancy and authorizes admitting evidence which otherwise would have been irrelevant." *Clark v. State*, 332 Md. 77, 84-85 (1993) (footnote omitted).

We agree with Murduck's assertion that his incarceration was not inconsistent with his statement that he had been "on his own" during the prior six years. As the trial judge stated during a bench conference, "even when folks are incarcerated, you ask them for their address, and where they live." The phrase "on my own" is a general statement; one that a reasonable person would only interpret to mean that the defendant was no longer being provided for by his parents or guardian,[9] and was no longer living in the family home. Because his initial statements were not inconsistent with the facts, Md. Rule 5-616(a)(2) did not apply, and the evidence was impermissibly admitted.

The State responds that Murduck "opened the door" by making "his ability to support himself front and center" in the trial. However, if the State's intention with the

[9] This would apply equally, if not more, if the person had been a "ward of the state" and, therefore, cared for by foster parents or in a group home facility.

line of inquiry was to show that Murduck could not financially support himself and was a freeloader who was using Andrews, Murduck's answer that he may have been homeless for a period of time certainly accomplished this task but the State did not rest on that answer. Rather, the prosecutor continued to ask questions to get at Murduck's incarceration, under the guise of impeaching his prior statement that he had been on his own. The prosecutor ended the inquiry once the jury heard that Murduck had been in Jessup, and did not focus again on Murduck's ability to provide for himself.

Murduck avers that the State cannot use the guise of impeachment to admit otherwise inadmissible evidence, relying on *Bradley v. State*, 333 Md. 593 (1994), *Spence v. State*, 321 Md. 526 (1991), and *Cason v. State*, 66 Md. App. 757 (1986). Murduck asserts that here, the State was allowed to ask Murduck a significant number of questions in order to bring in otherwise inadmissible evidence that was unnecessary and not helpful to the State's case on an independent inquiry – where Murduck lived from July of 2013 until April 2014. The State responds by attempting to distinguish *Spence* and *Bradley* as related to hearsay evidence.

We agree with Murduck's argument and find *Cason* persuasive. In *Cason*, an officer testified that he saw a defendant attempt to throw a baggie of heroin, and the defendant, charged with several counts of heroin-related offenses, testified that he had never possessed the drugs. 66 Md. App. at 763. On cross-examination, the State was permitted to ask the defendant if he knew how heroin is packaged for sale and if he used heroin, and the defendant answered both in the negative. *Id.* at 763-64. The trial court then permitted the State to question the defendant about a prior conviction for possession

of heroin. *Id.* at 764-66. The State argued that the prior convictions were admissible as impeachment evidence, and that the defense had opened the door to its admission by his claims that he did not know how heroin was packaged for sale. *Id.* at 775. We disagreed and reversed, stating that the "doctrine [of curative admissibility] applies when the evidence to be rebutted is presented by the defense in the first instance." *Id.* at 776 (citation omitted). We concluded there, as we do here, that the admission of prior crimes evidence was improper, where, "upon cross-examination, *the State* built the strawman which it now seeks to tear down." *Id.*

**E. Harmless Error Analysis**

Because we find no exception or avenue for which the prior crime evidence could have properly been admitted, we need not address the Md. Rule 5-403 analysis of whether the undue prejudice from the evidence outweighed its probative value. Rather, we address whether the error was harmless.

Murduck contends that the error cannot be deemed harmless beyond a reasonable doubt because there is a reasonable possibility that the jury disbelieved all or part of Murduck's testimony based on the prosecutor's argument that he lied to them and should not be believed. Murduck further avers that the jury may have speculated that he was in custody for committing the most serious of crimes and led to significant prejudice.

The Court of Appeals has provided the standard of review on the question of harmless error:

> [W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way

> influenced the verdict, such error cannot be deemed 'harmless' and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of-whether erroneously admitted or excluded-may have contributed to the rendition of the guilty verdict.

*Dorsey v. State*, 276 Md. 638, 659 (1976) (footnote omitted).

The State avers that the error was harmless, delineating how the error did not contribute to the conviction for each charge. As to the theft charge, Murduck admitted that he left Andrews's apartment with various items of hers and that he used her credit card to withdraw $160. As to the second degree assault and resisting arrest charge, the State avers that the convictions rested predominantly on the testimony of Officer Zoviski and Oliver Phillips. The State further asserts that as to the resisting arrest charge, Murduck's own testimony "established that he had committed that offense." The State responds to Murduck's assertion regarding speculation by stating that the evidence "cuts both ways; in the absence of any evidence regarding prior conviction, the jury might have inferred that Murduck had been acquitted of the charges for which he was held or that they were ultimately dropped." The State concludes that evidence of Murduck's prior conviction in no way led the jury to reach a different conclusion on the charges than it would have in the absence of such evidence.

We agree with Murduck that the State fails to appreciate the tremendous potential for prejudice to a criminal defendant from the disclosure to a jury that he had previously been convicted of a crime. As we have stated previously:

> [W]hen it is the defendant's criminal history that is being inquired into, the trial court should be mindful that there is more than mere credibility being attacked. A more pervasive potential for prejudice must be considered,

> namely, the prejudice that is likely to emanate from advising the trier of fact that the very defendant on trial before it is already a convicted criminal.

*Bane v. State*, 73 Md. App. 135, 142 (1987).

As Murduck states, if the jury had credited all of Murduck's testimony, he would not have been found guilty on any charge for which he was convicted.

Murduck testified that he had given Andrews $160 that morning and used her ATM card to take back the same sum, and that he did not realize that the bag contained the goods when he left the apartment and immediately returned the goods when he realized that he had them. This testimony would eliminate the intent element of theft as to the bag containing the goods when he left the apartment, as it is generally held that the intent must be to permanently deprive the owner of the property. *Pulinski v. State*, 223 Md. 1, 3 (1960). However, as to the $160, there was no testimony that Murduck intended to return the $160, and it was not his to take back from Andrews. His testimony therefore, if given full credit, would not exculpate him from the theft charge completely, but at this point in our discussion there is only $160 in value.

As to the resisting arrest charge, both a refusal to submit to lawful arrest and resistance by force or threat of force are necessary to commit the offense. *Rich v. State*, 205 Md. App. 227, 250 (2012) (citations omitted). The State argues that Murduck also testified that when Officer Zovistoski "tried to grab [his] right hand," that Murduck "ripped it away." He also described that when the officer grabbed his arm, Murduck "grabbed it back from him." Murduck states that he started to run, and that they "both

ended up falling on the floor." Although Murduck does admit that he ran, his testimony does not admit the use of force or threat of force – a required element of resisting arrest.

As to the assault charge, Murduck testified that he did not push the officer or back into him, but only that when the officer attempted to grab his hand, he pulled it away and ran. The charge, therefore, came down to a question of credibility.

Although we cannot say with certainty that absent the admission of Murduck's prior conviction the jury would have entirely credited his testimony, we agree with Murduck that the State used the improperly-admitted evidence of his prior incarceration to argue that Murduck was a liar and the jury should disbelieve him. Further, we recognize the risk that a jury will "give more heed to the past conviction as evidence that the accused is the kind of man who would commit the crime on charge, or even that he ought to be put away without too much concern with present guilt, than they will to its legitimate bearing on credibility[.]" *Loper v. Beto,* 405 U.S. 473, 482 n.11 (1972) (citation omitted). Coupled together, we cannot say without reasonable doubt that the admission did not contribute to the jury's finding of guilt. As such, the appropriate remedy is to reverse Murduck's conviction and to remand the case for a new trial as to the assault and resisting arrest charges.

**II. Value of the Goods**

Having let the judgement as to the theft charge stand, we turn briefly to the question regarding the sufficiency of the evidence on the theft conviction as to value of the property stolen.

Murduck was charged with theft of property having a value of at least $1,000 but less than $10,000 under Md. Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CL"), § 7-104. Murduck avers that the State failed to prove that the present value of the goods, which were mainly electronics that had been purchased several years prior, exceeded $1,000. The State responds that the issue is unpreserved because the motion for judgment of acquittal was insufficient for lack of specificity.

Andrews testified that the following items were missing from her apartment: her driver's license, her debit card, her American Express card, her iPad, her laptop, and her charger. She testified that she paid $1,200 for the laptop in 2012 or 2013, $300 or $400 for her iPad in 2013 or 2014, and $75 for her laptop case. As we have previously discussed, she also testified that $160 was withdrawn from her account while she was speaking with the officers. The State did not produce evidence of current market value for the items.

CL § 7-103 of the Theft and Related Crimes Title regarding "Determination of value" provides in relevant part:

> (a) In this section, "value" means:
>
> (1) the market value of the property or service at the time and place of the crime; or
>
> (2) if the market value cannot satisfactorily be ascertained, the cost of the replacement of the property or service within a reasonable time after the crime.
>
> ***
>
> (e)(1) For the purposes of determining whether a theft violation . . . has been committed, when it cannot be determined whether the value of the

> property or service is more or less than $1,000 under the standards of this section, the value is deemed to be less than $1,000.

Present market value may be proven by direct or circumstantial evidence and any reasonable inferences from such evidence. *Wallace v. State*, 63 Md. App. 399, 410 (1985).

However, purchase price alone is generally insufficient to establish the market value of stolen electronic goods. In *Champagne v. State*, 199 Md. App. 671 (2011), we acknowledged the speed with which electronic equipment, specifically laptop computers, lose value. There, the only evidence at trial regarding the computer's value was the owner's testimony that he paid $1600-$1800 for it three years prior to the theft. *Id.* at 674. We considered whether the evidence was sufficient for the jury to conclude that the value of the laptop at the time of the theft was over $500 and determined that it was not. *Id.* at 676. We reach the same conclusion here and hold that absent testimony of current market value, the evidence was insufficient to establish that the goods were collectively valued at over $1,000, even considering the $160. The proper remedy is to vacate the conviction, enter a conviction for the lesser included offense of theft of property valued

under $1,000, and remand for a new sentence on that conviction. *Champagne*, 199 Md. App. at 677-78.

**JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED IN PART AND AFFIRMED IN PART. CASE REMANDED FOR A NEW TRIAL ON THE ASSAULT CHARGE AND RESISTING ARREST CHARGE, AND REMANDED FOR SENTENCING ON THE CONVICTION OF THEFT OF PROPERTY VALUED UNDER $1,000. COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.**