Circuit Court for Baltimore City
Case No. 116319016

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 454

September Term, 2018

JEREMIAH SAVAGE

v.

STATE OF MARYLAND

Nazarian,
Shaw Geter,
Eyler, Deborah S.
(Specially Assigned, Senior Judge),

JJ.

Opinion by Shaw Geter, J.

Filed: May 3, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Jeremiah Savage, appellant, was tried in the Circuit Court for Baltimore City and convicted by a jury of first-degree assault, second-degree assault, illegal possession of ammunition, illegal possession of a regulated firearm, and possession of a short-barreled shotgun. He brings this timely appeal and presents the following questions for our review:

1. Did the trial court deprive Jeremiah Savage of the full exercise of his peremptory challenges by failing to strike jurors who admitted extraneous conditions would bias or distract them?

2. Did the trial court abuse its discretion when it failed to exclude unduly prejudicial and uncorroborated testimony about Jeremiah Savage's character and an alleged incident between Savage and Margaret Nelson over one year before the instant offense?

BACKGROUND

A. October 20, 2016 Incident.

Savage first met Margaret Nelson in 2011. From 2011 to October 20, 2016, the two maintained an on-again, off-again romantic relationship. In early 2016, Nelson became pregnant with the couple's first child. Savage and Nelson lived together in a basement apartment in Baltimore.

From October 19 to October 20, 2016, Savage received multiple Facebook messages from another woman, asking "why he wasn't coming to see her." Having access to Savage's Facebook page, Nelson viewed the messages on her cell phone. The next day, at about 8:00 a.m., as Nelson lay in bed and Savage took a shower in the next room, she informed him that he could not use her car. At this time, Nelson was seven months pregnant with Savage's child.

Nelson's comment sparked an argument. Nelson testified that, in the middle of the argument, Savage suddenly drew a shotgun and placed it on a dresser, with the barrel pointed towards Nelson. According to Nelson, Savage then said, "Everything you think is going to happen to you will in the next five minutes if you don't tell me why you won't let me take the car." Nelson explained that Savage then placed both of his hands around her neck and raised her so that her feet could not touch the floor. She lost consciousness and awoke to Savage standing over her, straightening her legs. Between 8:00 and 8:30 a.m., Nelson texted her friend Synclaire Nickens, requesting Nickens call 911.

Nelson further testified that she then went to the front door and called her boss, Angel DeVan, and deleted the text messages she had sent to Nickens. Nelson explained that she called DeVan to "fake like [she] was calling out of work." Although Nelson testified, "Angel immediately heard my voice and knew that something was wrong and asked me if I needed to call the cops," DeVan testified that Nelson called out of work and told her that Savage had "choked her and she blacked out." DeVan further stated that, while she was on the phone with Nelson, she could hear a male voice in the background yelling, "You're fine, you're acting like a stupid B[itch]. Get up, go to work, you're looking stupid." While on the phone with Nelson, DeVan asked whether she needed her to call the police. Nelson responded that her friend had already called the police. DeVan testified that she then heard a male voice say, "You called the cops on me, you stupid B[itch]?," to which Nelson replied, "No, no, I didn't." DeVan indicated that Nelson sounded scared and repeatedly told the man to get away from her.

Officers Ryan Beaver and Jason Schmitt arrived at the residence. As the officers approached the apartment, Beaver saw Nelson standing in the front doorway. He then saw a man's arm pull her back into the house, before the door was closed. Seconds later, Nelson rushed out of the apartment, past Beaver. After obtaining consent from Nelson, Beaver entered the apartment and, pursuant to his training, scanned it for any weapons. As he exited the apartment into the backyard, Beaver saw Savage standing there in nothing but his underwear with his clothes in his hands.

While Officer Beaver was with Savage, Officer Schmitt spoke with Nelson outside for about two or three minutes.[1] Schmitt testified that Nelson appeared scared, and had red marks on her neck. Nelson indicated to Schmitt that a gun was located inside the apartment, and that it had been in the dresser. The officers searched the dresser, but found no gun. Nelson said, "Well, I have no idea where it is." As the two officers were exiting the apartment, Nelson observed a book bag and asked if the officers had searched it. Schmitt examined the contents of the bag and found a sawed-off-shotgun, loaded with two shotgun shells. Savage later admitted that the shotgun was his and was loaded.

Nelson was taken to Johns Hopkins Hospital. Officer Schmitt took photographs of the red marks on her neck. Dr. David Rose conducted a physical examination of Nelson and noted that she had "mild swelling anterior bilaterally on her neck with no obvious

[1] Initially, Nelson, in her conversation with Officer Schmitt, indicated that Savage had not used a shotgun during the incident. As a result, Schmitt's lethality report reflected that no shotgun was used in the incident. However, Schmitt testified that this was an "oversight" when he realized that, in the same report, Nelson had written "[Savage] pulled out a gun."

hematoma or skin markings." Dr. Rose further indicated that Nelson only complained of "mild tenderness on both sides of her anterior neck," and she did not require emergency or urgent neck imaging. An ultrasound was performed on Nelson to search for damage or a blockage in her neck. The results were "normal" and "unremarkable." Although Nelson complained of neck pain and difficulty swallowing, Registered Nurse Jenna Zehler's assessment of her head, eyes, ears, nose, throat, and respiratory, cardiovascular, musculoskeletal, and gastrointestinal systems were unremarkable.

During a jail phone call on November 10, 2016, Savage, in speaking about the charges for which he was "locked up," stated, "I choked Shorty out, yo. I ain't gonna lie. I choked her ass out cause she came out of her mouth like real disrespectful, yo. I did it. I'm gonna take my charge for that, Caroline. I did that shit."

On September 16, 2017, Nelson wrote a letter to the court requesting the charges against Savage be dropped. In the letter, Nelson wrote that "there was no testing and no medical proof to show that [Savage] strangled [her]." Nelson testified that she wrote the letter at Savage's urging, stating, "he has a way of being able to be convincing and I just kind of fell back into the pattern of our relationship that towards the end that it was."

B. Voir Dire.

The court and counsel conducted *voir dire* of potential jurors on January 30, 2018. In doing so, the court asked the jury panel a set of questions aimed at uncovering whether

the potential jurors could be fair and impartial.[2] The court then, after prefacing that "the simple fact [one] ha[d] a job is not considered a hardship," asked the jurors whether there was any potential juror "for whom service on this particular jury would present extraordinary hardship?"

Juror 2007 indicated that serving on the jury would present a hardship because she was a third-grade teacher, and she believed missing work would cause her students to suffer anxiety. The court concluded "work by itself [wasn't] a sufficient hardship," and did not excuse juror 2007. Defense counsel then asked juror 2007 whether her students' anxiety "would have any bearing on her ability to be fair and impartial or if she would . . . be thinking about the students while she was present such that she . . . could not be fair and impartial." Juror 2007 responded, "I would likely be distracted by it. It could cause me to be . . . partial. But I'm not sure. I don't know for sure." Defense counsel moved to strike the potential juror for cause. The court denied the motion, describing juror 2007's belief that her concern for her students might make her unfair as "completely unrelated and far-fetched."

[2] Among other questions, the court asked the venire the following: "Is there any member of the jury panel who has strong feelings about the offense for which the defendant is charged?"; "Does any member of the panel hold any moral, philosophical, or religious beliefs that would prevent you from being fair and impartial if selected to serve on this jury?"; "Is there any member of the jury panel who would give more or less weight to the testimony of a law enforcement officer solely due to their employment in that profession?"; "Is there any member of the jury panel who objects to interracial dating?"; and "Is there any member of the jury panel who would be prejudiced against a defendant or witness because of their race, color, religion, ethnicity, sexual orientation, gender or gender identity?"

Juror 2047 also indicated that serving on the jury would be a hardship for him. He explained that he owns a small business with eight employees and he was attempting "to try and figure out how to make payroll" that week. The court inquired about whether his business would "interfere with [his] jury performance[.]" Juror 2047 replied, "It might distract me a little bit. But it certainly wouldn't make me—it wouldn't impact me being fair or impartial." The court then asked, "If you were to be out of work between now and possibly through Monday how would that impact your ability to make payroll?" In response, juror 2047 indicated that completing payroll would be difficult, "[b]ut if [he] need[s] to serve, [he's] going to serve." Defense counsel moved to strike juror 2047 for cause. The court denied the motion.

After jurors 2007 and 2047 were instructed to take their seats in the jury box, defense counsel exercised her first and third peremptory strikes to excuse jurors 2007 and 2047. Defense counsel then used all available remaining peremptory challenges.

C. Evidence Relating to Savage's Character and Prior Bad Acts.

During trial, on January 31, 2018, the prosecutor called Nelson as a witness. Nelson testified that during their relationship Savage was "[v]ery controlling" and "manipulative." She stated that on prior occasions when she had not allowed him to use her car, "he would throw a fit." There were some instances in which she consented to Savage using her car because she "was too scared" to tell him "no." Nelson indicated that Savage was verbally abusive to her, testifying that he told her multiple times that she was "lesser than him"

because he believed "men are better and more powerful than women." She further stated that Savage has "raised his fists at [her] multiple times as if he would hit [her]."

The prosecutor asked Nelson whether Savage had ever put his hands on her before the October 20, 2016 incident. Nelson described an incident that had taken place about a year before the assault for which Savage was charged. On that occasion, she explained that an argument between Savage and her developed because he had taken her car for too long. According to Nelson, "to make [her] shut up, he put his hands around [her] neck and pushed [her] through the kitchen . . . up against the counters, down to the fridge[.]" Defense counsel objected to Nelson's testimony regarding Savage's character and his prior bad acts, arguing that it was being used to show Savage's propensity for committing the crime with which he was charged in violation of Maryland Rule 5-404.

On February 2, 2016, the case was submitted to a jury. After four hours of deliberation, spanning two days, the jury found Savage guilty of first-degree assault, second-degree assault, possession of a regulated firearm, and possession of a short-barreled firearm. Savage then timely appealed.

DISCUSSION

I. Whether the exercise of Savage's peremptory challenges was impermissibly impaired by the trial court's refusal to strike certain jurors for cause.

i. Whether the claim of error relating to the court's refusal to strike Jurors 2007 and 2047 for cause was properly preserved for appeal.

The State claims Savage's appeal alleging the court erred in failing to strike certain jurors for cause is not properly preserved for our consideration because "Savage did not

express dissatisfaction with the jury as impaneled or claim below that the exercise of his peremptory challenges was in any way impaired." Savage argues the issue is properly preserved because the defense requested the jurors be struck, exercised all available peremptory strikes, and never expressed acceptance of the impaneled jury.

A claim of error related to the impairment of the exercise of peremptory challenges must be preserved for appellate review. *King v. State Roads Comm'n of State Highway Admin.*, 284 Md. 368, 371 (1979) (citing *Swain v. Alabama*, 380 U.S. 202, 219 (1965)) ("[T]he importance of the peremptory challenge requires that any significant deviation from the prescribed procedure that impairs or denies the privilege's full exercise is error that, *unless waived*, ordinarily will require reversal without the necessity of showing prejudice.") (emphasis added). Generally, a defendant will waive any challenge to an alleged impairment of the exercise of his or her peremptory challenges where the defense expresses "satisfaction with the jury after all peremptory challenges ha[ve] been exhausted." *White v. State*, 300 Md. 719, 729 (1984); *see also*, *Thomas v. State*, 301 Md. 294, 310 (1984) (claim of error relating to denial of motion to strike three jurors for cause was waived where defense stated that the jury was acceptable and could have excused the three challenged jurors with its four remaining peremptory challenges).

We are not persuaded that Savage waived a claim of error regarding the trial court's failure to strike Jurors 2007 and 2047. Defense counsel moved to strike each respective juror. At no point after the court denied these motions did the defense express satisfaction with the jury as it was impaneled. Additionally, the defense retained no peremptory

challenge, thus leading to the possibility that the trial court's denial of their respective motions to strike Jurors 2007 and 2047 impaired the exercise of Savage's peremptory challenges. Accordingly, the issue of whether the exercise of Savage's peremptory challenges was impaired by the trial court's failure to strike Jurors 2007 and 2047 is properly before us for our consideration.

ii. Whether the trial court abused its discretion in its voir dire of Jurors 2007 and 2047, or in otherwise failing to strike them for cause, thereby impairing Savage's use of his peremptory challenges.

Savage asserts the trial court abused its discretion in "failing to comprehensively question and remove Jurors 2007 and 2047 after they stated they would be distracted by outside influences if selected to serve on the jury." He argues the court's failure to strike the jurors forced him to use two of his peremptory challenges to excuse the jurors, thereby impairing his statutory right to ten peremptory challenges. The State claims the court conducted a sufficient inquiry, and correctly determined the prospective jurors could be fair and impartial.

The Sixth Amendment to the United States Constitution, as applied to the States by the Fourteenth Amendment, and Article 21 of the Maryland Declaration of Rights guarantee criminal defendants the right to an impartial jury trial. *Williams v. State*, 394 Md. 98, 105−06 (2006). A defendant is guaranteed that his "fate will be determined by an impartial fact finder who depends solely on the evidence and arguments introduced in open court." *Id*. at 106 (quoting *Allen v. State*, 89 Md. App. 25, 42 (1991)).

The process of *voir dire* is "critical" to ensuring a defendant's "guarantees to a fair and impartial trial is honored." *Stewart v. State*, 399 Md. 146, 158 (2007). "*Voir dire* is a flexible process," and the trial court is granted "significant latitude in the process of conducting *voir dire* and the scope and form of questions presented to the venire." *Collins v. State*, 452 Md. 614, 622–23 (2017). "[T]he proper focus [of *voir dire*] is on the venire person's state of mind, specifically, whether there is some bias, prejudice, or preconception." *Williams*, 394 at 108. "However, no formula or precise technical test exists for determining whether a prospective juror is impartial." *White v. State*, 374 Md. 232, 241 (2003). Trial judges are given great discretion in determining whether a juror can be fair and impartial because "[t]he trial court is in the best position to assess a juror's state of mind, by taking into consideration the juror's demeanor and credibility." *Ware v. State*, 360 Md. 650, 666 (2000).

"It is the responsibility of the judge, not the juror, to make the final determination as to whether the juror can be impartial." *White v. State*, 374 Md. at 242. "The competency of the juror is left to the discretion of the court; and in the exercise of this duty the trial court is not limited to the answers made by the juror, but must be satisfied from all the circumstances, as well as the examination, that the juror is competent." *Lockhart v. State*, 145 Md. 602, 619 (1924). "Accordingly, on appellate review, great deference is paid to the conclusion of the trial judge, who had an opportunity to hear and observe the prospective juror." *White*, 374 Md. at 241. However, where "*voir dire* is cursory, rushed, and unduly limited, then the conclusions of the trial judge are entitled to less deference."

Id. Ultimately, "the standard for evaluating a court's exercise of discretion during the *voir dire* is whether the questions posed and the procedures employed have created a reasonable assurance that prejudice would be discovered if present." *Id*. at 242.

Where a party believes that a prospective juror will not be fair or impartial, the party can move to strike that juror for cause. Md. Rule 4-312(e)(2). Additionally, a party also enjoys peremptory challenges, which "permits a party to eliminate a prospective juror with personal traits or predilections that, although not challengeable for cause, will, in the opinion of the litigant, impel that individual to decide the case on a basis other than the evidence presented." *King v. State Roads Comm'n of State Highway Admin.*, 284 Md. 368, 370 (1979). However, it is important to note that in Maryland "*voir dire*'s sole purpose is to elicit specific cause for disqualification, not to aid counsel in the intelligent use of peremptory strikes." *Collins v. State*, No. 54, slip op. at 32–33 (Md. April 2, 2019) (citing *Pearson v. State*, 437 Md. 350, 356–57 (2014)).

"[T]he importance of the peremptory challenge requires that any significant deviation from the prescribed procedure that impairs or denies the privilege's full exercise is error that, unless waived, ordinarily will require reversal without the necessity of showing prejudice." *Id*. at 371; *see also Whitney v. State*, 158 Md. App. 519, 554 (2004) ("Although the Supreme Court in *Martinez-Salazar* has clarified as dictum the statement from *Swain* that the impairment of a federal defendant's peremptory challenges dictates reversal per se, we discern no effort by the courts of this State to retreat from the

'reversibility *per se*' rule for the judicial impairment of a party's allotment of peremptory strikes.")

Savage, citing *Wilson v. Morris*, insists the trial court erred in failing to further examine Juror 2007 to evaluate whether she could put aside her personal bias and render a fair and impartial verdict. 317 Md. 284 (1989). In *Wilson*, a personal injury case, an impaneled juror was overheard before jury selection saying, "these cases are costing too much money." *Id*. at 302. No alternates were available so the plaintiff moved for a mistrial. *Id*. at 288. The court denied the motion, finding the uncorroborated allegation was insufficient to warrant a mistrial because the jurors had taken an oath to try the case fairly and impartially. *Id*. The Court of Appeals held that when there is an allegation of "patent juror bias," the trial court has an affirmative obligation to *voir dire* the juror before it may properly exercise its discretion in determining whether there was manifest necessity for a mistrial. *Id*. at 303.

The State contends *Nash v. State* is more analogous to the case at bar. 439 Md. 53 (2014). In *Nash*, the trial court received from the jury foreperson a note indicating that one juror stated that she was willing to change her "not guilty" verdict to "guilty" if it meant that she could go home and not return to the courthouse. The Court of Appeals held that the "trial judge's assessment that the Subject Juror's alleged statement was a result of fatigue as opposed to patent bias, was reasonable given the circumstances." *Id*. at 78. In distinguishing that case from *Wilson*, the Court stated that "there existed no evidence that the Subject Juror had a preexisting patent bias." *Id*.

Savage contends Jurors 2007 and 2047's respective responses to a certain *voir dire* question indicated each could not serve on the jury fairly and impartially. Upon the trial court asking whether serving on the jury would cause her a hardship, Juror 2007 responded that she "would most likely be distracted" and "partial," but then stated that she wasn't sure. Likewise, after being asked the same question, Juror 2047 indicated that serving on the jury would make "figure[ing] out how to make payroll" difficult, but nonetheless stated, "[b]ut if I need to serve, I'm going to serve." Savage contends these responses required the trial court to further examine the jurors to ascertain whether they could have served fairly and impartially, or strike each for cause. We disagree.

We are not persuaded that Juror 2007's students' predicted anxiety could likely cause her to have a "preexisting patent bias" against Savage as in *Wilson*, or otherwise not be fair or impartial while serving on the jury. Juror 2007 initially indicated that serving on the jury would be a hardship due to her predicted anxiety of her students because of her absence. Defense counsel then asked her "whether the anxiety of the students that she teach[es] . . . would have any bearing on her ability to be fair and impartial[?]" Juror 2007 responded that it could *possibly* affect her impartiality and then stated twice that she could not be sure. In our view, defense counsel's question and Juror 2007's answer did not indicate she had any preexisting patent bias towards Savage or that she could not be fair and impartial.

A review of the record shows no indication that Juror 2007 harbored a bias against Savage as to make her unable to be fair and impartial. The trial court asked her multiple

questions designed to ascertain juror bias against Savage. Juror 2007 indicated she did not have strong feelings about the offenses for which the defendant was charged, and that she did not have any moral, philosophical, or religious beliefs that would prevent her from being fair and impartial. She indicated she would not give more or less weight to the testimony of a police officer. She indicated that she did not object to interracial dating and would not be prejudiced against Savage or any witness because of race, religion, or ethnicity. She did not respond when the trial judge asked if there was "any other matter, fact, or thing" that would prevent her from being fair and impartial if she was selected to serve on the jury. The trial judge could therefore properly conclude, based on all of these circumstances, rather than her one equivocal answer to defense's leading question, that Juror 2007 could be a fair and impartial juror.

Moreover, nothing in the record evidences Juror 2047 had a "preexisting patent bias" against Savage or could not be fair and impartial while serving on the jury. Juror 2047 merely indicated that making payroll for his small business would "distract [him] a little bit." Nonetheless, he unequivocally stated, "it wouldn't impact [him] being fair or impartial."

As we see it, the trial court did not abuse its discretion in its *voir dire* of Jurors 2007 and 2047 and in finding they would be fair and impartial. Thus, Savage's exercise of his peremptory challenges was not impermissibly impaired.

II. Whether the trial court abused its discretion in failing to exclude testimony regarding Savage's character and prior bad acts.

Savage also contends the trial court erred in admitting evidence of his character and prior assault of Nelson because his involvement in the prior assault was not established by clear and convincing evidence and it was unduly prejudicial. Conversely, the State argues the evidence was properly admitted because it was relevant to show a pattern of domestic abuse, which in turn demonstrated Savage's motive and intent in assaulting Nelson.

"Evidence of other crimes, wrongs, or acts including delinquent acts . . . is not admissible to prove the character of a person in order to show action in conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident." Md. Rule 5-404(b). Before a trial court may admit evidence of other crimes or bad acts, it must undertake the three-prong analysis detailed in *State v. Faulkner*, 314 Md. 630 (1989).

First, the trial court must determine whether the evidence fits within an exception listed in Rule 5-404(b). *Page v. State*, 222 Md. App. 648, 661 (2015) (citing *Id*. at 634). The evidence "must carry special relevance unrelated to a defendant's disposition to commit a crime." *Streater v. State*, 352 Md. 800, 808 (1999). To be admissible as evidence of motive, "the prior conduct must be committed within such time, or show such relationship to the main charge, as to make connection obvious . . . that is to say they are so linked in point of time or circumstances as to show intent or motive." *Snyder v. State*, 361 Md. 580, 605 (2000) (quoting *Johnson v. State*, 332 Md. 456, 470 (1993)) (internal quotations omitted).

"Evidence of previous quarrels and difficulties between a victim and a defendant is generally admissible to show motive." *Id*. For example, in *Jones v. State*, the State sought to admit evidence that Jones had committed violent acts against his wife during the course of their marriage in his trial for her murder. 182 Md. 653 (1944). The Court of Appeals affirmed the admissibility of the evidence noting, "there was almost a continuous state of hostility between them. These crimes of the accused, having been committed on the same person, are so closely connected to the offense charged as to be evidence as to the intent and motive of the accused in this case." *Id*. at 657.

In *Snyder v. State*, where Snyder was on trial for the murder of his wife, the Court held that the trial court properly admitted testimony about a physical dispute between Snyder and his wife that occurred nearly a year before her murder, the couple's "stormy" relationship, and a fight the night before the murder during which Snyder said that his wife was "a dead woman." 361 Md. 580, 608 (2000). The Court explained that the "evidence was probative of continuing hostility and animosity, on the part of [Snyder], toward the victim and, therefore, of a motive to murder, not simply the propensity to commit murder." *Id*. at 608–09. Similarly, the Court held that the trial court had properly admitted testimony from the couple's daughter of prior instances of Snyder hitting his wife. *Id*. at 609.

Lastly, in *Jackson v. State*, where Jackson was on trial for assault on his girlfriend, we held the trial court properly admitted testimony that Jackson and the victim had a "violent" relationship, Jackson "knocked [the victim's] bottom tooth out" with a phone during a prior incident, and Jackson had assaulted the victim before. 230 Md. App. 450,

461 (2016). There, we held the challenged evidence was probative of Jackson's motive, which was "the exertion of control over the victim through the perpetration of a cycle of violence." *Id*.

Nelson's testimony was probative of Savage's motive for the charged assault in that it showed a history of abuse by Savage of Nelson, similar to the properly admitted evidence in *Jones*, *Snyder*, and *Jackson*. The crime for which Savage was on trial and the prior bad act to which Nelson testified were "so closely connected" in that both were physical assaults against the same victim—Nelson—and arose from similar arguments—Savage's use of Nelson's car. Similar to *Jackson*, in addition to Savage's prior assault on Nelson, Nelson's testimony describing Savage as misogynistic, "[v]ery controlling," "manipulative," and that he would "raise[] his fists at [her] multiples times as if he would hit [her]" was indicative of Savage's motive to exert his control over Nelson through the perpetration of a cycle of violence similar to *Jackson*. Savage's contention that his prior assault on Nelson, which occurred one year prior to trial, was "too remote" in time to maintain its link to the instant offense is meritless. *See Snyder v. State*, 361 Md. 580, 610−11 (2000) (holding testimony of a prior physical dispute between defendant and victim taking place one year before the instant offense was "logically related to motive," and properly admitted under Rule 5-404(b)).

The second prong in the analysis requires the trial court to determine that the defendant's involvement in the other crime or bad act is established by clear and convincing evidence. *Page v. State*, 222 Md. App. 648, 661 (2015) (citing *State v.*

Faulkner, 314 Md. 630, 634 (1989)). "Clear and convincing evidence means that the witness to a fact must be found to be credible, and that the facts to which he has testified are distinctly remembered and the details thereof narrated exactly and in due order, so as to enable the trier of the facts to come to a clear conviction, without hesitance, of the truth of the precise facts in issue." *Id.* at 665 (quoting *Cousar v. State*, 198 Md. App. 486, 514–15 (2011)) (internal quotations omitted). It "is the trial judge who must be [] persuaded clearly and convincingly," and we will not reverse that decision on appeal where "there was some competent evidence which, if believed, could persuade the fact finder as to the existence of the fact in issue." *Id.* (quoting *Emory v. State*, 101 Md. App. 585, 622 (1994)).

Savage's involvement in the prior assault against Nelson was established by clear and convincing evidence. At the time of trial, Nelson and Savage had had a romantic on-again, off-again relationship for the past five years. Nelson, the victim of the prior assault, distinctly explained the facts thereof. Testifying under oath, she stated with clarity that an argument ensued between her and Savage regarding his use of her car. To stop her from speaking, she distinctly recalled that Savage placed his hands around her neck then pushed her through the kitchen against countertops and the refrigerator. We conclude this testimony was sufficient to persuade the trial judge of Savage's involvement in the prior assault by a clear and convincing standard. *See Page v. State*, 222 Md. App. 648, 666 (2015) (holding victim's sworn testimony that victim knew defendant for nine to ten years was sufficient to establish defendant's involvement in prior bad act by clear and convincing evidence in absence of any reason to believe that the victim was unworthy of being

believed); *see also*, *Emory v. State*, 101 Md. App. 585, 623 (1994) (concluding that the testimony of a competent witness, under oath, that prior crimes occurred was sufficient to establish defendant's involvement in said crimes).

Savage's assertion that Nelson's testimony regarding the prior assault was insufficient to satisfy the clear and convincing standard because it was uncorroborated by direct physical or testimonial evidence is without merit. Such arguments "speak to the persuasiveness of the evidence, not its sufficiency." *Page v. State*, 222 Md. App. 648, 665 (2015) (holding victim's testimony sufficiently established prior bad act by clear and convincing evidence despite no other evidence supporting said testimony and the victim not reporting the bad act at the time it occurred or in victim's first statement to police).

Third, the trial court was required to weigh whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. *Id*. at 661 (citing *State v. Faulkner*, 314 Md. 630, 634 (1989)). "This final balancing between probative value and *unfair* prejudice is something that is entrusted to the wide discretion of the trial judge. The appellate standard of review, therefore, is the highly deferential abuse-of-discretion standard." *Id*. at 666 (quoting *Oesby v. State*, 142 Md. App. 144, 167 (2002)) (emphasis in original). A trial judge will abuse his discretion "where the ruling is well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Jackson v. State*, 230 Md. App. 450, 461 (2016) (internal quotations omitted).

We discern no abuse of discretion by the trial court in this case. As previously stated, Savage's prior acts were probative of the instant offense in that the two involved Savage putting his hands around Nelson's neck to choke her as a result of a dispute between the two regarding Savage's use of Nelson's car. The State presented the evidence of Savage's prior acts, in addition with Nelson's description of his character, to establish a pattern of control by Savage over Nelson, which was relevant to establishing Savage's motive and intent for the charged assault on Nelson. The evidence also helped to explain why Nelson wrote the letter to the trial court in which she asked that the charges against Savage for the assault be dropped. Certainly, the evidence was prejudicial, as most evidence often is against an accused, but we are unable to conclude that the trial court abused its discretion in determining that the evidence was not unfairly prejudicial to such a degree that it outweighed the probative value of the evidence.

Moreover, even if the court erred in admitting the evidence of Savage's character and prior bad acts, the error was harmless. An error is harmless where "a reviewing court, upon its own independent review of the record, is able to declare belief beyond a reasonable doubt that the error in no way influence[d] the verdict." *Dorsey v. State*, 276 Md. 638, 659 (1976).

In this case, even without Nelson's testimony regarding Savage's character and prior assault on her, there existed substantial evidence of Savage's guilt. Savage admitted in a recorded statement that the sawed-off shotgun was his and was loaded. Defense counsel, during her closing statement, conceded that Savage was guilty of illegally

possessing a firearm. Savage also admitted that he had grabbed Nelson by the arm and "yanked" her back into the apartment. Defense counsel argued in her closing argument that this was sufficient to find Savage guilty of second-degree assault. Significantly, Savage also admitted in the recorded jail phone call, when speaking about the offenses with which he was charged, that he "choked her ass out cause she came out of her mouth like real disrespectful."

Reviewing the record, we conclude beyond a reasonable doubt that the admission of evidence regarding Savage's character and prior bad acts against Nelson in no way influenced the verdict in this case. Thus, reversal is not appropriate in this case.

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