Circuit Court for Baltimore City

Case No. 118232001

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1892

September Term, 2019

No. 0495

September Term, 2021

FRANCOIS BROWNE

V.

STATE OF MARYLAND

Arthur,
Tang,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Moylan, J.
Dissenting Opinion by Arthur, J.

Filed: December 7, 2022

"The man who wins the lottery once is envied;
the one who wins it twice is investigated."[1]

That simple but profound truism epitomizes what both in the law of logic and in the law of criminal evidence is the principle of inherent improbability. It is now more frequently referred to as the Doctrine of Chances. That principle is not an "exception" to the presumptive exclusion of evidence of "other crimes." It is, rather, an instance of the "other crimes" rule's threshold inapplicability. That distinction lies at the very heart of this appeal.

Questions Simple And Abstract

What is this case all about? Such a question would seem to be simple enough. The actual question before us, however, is infinitely more complex. Searching for the first-level answer serves only to implicate other questions of vastly more far-reaching significance. First and foremost, of course, the case is about whether this appellant's criminal convictions will be affirmed or reversed. That is important, as it should be. What is before us, however, is obviously much more than a question of the continued incarceration of Francois Browne.

The problem solving process for that question necessarily implicates the larger and more abstract question of Maryland's fundamental perception of its "other crimes" rule - the rule's basic configuration - the rule's conceptualization. The improbable fact pattern in the case now before us brings to the front of the mind, yet again, that Maryland has tended to ignore the fact that the vitally important component of our criminal and evidentiary

---

1 United States v. York, 933 F.2d 1343, 1350 (7th Cir. 1991).

common law known as the "other crimes" rule has undergone a relatively recent period of significant doctrinal flux but is now enjoying the benefit of a fresh perspective. Over the last forty to fifty years, the intellectual understanding of this venerable rule has benefited from, both in introspective caselaw and in academic commentary, a significant revision.

That more abstract problem, in turn, generates the even more abstract question of how does Maryland arrive at its perception of the rule. Does it operate in a judicial vacuum? Or will it be influenced by the changing perception taking place in sister jurisdictions? The "other crimes" rule in Maryland is but a single strand in a much older and much larger cable of no less than sixty strands. Throughout that cable, generally, a widespread change in perception is now afoot. The question is whether our strand is alert to the general trend. It is imperative to remember, moreover, that we are dealing not with a common law principle that traces back to Ross v. State, 276 Md. 664, in 1976, but with one that traces back, at the least, to Rex v. Cole in the Michaelmas Term of 1810. The fresh perspective being enjoyed throughout the common law world is both worthy of and in need of fresh examination locally. But first:

The First-Level Question Before Us

The appellant, Francois Browne, was found guilty in the Circuit Court for Baltimore City by a jury, presided over by Judge Charles J. Peters, of second-degree murder and first-degree child abuse resulting in death. On November 7, 2019, Judge Peters sentenced the appellant to life imprisonment for the first-degree child abuse and to a consecutive term of

forty-five years for the second-degree murder. The appellant noted an appeal, which was docketed as Case No. 1892 of the Term of September 2019. Before briefing, however, that appeal was stayed.

On January 19, 2021, the appellant filed a Motion for a New Trial, which motion was denied by Judge Peters on May 27, 2021. The appellant noted an appeal from that denial, which was docketed as Case No. 495 of the September 2021 term. On August 23, 2021, this Court granted the appellant's motion to lift the stay in his first appeal and then to consolidate the two appeals for purposes of briefing and submission to this Court.

The Crime On Trial: The Infanticide of 2018

The appellant was convicted of the second-degree murder and first-degree child abuse resulting in death of seventeen-month-old Zaray Gray who died on Wednesday, July 18, 2018. Throughout that day, the appellant had been the primary adult caretaker of Zaray and the only adult other than Zaray's mother even to have any contact with him. Since the preceding May, the appellant had been involved in a romantic relationship with Zaray's mother, Whitney West. The appellant spent three or four days and nights per week at the West household with the mother and her three children: Zaray; Zoe, a sister who was seven years of age at the time of the trial; and Zakhi, a brother who was eight years of age at the time of the trial.

On that crucial Wednesday, the appellant came over to the West household at breakfast time and Ms. West cooked breakfast for the entire extended family. After

breakfast, Ms. West's mission for the day was to gather together some clothes which she was planning to donate to Goodwill. While she was busy doing so, the appellant agreed to take the three children to a nearby playground. While at the playground, Zaray remained in the care of the appellant while the two older children played on their own. At one point, Zaray tried to go down a sliding board but fell off when he got to the bottom. In a later statement to the police, the appellant said that when Zaray fell off at the bottom, he landed on his back and bumped his head.

Zakhi related an incident that before they all went home, they engaged in a race from the playground to behind a building. Zakhi testified that at one point behind the building, he saw the appellant "yanking" Zaray's arm while Zaray was crying. He also testified that he and Zoe took a different route back home and left Zaray alone with the appellant.

When the group got home, Ms. West was still gathering clothes for the Goodwill donation. The appellant brought Zaray upstairs to his mother. Zaray vomited while sitting on Zoe's bed. According to Ms. West, Zaray seemed tired and thirsty from the heat and the walk but otherwise seemed normal. While Ms. West cleaned up the bed and the floor, the appellant cleaned up Zaray and changed his clothes. Ms. West put Zaray on the bed in her room. The appellant went downstairs. Ms. West finally left the house at about 4:00 PM and took Zoe with her. At one point, the appellant took Zaray and Zakhi outside. When the appellant and Zaray came back inside, Zakhi continued to play outside with his friends. In his statement to the police, the appellant said that he and Zaray were together on the sofa

watching television for about an hour before he took Zaray upstairs to watch cartoons. During that period, Zaray vomited two more times. The appellant bathed him and changed him and then laid him down on Ms. West's bed.

In the meantime, Ms. West and Zoe had been to several stores and then went to get their nails done. Ms. West was gone for about two hours and got home at between 6:00 and 7:00 PM. After 15 to 20 minutes, Ms. West went upstairs to check on Zaray. He was lying on his stomach and "kind of moaning in his sleep." This did not alarm her and she went downstairs to cook dinner. Zaray stayed in the bedroom and did not have dinner with the others. Somewhat later, Ms. West decided to change Zaray's diaper before she and the appellant went to bed. It was then that Ms. West discovered that Zaray was not breathing and she could not find a pulse or a heartbeat. Zaray was taken to the hospital by ambulance. Zaray arrived at the hospital in cardiac arrest and was pronounced dead at 10:35 PM.

A head CT scan was negative for fractures and bleeding but an x-ray revealed a fractured left clavicle.[2] Among the more prominent findings, there were contusions on the right side torso that formed a pattern injury with five impact points, all consistent with a hand or a fist. The Assistant Medical Examiner, Diana Nointin, found evidence of "two blunt force impacts to the head and face and eight blunt force impacts to the torso." She also found significant internal injuries in the abdominal cavity, a hole and evidence of fresh hemorrhage in the "omentum," which is a sheet of fatty tissue between the intestines and

[2] The left collarbone.

the abdominal wall, which covers the front of the abdomen and protects the internal organs from external damage. Dr. Nointin testified that the tear in the omentum could cause nausea and vomiting. She further testified that such an injury would be caused by a lot of force and would not be consistent with falling off the bottom of a slide. The abdominal injury could have triggered an extreme inflammatory response, putting a strain on the heart and ultimately causing cardiac arrest. Dr. Nointin testified that the injuries were consistent with an adult having punched Zaray. In order for a child to have caused such damage, it would take acceleration such as jumping off a bed and landing on Zaray or jumping on him repeatedly.

Dr. Nointin also opined that the clavicle fracture was a displaced fracture and it was indicative of blunt force trauma, either by a direct impact or from pulling or twisting the arm. One would need momentum and enough force to break a bone. Dr. Nointin concluded that the cause of Zaray's death was "multiple injuries" and the manner of death was homicide. She testified that the injuries that caused death had occurred within hours before the death and were consistent with an adult's punching of the child.

In terms of timing, the clavicle fracture was fresh, meaning that it had occurred "within hours" of Zaray's death. So too were contusions to the lower abdomen. The internal injuries to the abdomen were a mix of fresh injuries and older injuries. The fatal injuries to the abdomen had occurred within two to twenty-four hours of the time of death.

Dr. Amy Hawes, an expert in forensic pathology, also testified, as a witness for the defense. She agreed that the manner and cause of death was homicide as a result of blunt

force injuries. She testified that the displaced clavicle fracture was caused by blunt force, either a direct blow from a person or a significant fall. She did not believe that the clavicle fracture could have been caused by a pulling or yanking of the arm. She opined that the clavicle fracture had occurred within approximately 24 hours of the time of death.

The "Other Crime": The Infanticide Of 2012

Over defense objection, the State, pursuant to Maryland Rule 5-404(b), presented evidence of the appellant's prior conviction in Baltimore City of the first-degree child abuse resulting in death of his own seven-month-old son, Kendall Browne. In the Circuit Court for Baltimore City, Judge Timothy Doory had found the appellant guilty on his plea of guilty (actually an Alford plea[3]) for the death of the appellant's infant son.

In addition to the results of the Court proceeding, the State, at the current proceeding, presented evidence describing some of the circumstances of the earlier crime from three witnesses. Whitney West (Zaray's mother) testified to statements that the appellant had made to her recounting his version of the death of his son, seven-month-old Kendall. The appellant acknowledged to his having been convicted for his son's death but protested his actual innocence. The appellant explained that Kendall's mother was lazy and

[3] In the case of North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) the Supreme Court approved of a procedure whereby a criminal defendant does not contest the accuracy of the charges against him and submits to a conviction but does not personally acknowledge his guilt as he would do with a guilty plea. The procedure is known as an Alford plea.

did not take care of Kendall, instead entrusting Kendall to the care of his eight or nine-year-old brother, who would repeatedly drop Kendall on the floor.

A second witness to the death of Kendall was Sgt. Misty Goines, the police officer who had investigated that earlier case. Sgt. Goines explained that although young Kendall lived with his mother and several older siblings, the appellant, who was the biological father of Kendall, started having custody of Kendall every weekend for two or three weeks before the child died. The appellant had custody on December 30, when the mother dropped Kendall off and on December 31 until the emergency call was put in for 911. The appellant explained to Sgt. Goines that he did not know what had happened to Kendall, but acknowledged that he had been the only person who had been with Kendall before Kendall started showing the symptoms that prompted the appellant's calling of 911. Kendall died on January 3, 2013, three days after being admitted to the hospital. Judge Peters admitted the hospital records in Kendall's case without objection. A true-test copy of the appellant's conviction was also received in evidence. At trial, the State also called Dr. Zabiulah Ali, the assistant medical examiner who performed the autopsy on Kendall. Kendall's death was determined by Dr. Ali to have been a homicide, resulting from multiple head injuries. The mechanism of injury had been blunt force trauma to the head. The autopsy report was admitted in evidence.

In terms of "other crimes" evidence, the case against the appellant for the child abuse and death of Kendall was indisputably strong. Sometimes the proof of the "other crime" does not have the benefit of a prior court adjudication, let alone a conviction. This

one did. The proof of the earlier crime frequently has to be established, for the first time, from the recollection of witnesses to an event, sometimes years after its occurrence. The proof sometimes has to depend upon even indirect accounts. In this case, by contrast, the State here had not only the support of a certified conviction. It also had the support of an Alford-plea, in which the appellant admitted that the State's evidence, if believed, was sufficient to enable a jury to find him guilty beyond a reasonable doubt.

The Contentions

In appellate brief, the appellant has ostensibly raised two contentions which we, for analytic convenience, will treat as three contentions. They are the claims:

> **1. That Judge Peters erroneously admitted "other crimes" evidence consisting of the appellant's earlier conviction for the child abuse resulting in death of his infant son, Kendall;**
>
> **2. That Judge Peters erroneously admitted "other crimes" evidence consisting of an alleged argument between the appellant and Whitney West to show the appellant's propensity for a quick temper and violence; and**
>
> **3. That, as an exclusively post-trial ruling, Judge Peters erroneously denied the appellant's Motion for a New Trial.**

Once we get to them, the second and third contentions will not detain us long. It is the appellant's first contention that is the formidable challenge in this case.

Settling On A Name

We will be addressing what is generally called the "other crimes" rule. More fully, it is an evidentiary rule that under one very specific circumstance prohibits the introduction against a defendant in a criminal case of evidence of "prior crimes or other bad acts"

committed by that defendant. For convenience, we will refer to the full rule simply as the "other crimes" rule. The inclusion of "other bad acts" will have to be implicit.

This rule or evidentiary ban is a rule of limited applicability. It is not a prohibition on the introduction of evidence of prior crimes or other bad acts generally. This "other crimes" rule, applicable in criminal cases, is but one member of a significantly larger matrix of evidentiary laws dealing generally with proof of a trait of character. That larger body of evidentiary law applies to civil and criminal cases alike. It deals with pertinent traits of character of the parties to the litigation, of witnesses, of possibly aggressive victims in cases charging assault or other violence. The very presence of the "other crimes" rule as a part of a larger family of rules helps to give us a broader understanding of why an "other crimes" rule even exists. It is related to the proof of a character trait, such as a trait of a criminal defendant that might be indicative of a criminal propensity.

The prohibition of evidence of other crimes or other bad acts, however, is not a general ban of universal applicability. In the express language of Maryland Rule of Procedure 5-404(b), the prohibited evidence "is not admissible to prove the character of a person in order to show action in conformity therewith." The risk or damage that the "other crimes" rule seeks to avoid is that such past behavior of the defendant may persuade the factfinder that the defendant is a "bad man" with an enhanced propensity to commit crime. In referring to this risk or chance, we, and the caselaw, may sometimes refer to the "other crimes" rule as the "propensity rule." The proof of a criminal propensity is the forbidden purpose.

"What's In A Name?"[4]
The Propensity Rule And Limited Applicability

In Lynn McLain, Maryland Evidence, Sect. 404.1, 342, Professor McLain's description of the propensity rule makes it clear that it is a rule of limited exclusion, not excluding evidence of "other crimes" broadly but only when such evidence is offered to prove propensity:

> When character is not directly in issue, but character evidence is offered to show that a party is a "good" or "bad" person, either in general or with regard to a particular trait, and thus did the "right" or "wrong" thing in the incident which led to the trial, it is inadmissible. This rule of general exclusion of character evidence when offered to prove that a person acted in accordance with his or her character on a particular occasion is known as the propensity rule.

(Emphasis supplied.)

The same limited applicability is recognized and discussed in Comment, "Procedural Protections of the Criminal Defendant – A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime," 78 Harv. L. Rev. 426, 435-36 (1964):

> In the common law system the prosecutor has traditionally been prohibited from introducing evidence of a defendant's character solely to prove his propensity to commit the crime charged. In a prosecution for theft, for example, the prosecutor may not introduce evidence of prior stealing or dishonest reputation, despite the conceded relevance of such evidence to the question of whether the defendant committed the crime of which he is accused. Today this rule, hereinafter referred to as the "propensity rule," is considered basic to the common law system. The propensity rule is accepted by all jurisdictions as a common law or statutory rule of evidence.

[4] Shakespeare, Romeo and Juliet, Act 2, Scene 2. Shakespeare went on to remind us, "that which we call a rose by any other name would smell as sweet."

(Emphasis supplied.)

That limited applicability of the exclusion of evidence is also noted in Comment, "Other Crimes Evidence at Trial: Of Balancing and Other Matters," 70 Yale L. J. 763, 766 (1961):

> All jurisdictions observe the requirement that no evidence may be admitted which tends solely to prove that the accused has a "criminal disposition." The rationale for this absolute prohibition is that such evidence is always more prejudicial than probative.

(Emphasis supplied.)

Although the "other crimes" rule and the "propensity" rule (in the context of the criminal law) are in large part one and the same, our very choice of language can have a subtle influence on our subconscious thinking. The term "other crimes" focuses on the type of evidence subject to exclusion and suggests that such evidence may be broadly excluded. The term "propensity," by contrast, focuses on the limited purpose for which such evidence may be excluded. Is our attention focused on exclusion or on its limitation? The difference is but a nuance, but such a nuance can have a subtle influence on our thinking, particularly when we are not consciously thinking.[5]

[5] Maryland has long recognized one very prominent exception to the rule prohibiting the admission of "other crimes" evidence offered solely or primarily to prove the propensity of the defendant to commit the crime for which he was being tried. In Vogel v. State, 315 Md. 458, 554 A.2d 1231 (1989), a case which predates Maryland's adoption of Rule 5-404 in 1993 and was based on the general common law rule, the Court of Appeals made it clear that 1) when the prosecution is for sexual crimes, 2) when the prior illicit sexual acts are similar to that for which the accused is on trial, and 3) when the victim in the earlier incident and the victim in the crime on trial are one and the same, the evidence

The Procedural Framework: Faulkner v. State

It behooves us at this point to jump ahead in our analysis simply to get out on the table the procedural framework to which we will need, on frequent occasions, to refer. Albeit a four to three decision, the leading Maryland opinion on the "other crimes" rule is State v. Faulkner, 314 Md. 630, 552 A.2d 896 (1989). The Court of Appeals there, speaking through Judge William Adkins, set out a three-step procedure for litigating the admissibility of evidence pursuant to the "other crimes" rule. The first step is to determine whether the proffered evidence offends the "other crimes" rule, to wit, whether the evidence is offered to prove criminal propensity or is offered to serve some other non-propensity or non-character purpose:

> When a trial court is faced with the need to decide whether to admit evidence of another crime – that is, evidence that relates to an offense separate from that for which the defendant is presently on trial – it first determines whether the evidence

---

of the earlier bad act is admissible to show propensity. *See also* Hurst v. State, 400 Md. 397, 415-16, 929 A.2d 157 (2007).

That lowering of the bar generally with respect to the use of other incidents of a sexual offense to show a defendant's propensity on his trial for a similar sexual offense received broad legislative approval with the passage of what is now codified as Maryland Code, Courts and Judicial Proceedings Article, Sect. 10-923 by Acts of 2018, chs. 362 and 363.

The first occasion for either Maryland appellate court to examine the new law was the meticulously thorough and comprehensive opinion of Judge Friedman for this Court in Woodlin v. State, No. 107, September Term 2021, filed on May 31, 2022. As Judge Friedman explained, "This new law changes the rules of evidence and makes admissible evidence that was previously inadmissible regarding prior sexually assaultive behavior." What is now before us in the current case, however, does not involve sexually assaultive behavior and is beyond the purview of Courts Article, Sec. 10-923.

> fits within one or more of the Ross exceptions. That is a legal determination and does not involve any exercise of discretion.

314 Md. at 634. (Emphasis supplied.)

Even if the purpose for which the evidence is offered is presumptively proper, the second step of Faulkner's procedural examination requires that the defendant's involvement in the prior crime or bad conduct be convincingly established:

> If one or more of the exceptions applies, the next step is to decide whether the accused's involvement in the other crimes is established by clear and convincing evidence. We will review this decision to determine whether the evidence was sufficient to support the trial judge's finding.

314 Md. at 634-35. (Emphasis supplied.) *See* Lodowski v. State, 302 Md. 691, 728, 490 A.2d 1228 (1985); Cross v. State, 282 Md. 468, 474, 386 A.2d 757 (1978); Oesby v. State, 142 Md. App. 144, 164-65, 788 A.2d 662 (2002); Solomon v. State, 101 Md. App. 331, 338-39, 646 A.2d 1064 (1995). *And see* Huddleston v. United States, 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988).

Even if at that second stage the proffered "other crimes" evidence has passed muster, the defendant still has the opportunity at the third Faulkner stage to convince the trial judge that the risk of probable prejudice, via propensity, outweighs the value of the evidence to the State:

> If this requirement is met, the trial court proceeds to the final step. The necessity for and probative value of the "other crimes" evidence is to be carefully weighed against any undue prejudice likely to result from its admission. This segment of the analysis implicates the exercise of the trial court's discretion.

314 Md. at 635. (Emphasis supplied.)[6] *See* Cross v. State, 282 Md. 468, 474, 386 A.2d 757 (1978); Moore v. State, 73 Md. App. 36, 44-45, 533 A.2d 1 (1987); Oesby v. State, 142 Md. App. 144, 165-66, 788 A.2d 662 (2002); Solomon v. State, 101 Md. App. 331, 339, 646 A.2d 1064 (1995).

In this delicate weighing between value and risk, the first and third procedural steps counterbalance each other. In the first, the State must establish, as a matter of law, the presumptive relevance or admissibility of the "other crimes" evidence, by showing that it has relevance without showing propensity. In the third step, the defense may try to persuade the trial judge that, notwithstanding presumptive admissibility, the risk posed by the evidence still outweighs its value. It is a discretionary call. Even if the State gets across the inclusionary threshold, the defense still gets another exclusionary chance.[7]

---

[6] Just as the first step in this three-step process is mandated both by Maryland Rule of Procedure 5-404(b) and Federal Rule of Evidence 404(b), the third Faulkner step is mandated by Maryland Rule 5-403 and by Federal Rule of Evidence 403. Maryland Rule 5-403 provides:

> Although 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.

The Maryland Rule is derived from Federal Rule of Evidence 403 and the two rules are essentially verbatim. They are, moreover, Faulkner's third step. Federal Rule of Evidence 403 is a companion to Federal Rule of Evidence 404 just as Maryland Rule 5-403 is a companion to Maryland Rule 5-404.

[7] It is important to remember that the "prejudice" on the negative side of the scale in the weighing exercise is not all "prejudice" but only "unfair prejudice." In Oesby v. State, 142 Md. App. 144, 165-66, 788 A.2d 662 (2002), we stressed that critical difference:

On appellate review of the Faulkner three-part testing, appellate reversal will almost never come with respect to the third step. That is to be expected because the standard of appellate review is the highly deferential abuse of discretion standard.[8] Any appellate reversal is far more likely to come with respect to the first Faulkner step, where the appellate court is burdened with making a de novo call. On a delicately balanced issue that

---

> The ill effect that militates against admissibility is not prejudice generally, but only unfair prejudice. In a larger sense, all competent and trustworthy evidence offered against a defendant is prejudicial. If it were not, there would be no purpose in offering it. The special relevance that gives "other crimes" evidence its probative value ipso facto makes it prejudicial in that it is, by definition, strong but legitimate proof that the defendant is guilty.
>
> Such self-evident prejudice in the larger sense, however, is not the "unfair" prejudice that should enter into the balancing process. To measure probative value against legitimate prejudice would be to measure probative value against itself. In such an exercise in futility the scales could never tilt in favor of probative value. That obviously is not what the balancing test is designed to do. The "unfair" component of the prejudice is not the tendency of the evidence to prove the identity of the defendant as the perpetrator of the crimes. What is "unfair" is only the incremental tendency of the evidence to prove that the defendant was a "bad man." As we balance, therefore, the emphasis must be not on the noun "prejudice" but on the qualifying, and limiting, adjective "unfair."

(Emphasis supplied.)

[8] Oesby, 142 Md. App. at 167-68, went on:

> A properly disciplined appellate court will not reverse an exercise of discretion because it thinks the trial judge's decision was wrong. That would be substituting its judgment for that of the trial court, which is inappropriate if not forbidden. Reversal should be reserved for those rare and bizarre exercises of discretion that are, in the judgment of the appellate court, not only wrong but flagrantly and outrageously so.

can easily teeter in one direction or the other, the slightest nuance or even a subtle predisposition can be critical. Our subconscious tilt may be simply the product of how we conceptualize the "other crimes" rule. Is it a broad exclusionary rule with a finite list of well-established exceptions? Or is it an exclusionary rule of only limited applicability, depending upon its being used for a specific and forbidden purpose? The difference may be slight, but it is enough to influence the tilt. Where we come out on a given issue is frequently a function of where we go in.

The Faulkner Analysis In The Present Case

With respect to this three-step procedural framework, the challenge on this appeal is with respect to the satisfaction of the first of the three steps. The second and third steps were routinely satisfied, so we may reduce the clutter by ruling on them summarily. With respect to the certainty of the evidence to establish the circumstance of Kendall's death, the second Faulkner step, we have a certified judgment not only of a court, but of a court in our own jurisdiction, backed up by the appellant's Alford plea and by the testimony of Whitney West; by that of the police investigator, Sgt. Goins; and by that of the medical examiner, Dr. Zabiulah Ali.

The drastically shortened chain of required inferences to establish the first infanticide began with a finally adjudicated crime and not merely with an alleged "bad act." That was proof of a very different order. It started on third base. Judge Peters ruled:

> As to step two, whether the Defendant's involvement in the bad conduct was proven by clear and convincing evidence, I find that in fact, since he was found guilty pursuant to a plea under North Carolina v. Alford, that clearly the bad conduct was

> established by clear and convincing evidence. Any judge in the State of Maryland before he can accept a plea, and I'm sure Judge Doory did this, must find that there's a factual basis for a plea and in fact the Defendant was guilty beyond a reasonable doubt, which exceeds the [required] burden, a standard for clear and convincing evidence.

(Emphasis supplied.)

We affirm that ruling as not clearly erroneous. With respect to the third Faulkner step of the required three-step procedure, Judge Peters ruled:

> The last step is step three, which means that the probative value of the bad conduct evidence is substantially outweighed by its potential for unfair prejudice, confusion of the issues, or misleading the jury, by consideration of undue delay, waste of time, or needless presentation of cumulative evidence. It seems to me the necessity for this particular evidence is strong in this case.
>
> And I'll just define for the record "necessity," meaning, this corroborative evidence, including the other crimes evidence, is not merely cumulative in establishing defendant's guilt. It was reasonably necessary and served an appropriate probative purpose, and I'm citing from Faulkner.
>
> It seems to me in this particular case, the State is going to be required to show the identity, knowledge, absence of accident by the perpetrator in this particular case. What the State has proffered to me is that they have the Defendant who was in custody of the victim in this case for parts of the time span for which the injuries occurred, so sort of the circumstantial evidence to establish his guilt in that means, and further that Defendant claims that there was an accident during that time period as well.
>
> So I think the State needs to meet that issue, and the only thing other than that mere circumstantial evidence is the testimony of an 8-year-old. Now I believe he's 8 years old; at the time I believe he was 7 – that the Defendant may have been physically abusive to the victim. So I would find that in fact weighing then the probative value, although clearly it is going to be prejudicial to the Defendant, there is no doubt about that, but it's a question of whether it's unfair prejudice and I find it isn't, because I find the probative value outweighs any unfair prejudice. And I will permit the admission of that evidence and I will give it a limiting instruction if requested by the Defense.

(Emphasis supplied.)

That third decision was one entrusted to the broad discretion of the trial judge. Once again, we affirm Judge Peters's ruling. Judge Peters engaged in a thoughtful appraisal of the pros and of the cons of admitting the evidence. Evidentiary value outweighed evidentiary risk. Under such circumstances, we cannot say that he was guilty of having abused the broad discretion that was necessarily entrusted to him.

Our further focus in this appeal, therefore, will be on the first of Faulkner's three procedural steps, that of determining the threshold applicability or inapplicability of the "other crimes" prohibition. That determination may turn on our fundamental conceptualization of the "other crimes" rule. Is it an exclusionary rule of only limited applicability? Or is it a broad exclusionary rule with a formal list of well-established and finite exceptions?

The Sources Of The Law: Rules Of Procedure

In probing what can at times be subtle nuances of the "other crimes" rule, we find ourselves looking bifocally at two possible sources of that law. We are looking first at rules of procedure, both Maryland and federal. They are front and center. We are also looking, however, at a rich and venerable caselaw, both in Maryland and in the vastly broader common law world. Fortunately, the rules of procedure and the caselaw accurately reflect each other, so there is no choice that needs to be made between the two. In another sense, however, the rules of procedure, both federal and in Maryland, are very recent, whereas

the caselaw reveals a rich and venerable lode of common law history and development capped off by a massive and penetrating academic analysis. On it – the law's long and evolving history - will be our primary focus. It is far more likely, of course, that it is here, in the primordial DNA of the "other crimes" rule, that we may find its proper conceptualization. By contrast, the rules of procedure, both State and federal, accurately reflect the state of the existing law, but they are by no means the source of that existing law. These latter-day rules of procedure are simply "riding shotgun" and they only climbed aboard, moreover, well along the trail.

In looking to the long and rich history of the "other crimes" rule, we by no means disdain Maryland Rule of Procedure 5-404(b), which provides:

> **(b) Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or other acts is not admissible to prove the character of a person in order to show action in the 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, absence of mistake or accident, or in conformity with Rule 5-413.

(Emphasis supplied.)

Rule 5-404(b), however, was only adopted on December 15, 1993, long after most of our controlling caselaw was written. It was derived from Federal Rule of Evidence 404(b) and is essentially verbatim with it. Maryland followed the general trend. Federal Rule 404(b), however, was itself only adopted in 1975. Although its pedigree is also short, it has attracted significant academic attention. *See* Andrew J. Morris, "Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning From Other Crime

Evidence," 17 Review of Litigation L. Rev. (University of Texas Law School) 181, 182-83 (Spring 1998):

> Rule 404(b) is probably the most litigated Federal Rule of Evidence. Decisions on the admissibility of bad acts evidence may determine more criminal cases than any other type of evidence, and bad acts evidence plays a central role in many negligence, harassment, and discrimination cases. One authority's identification of the scope of Rule 404(b) as "the single most important issue in contemporary criminal evidence law," certainly seems apt.

(Emphasis supplied.) *See also* Edward J. Imwinkelried, "The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea," 130 Military L. Rev. 41, 43 (1990) ("Rule 404(b) has generated more published opinions than any other subsection of the Federal Rules.").[9] The Federal Rules of Evidence have now, moreover, been effectively adopted by 30 states, including Maryland with Rule 404(b).

The Problem Of Conceptualization

It is a minor problem, but it can be a vexing problem. How do we conceptualize the "other crimes" rule? Is it a basically exclusionary rule, but one with a finite list of formal exceptions? Or is it a rule of only limited applicability, aimed only at excluding evidence that is offered for and will probably have the effect of establishing a criminal defendant's

[9] In a series of three extensive surveys, Prof. Thomas J. Reed has explored the promulgation of Federal Rule of Evidence 404 and its subsequent impact in federal trials. They are Reed, "Trial by Propensity: Admission of Other Criminal Acts Evidence in Federal Criminal Trials," 50 U. Cin. L. Rev. 713 (1981); Reed, "The Development of the Propensity Rule in Federal Criminal Courts 1840-1975," 51 U. Cin. L. Rev. 299 (1982); and Reed, "Admissions of Other Criminal Act Evidence," 53 U. Cin. L. Rev. 113 (1984). Prof. Reed's preferred usage is that of the "propensity rule." The exclusionary focus is not on "other crimes" generally but on "propensity" specifically.

character or criminal propensity? To be sure, under either conceptualization of the "other crimes" rule, the law gets to the same place most of the time. The difference in actual results is slight. The difference is little more than a shift in grammatical emphasis. The one conceptualization assumes exclusion unless an exception is shown to exist. The other does not assume exclusion unless the risk of propensity is shown to exist. It may fairly be called "inclusionary." At least it may be called "non-exclusionary."

If many jurisdictions are not in one conceptualization camp or the other, it is for the obvious reason that most jurisdictions have not had the occasion even to think about this relatively arcane problem. The conceptualization question is in most cases at best tangential. On the other hand, even those jurisdictions that appear to be in one conceptualization camp or in the other are sometimes there only by random chance, depending on the shear happenstance of casual and subconscious wording and not by conscious choice. The wording of Ross v. State, 276 Md. 664, 350 A.2d 680 (1976), for instance, may inadvertently have seemed to place Maryland in what appears to be the "presumptive exclusion subject to exception" category without having had any expressed reason for having done so. This Court commented on the process of random happenstance in Harris v. State, 81 Md. App. 247, 258-59, 567 A.2d 476 (1989):

> Instead of a neutral statement that the evidence in issue is inadmissible to show propensity but is, with equally enthusiastic endorsement, admissible for any other relevant purpose, the restatement by *Ross* has had the practical effect of treating such evidence as presumptively inadmissible. The State, instead of facing the routine task of showing relevance and overcoming its counterweights, faces the more daunting challenge of demonstrating a special exemption from an exclusionary norm. What has been subliminally influenced is the mind-set or "tilt"

> with which we approach the question. From the very way in which the proposition is stated, we find ourselves subconsciously predisposed toward exclusion "going in."

(Emphasis supplied.)

In the case now before us, we would reach the same decision – that the evidence of the earlier infanticide in 2012 was properly admitted – under either conceptualization of the "other crimes" rule. The choice of conceptualization, however, can influence the length and the organization of the supporting opinion. It is a subject well worth exploring and it is one that has never been fully and consciously addressed by the courts of Maryland. We think it worth the effort to do so now.

The "Other Crimes" Rule In England

The "other crimes" rule was born a long time ago. Any serious examination of the origins and subsequent development of the "other crimes" rule in Anglo-America must begin with Prof. Julius Stone of the University of Leeds and his two landmark articles in the Harvard Law Review in 1933 and 1938. They are Julius Stone, "The Rule of Exclusion of Similar Fact Evidence: England," 46 Harv. L. Rev. 954 (1933) ("Stone I") and Julius Stone, "The Rule of Exclusion of Similar Fact Evidence: America," 51 Harv. L. Rev. 988 (1938) ("Stone II"). These two groundbreaking articles by Prof. Stone are truly the Urtext.

At the very outset, Prof. Stone explained the chronological positioning of the two surveys. He also explained how the English conceptualization of the rule has been settled for more than a century, whereas the American conceptualization was still (as of 1938) in "considerable flux:"

> The position in England has been investigated first because historically, whatever the American position actually is, it was originally based upon the English practice. Moreover, the English doctrine has maintained substantially its original scope for more than a century, whereas even a preliminary survey indicates considerable flux in the American position. The first study will, therefore, lay the necessary groundwork for an appreciation of the latter.

Stone I, at 954. (Emphasis supplied.)

At the outset also, Prof. Stone explained the delicate balancing required in weighing a strong reason for excluding the evidence against a strong reason for admitting the evidence. The slightest tilt or teeter in one direction or the other could be critical to the ultimate decision:

> [T]wo reasons make it worthy of special attention. First, the admission of such evidence presents the possibility of undue prejudice in an extreme form. Second, and somewhat paradoxically, the extreme likelihood of prejudice, which is a reason for its exclusion is concomitant with a strong likelihood that the evidence tendered has real probative value and should be admitted. How should the resulting conflict be adjusted?

Id. (Emphasis supplied.)

All of the academic historians agree that the first recorded case applying the "other crimes" rule was that of Rex v. Cole in the Michaelmas Term of 1810. It was described as a holding by all of the judges that "in a prosecution for an infamous crime, an admission by the prisoner that he had committed such an offense at another time and with another person and that he had a tendency to such practices, ought not to be admitted." (Emphasis supplied.)[10] Prof. Stone described Rex v. Cole as establishing the principle that "evidence

[10] Thus described in Phillips, Law of Evidence (1st ed.) 69-70.

which merely showed that the defendant had a propensity to do the sort of acts with which he was charged was not admissible." Stone I, at 961. He went on to explain, "This is a very narrow principle of exclusion." (Emphasis supplied.) After citing a series of cases in which "similar facts" evidence was admitted for various relevant purposes, Prof. Stone turned to the 1849 case of Regina v. Geering, 18 L.J. (N.S.) 215. He describes Regina v. Geering as "the authority repeatedly cited as a starting-point for the alleged modern relaxation of a posited broad rule of exclusion." Prof. Stone described the factual scenario:

> Ann Geering was indicted for the murder of her husband by administering arsenic to him in September, 1848. The defense was a complete denial. The prosecutor, after proving the death and the accompanying symptoms, offered evidence that arsenic had been taken by the prisoner's two sons, one of whom died in December, 1848, and the other in March, 1849, and that a third son took arsenic in April, 1849, but did not die; and that all four men lived under the domestic care of the prisoner, who prepared their meals. It was argued that these facts were admissible to show that the death of the husband was from poisoning, and to show that the death of the husband was not accidental.

(Emphasis supplied.) Stone I, at 962. Chief Baron Pollock "held without hesitation that the domestic history of the family was admissible to prove that the death, whether felonious or not, was caused by arsenic, and also to show whether the death was accidental." (Emphasis supplied.) Id. The prisoner was convicted.

Prof. Stone looked at all of the English cases prior to 1850 and concluded that they did not stand for a rule of broad exclusion with a finite number of exceptions but rather represented an exclusionary rule of very limited applicability, applicable only where the evidence was offered only to show a criminal propensity:

> The foregoing examination of the writers and cases prior to 1850 leads to the conclusion that whenever the evidence of similar facts offered was relevant to any specific fact or issue upon which the jury has to make up its mind, it was admitted. *Rex v. Cole* set the only boundary line of admissibility and its authority has never been questioned, despite its meager report. The rule deducible from it, however, is not a rule excluding all evidence of similar offenses unless it falls under some one of a closed list of exceptions. It is authority merely for the proposition that if the evidence offered is relevant only by an argument which proceeds from the other crimes to the disposition of the prisoner to commit such crimes, and thence to the probability of his having committed the crime charged, it is not admissible.

Stone I, at 965-66. (Emphasis supplied.)

After listing a number of reasons why many of the English cases had found the evidence to be admissible, Prof. Stone concluded:

> To a large extent these are the heads under which modern text-writers enumerate the exceptions to the rule of exclusion, but in 1850 they cannot be taken to be more than an enumeration of some of the respects in which evidence of similar facts may be relevant to an issue before the jury.

Id. (Emphasis supplied.)

It is almost universally agreed that the English understanding of not only what the "other crimes" or "similar facts" rule is but also of the rule's basic nature was firmly stated by the case of Makin v. Attorney-General of New South Wales, A. C. 57, in 1894 and that has not changed since 1894. A passage from the opinion sets out the English understanding of the rule:

> It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it…bears upon the question whether the acts alleged to constitute the

> crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.

(Emphasis supplied.) Prof. Stone was clear as to the proper conceptualization of such a rule:

> Here is no broad rule of exclusion with exceptions, but a broad rule of admissibility where there is relevance, except where the only relevance is via disposition.

Stone I, at 975. (Emphasis supplied.)

As he wrapped up his survey of the English experience, Prof. Stone concluded that the "other crimes" rule in England was an exclusionary rule of "very narrow" applicability and that the protection a defendant enjoyed against any unfair or prejudicial showing of criminal propensity lay primarily in the discretionary authority of the trial judge to weigh the prejudicial risk of the evidence against the probative value of the evidence.[11]

To what end have we engaged in this extensive auditing of the pedigree of the "other crimes" rule? What can Rex v. Cole from 1810 possibly tell us 212 years after the fact and over 3,000 miles away? Rex v. Cole, in fact, tells us quite a lot. It tells us that the rule of law controlling this review of a conviction for first-degree child abuse in Baltimore City in 2019 did not proceed from the promulgation of Maryland Rule of Procedure 5-404(b) in 1993 nor even from the promulgation of Federal Rule of Evidence 404 in 1975. It tells us that the controlling rule of law is neither the product of State v. Faulkner (1989) nor even

[11] This is the protection provided by the third stage of the Faulkner three-step examination and guaranteed by Maryland Rule 5-403 and by Federal Rule of Evidence 403.

of Ross v. State (1976). It tells us that our review is of a bedrock principle of the common law that has been evolving for no less than two centuries and that has multiplied and transplanted itself into every corner of the United Kingdom and, a generation later, into every corner of the United States, not to mention a far-flung but prominent appearance in the very antipodes in Makin v. Attorney-General of New South Wales in 1894. It tells us that our rule's doctrinal DNA is neither narrowly localized nor precedentially parochial and that our focus, therefore, need necessarily be broad.

The "Other Crimes" Rule In America

As Prof. Stone turned his attention to the "other crimes" rule being applied in the United States, he observed that the conflicting views were intractably chaotic. He found a basic inconsistency in the conceptualization of the rule that was being applied. One of the two competing conceptualizations he delineated as adherence to the original rule, which was a rule of only limited exclusion when the purpose of the evidence was to show only criminal propensity. The opposing conceptualization was what he called the "spurious rule," a rule of presumptive exclusion subject to a finite number of formal exceptions. At Stone II, p. 989, he juxtaposed the two:

> The conflict was between the original rule which only excluded similar fact evidence when relevant merely to disposition, and a much broader spurious rule excluding all similar facts except those falling within a few closed categories settled by earlier decisions. Two rules so different were bound to cause and did cause inconsistencies.

(Emphasis supplied.)

To the extent to which some of the American cases seemed to drift away from the original rule and toward what he called the spurious rule, the drift appeared to have been an unconscious one.

> There can be little doubt, therefore, that the early American courts thought that they were applying the English rule. What that English rule in reality was has been established in an earlier study. It did not exclude all similar bad acts, but only acts relevant merely through disposition. It is of course conceivable that while purporting to apply the English rule the American courts transformed it unconsciously into something different.

Id. at 993. (Emphasis supplied.)

A central problem with the spurious rule was that it exaggerated the significance of the exceptions and afforded them a prominence far beyond that of merely being illustrative examples of special relevance:

> Let it be assumed for a moment, however, that the rule is stated as a broad rule excluding evidence of all other bad acts, unless the evidence falls within some one of a list of exceptions. The writer will call this form "the spurious rule." What is the result? In the place of the inquiry – is this evidence relevant otherwise than merely through propensity? There is immediately substituted the inquiry – does this evidence fall within any exception to the rule of exclusion?

Id. at 1005. (Emphasis supplied.)

The exceptions frequently grew into formal legal inquiries in their own right instead of being simply examples of some special or substantial relevance beyond the mere showing of a general propensity to commit crime. Prof. Stone's survey of the American scene, of course, did not extend beyond 1938. His conclusion was that resort to the spurious rule instead of adherence to the original rule was frequently randomly inadvertent rather than representing a conscious choice:

> The spurious' rule grew up imperceptibly after 1840. It did not displace the original rule; they were applied side by side by the courts of the various states, often at different times in different cases in the courts of the same state, sometimes indeed at the same time in the same case by different judges of the same court, and finally, even on occasion by the same judge in the same opinion.

Id. at 1034. (Emphasis supplied.)

He offered his appraisal of how such inadvertent or unconscious drift can easily occur:

> First in importance should be placed the inevitable tendency of the common law to categorize the application of a broad principle into minor rules, which invented as illustrations and as an aid to memory, end unless checked by displacing the principle altogether. So the exceptions first appear as illustrations of relevance, to aid future application. Then they are regarded as exhaustive, and when they are so regarded it follows that all evidence of other offences not within them is inadmissible, and the spurious rule is then complete.

Id. at 1035. (Emphasis supplied.)

Prof. Stone's survey of the American scene ended, of course, with the publication of his second landmark article in 1938. Our view of the gradual evolution of the American position can properly pick up with the work of Prof. Thomas J. Reed. In Reed, "Admission of Other Criminal Act Evidence After Adoption of the Federal Rules of Evidence," 53 U. Cin. L. Rev. 113 (1984), (Reed, Federal Rules). Prof. Reed looks upon 1975, the year that Federal Rules of Evidence 404 and 403 were adopted, as a pivotal turning point in the handling of the "other crimes" principle. He pointed out that prior to 1975, there was considerable flux about which was the better conceptualization of the rule. Was the rule a broad exclusionary rule subject to an increasingly formal list of well-delineated exceptions or was it an exclusionary rule of only limited applicability, available only when the "other

crimes" evidence was for the purpose of showing only bad character, to wit, a propensity to commit crime generally? The Advisory Committee Comments and the House Judiciary Committee report seemed strongly to suggest an inclusionary rather than an exclusionary character:

> The somewhat ambiguous formulation of Rule 404(b) left open the question of whether the federal propensity rule should be treated as an inclusionary rule authorizing the admission of extrinsic criminal acts unless the sole reason for their admission is to prove the defendant's propensity to commit the crime charged. The advisory committee comments indicate the drafters' apparent intent that the rule be treated as inclusionary, as does the House Judiciary Committee report.

Reed, Federal Rules 156. (Emphasis supplied.)

Prior to 1975, a slight minority of the federal circuits had, as had a slight majority of American state courts, tended to follow the exclusionary conceptualization of the rule. A minority of the federal circuits, on the other hand, were signaling a newer approach to look upon the rule as basically inclusionary. The "more prestigious commentaries" favored that inclusionary tilt. It was, indeed, the position favored by the legendary Dean John Henry Wigmore:

> Prior federal practice had split into a majority and minority position. The majority of the circuits had held the rule to be an exclusionary rule, permitting no introduction of extrinsic criminal acts of the defendant unless the extrinsic act was offered under one of the exceptions to the propensity rule. A minority of circuits had begun to treat the propensity rule as inclusionary before 1975. The more prestigious commentators consistently had favored an inclusionary relevance rule, one that would allow admission of extrinsic criminal acts of the accused for any purpose other than to prove that the actor acted in conformity with his or her criminal character. The difference of opinion resulted from distinct views about the ends of the criminal justice process. The inclusionary rule, favored by Dean Wigmore in his earliest writing, presented the prosecutorial point of view.

Reed, Federal Rules 156-57. (Emphasis supplied.)

Prof. Reed pointed out that, "Rule 404(b) has been the occasion for several circuits to change from an exclusionary viewpoint to an inclusionary viewpoint with respect to other criminal act evidence." (Emphasis supplied.) The count among the federal circuits is now seven to three in favor of the inclusionary conceptualization:

> Thus, the First, Second, Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits have in one way or another adopted the view that Rule 404(b) is an inclusionary rule permitting introduction of extrinsic criminal acts to establish a relevant point other than the defendant's propensity for committing crimes. Judicial statements of the rule run from the elaborate considerations of common law character rules in United States v. Moccia to the tart statement by the Ninth Circuit in United States v. Diggs that 'this circuit had adopted the position that Rule 404(b) is an inclusionary rule – i.e., evidence of other crimes is inadmissible under this rule only when it proves nothing but the defendant's criminal disposition.' The practical effect of these judicial declarations as to the scope of the propensity rule is that any extrinsic criminal act of the accused relevant to something besides the defendant's evil tendencies is admissible, subject, however, to the balancing test of Rule 403.

Reed, Federal Rules 159-60. (Emphasis supplied.) Prof. Reed also made the call that the Sixth Circuit "appeared to [be authoring] an inclusionary rule," which would up the inclusionary majority vote to one of eight to three. Prof. Reed also noted, Id. at 161, "The Third Circuit seems to have opted for an inclusionary approach." In United States v. Long, 575 F.2d 761, 766 (1978), the Third Circuit had noted, "The drafters of Rule 404(b) intended it to be construed as one of 'inclusion' and not 'exclusion.'" That would bring the count among the federal circuit courts to one of nine to three in favor of the inclusionary approach.

Although the difference between the inclusionary conceptualization and the exclusionary conceptualization is only a matter of very subtle nuancing, that subtle nuancing at times became a wedge pushing different analytic approaches effecting different results. In the latter half of the 19th Century, many American courts began, largely inadvertently, to focus on and to exaggerate the significance of lists of exceptions. With time, the exceptions became ossified, with each exception becoming a veritable legal sub-genre of its own with separate rules and with its own body of precedential caselaw. In opinion after opinion, the analysis consists of trying to fit the "other crimes" evidence in issue into one or more of the formal pigeonholes on the formal list of exceptions. Notwithstanding some special relevance in a general sense, the failure to fit the evidence in issue into a well-defined pigeonhole was frequently fatal. Under the inclusionary approach, by contrast, the focus is directly on special relevance to show something other than propensity and categorizing the evidence according to some preexisting list of exceptions is meaningless. The inclusionary approach treats these so-called "exceptions" merely as examples on an open-ended list of helpful illustrations of special relevance beyond propensity.

In Edward J. Imwinkelried, "The Evolution of the Use of the Doctrine of Chances as Theory of Admissibility for Similar Fact Evidence," Anglo-American L. Rev. 73 (1993) (hereinafter Imwinkelried, Doctrine of Chances), Prof. Imwinkelried described the pattern that many of the American cases had begun to fall into:

> American courts began to decide similar fact issues on the basis of "categories." The American courts lost sight of the fundamental principles of logical relevance; they tended to automatically reject novel non-character theories of logical relevance and were equally inclined to admit similar fact evidence whenever the testimony appeared to fit within a previously approved category of issues. Professor Stone roundly condemned the list approach as spurious and fallacious, but he conceded that the list approach ultimately became the dominant view in roughly two thirds of the American states.

Id. at 86. (Emphasis supplied.)

A big influence on the American conceptualization was the example of People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (1901), an opinion wherein Judge Werner had catalogued a number of non-character theories of logical relevance including motive, intent, identity, common plan, and absence of mistake or accident. Prof. Imwinkelried described the effect that example had:

> In doing so, he repeatedly referred to the theories as "exceptions." That terminology implied that there was a general rule excluding uncharged misconduct testimony. If so, in order to justify the admission of such testimony, the prosecution had to bring the testimony within an "exception" to the rule. As more and more courts adopted the "exception" terminology from Molineux, a "pigeonholing" mentality developed. Unless the prosecution could fit its uncharged misconduct evidence within a finite number of recognized "exceptions," the evidence was automatically inadmissible.

Id. at 86-87. (Emphasis supplied.)

United States v. Woods (1973)

Notwithstanding that earlier approach by the American caselaw, there has been in more recent decades, if not a tidal wave, at least a ground swell of movement away from the "list of exceptions" approach. Prof. Imwinkelried attributes the start of the change of

direction to the groundbreaking and high octane opinion of Judge Harrison Winter for the Fourth Circuit in United States v. Woods, 484 F.2d 127 (4th Cir. 1973):

> [S]ince World War II, the trend in American law has been toward the abandonment of the list approach. One impetus for this trend has been progressive judicial decisions. One of the foremost decisions is the 1973 opinion by the United States Court of Appeals for the Fourth Circuit in United States v. Woods.

Id. at 87. (Emphasis supplied.)

The Fourth Circuit opinion in that case is truly what Prof. Imwinkelried refers to as a "progressive judicial decision." In addition to eschewing undue dependence on a formal list of increasingly rigid exceptions, the opinion is in the forefront of championing the Doctrine of Chances as a classic instance of a purpose that does not implicate propensity.

Martha Woods had been tried in Baltimore for the first-degree murder of her eight-month-old pre-adoptive foster son. Prior to its death, the infant had been almost exclusively in the care of Mrs. Woods. On August 20, 1969, the infant was gasping for breath, turning blue from lack of oxygen, and went into a coma from which it did not recover. A forensic pathologist opined that the death was probably homicidal due to smothering, but he could not conclusively rule out death from natural causes. The Government then presented evidence to show that over the course of the preceding 24 years, a total of nine other children who had been in the care of Mrs. Woods had suffered no less than twenty episodes of cyanosis, a medically severe bluing of the lips due to lack of oxygen. Seven of those children died due to lack of oxygen. The evidence was admitted to prove that the 1969 death then on trial was not accidental.

Judge Winter first offered a general observation to stress the heightened relevance of such evidence in child abuse and death cases:

> We think also that when the crime is one of infanticide or child abuse, evidence of repeated incidents is especially relevant because it may be the only evidence to prove the crime. A child of the age of Paul and of the other about whom evidence was received is a helpless, defenseless unit of human life. Such a child is too young, if he survives, to relate the facts concerning the attempt on his life, and too young, if he does not survive, to have exerted enough resistance that the marks of his cause of death will survive him. Absent the fortuitous presence of an eyewitness, infanticide or child abuse by suffocation would largely go unpunished.

484 F.2d. at 133. (Emphasis supplied.)

All parties agreed that "evidence of other crimes is not admissible to prove that an accused is a bad person and therefore likely to have committed the crime in question." Id. Mrs. Woods argued that the Government had failed to satisfy any of the accepted exceptions to the exclusionary "other crimes" rule. The Government responded with at least four exceptions that had arguably been satisfied:

> Defendant argues that while there are certain recognized exceptions to this rule, the instant case cannot be fitted into any of them, emphasizing that corpus delicti is not an exception. The government, in meeting this approach, contends that the evidence was admissible on the theory that it tended to prove (a) the existence of a continuing plan, (b) the handiwork or signature exception, (c) that the acts alleged in the indictment were not inadvertent, accidental, or unintentional, and (d) the defendant's identity as the perpetrator of the crime.

484 F.2d at 133-34. (Emphasis supplied.)

Although concluding that the evidence satisfied at least several of the exceptions, Judge Winter's opinion preferred to rest its analysis "upon a broader ground:"

> While we conclude that the evidence was admissible generally under the accident and signature exceptions, we prefer to place our decision upon a broader ground.

> Simply fitting evidence of this nature into an exception heretofore recognized is, to our minds, too mechanistic an approach.
>
> McCormick, in listing the instances in which evidence of other crimes may be admissible, cautions that the list is not complete, for the range of relevancy outside the ban is almost infinite. And then, McCormick states: some of the wiser opinions (especially recent ones) recognize that the problem is not merely one of pigeonholing, but one of balancing.

484 F.2d at 134. (Emphasis supplied.)

The Woods opinion then cited three separate United States Appellate Circuits (the 1st, the 3rd, and the D.C. Circuit) and stated that all of them stood for the proposition that the evidence, if relevant, will be received for any purpose other than to show "a mere propensity…to commit the crime:"

> These cases stand for the proposition that evidence of other offenses may be received, if relevant, for any purpose other than to show a mere propensity or disposition on the part of the defendant to commit the crime, provided that the trial judge may exclude the evidence if its probative value is outweighed by the risk that its admission will create a substantial danger of undue prejudice to the accused.

484 F.2d at 134. (Emphasis supplied.)

In addition to the Fourth Circuit, Prof. Imwinkelried also took kindly notice of the Maryland Court of Special Appeals:

> At first blush, the statute [Federal Rule of Evidence 404(b)] appears to codify a list approach to determining the admissibility of similar fact evidence. After all, the concluding words of the statute's second sentence list the uses of similar fact evidence most commonly approved at common law. However, the legislative history of the rule indicates that the drafters purposefully prefaced the list with "such as." In the words of a leading American jurist, Judge Charles Moylan, Rule 404(b) repudiates the notion that the admissibility of uncharged misconduct turns on the application of a "rigidified list." Every federal court of appeals has joined in construing Rule 404(b) as jettisoning the list approach.

Ironically, the opinion that was the occasion for that kindly notice, Harris v. State, 81 Md. App. 247, 567 A.2d 476 (1989), was reversed by the Court of Appeals in Harris v. State, 324 Md. 490, 597 A.2d 956 (1991). Of which, more anon.

The Supreme Court In Passing

We have found only a single Supreme Court case touching upon the "other crimes" rule. It is Huddleston v. United States, 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988). Huddleston's major concern, however, was not with a basic conceptualization of the "other crimes" rule, but only with the required certainty that the other crimes or other bad acts had actually taken place, the concern dealt with by Faulkner's second step of its three-step examination.

Chief Justice Rehnquist's opinion, however, touched upon the rule's broader structure in passing. It referred to the basic purpose of the rule as an inquiry into whether the evidence is probative of anything other than proof of bad character:

> The threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character.

485 U.S. at 686. (Emphasis supplied.) He went on to describe Federal Rule of Evidence 404 as a rule that does "not flatly prohibit the introduction of such evidence." It only "limit[s] the purpose for which [such evidence] may be introduced.:"

> Rules 404 through 412 address specific types of evidence that have generated problems. Generally, these latter Rules do not flatly prohibit the introduction of such evidence but instead limit the purpose for which it may be introduced. Rule 404(b), for example, protects against the introduction of extrinsic act evidence when that evidence is offered solely to prove character.

485 U.S. at 687. (Emphasis supplied.) This is not language that is broadly exclusionary. It is language stressing the rule's limited applicability to those instances when the "evidence is offered solely to prove character." This is, in a word, inclusionary and not exclusionary.

The "other crimes" rule has, indeed, come a long way since Rex v. Cole (1810). All of this historic background is important because Maryland has regularly followed what it takes to be the general thrust and direction of the common law with respect to the rule. It has never presumed or pushed for any unique or special version of that common law. It has never asserted a special position or broken ranks as some sort of an outlier. At least, it has never done so expressly.

Doctrinal Sclerosis

Our decisions in Maryland, however, have sometimes been better than our opinions. The Maryland decisions applying the "other crimes" rule have almost always been correct in terms of reaching the right result. The analyses producing those decisions, however, have been at times doctrinally schizophrenic. Since roughly the time of the adoption of the Federal Rule of Evidence 404(b) in 1975, there has been significant movement in terms of the law's basic conceptualization of the "other crimes" rule. The new understanding has been led by the essentially universal recognition by the academic community of the new dispensation and has enjoyed the support of most of the Federal Courts of Appeals and a broad acceptance of the new understanding by a number of the more progressive state court opinions.

This more up-to-date conceptualization is generally referred to as the "inclusionary" position. It stresses the fact that the "other crimes" rule is an exclusionary rule of only limited applicability. "Other crimes" evidence is not generally or broadly excluded. It is excluded solely when its purpose would be solely to show a defendant's bad character and would constitute a violation of the propensity rule. The older conceptualization, now in widespread retreat, is the "exclusionary" point of view. It pictures "other crimes" evidence as evidence generally and presumptively excluded, subject only to a very formalized list of exceptions.

This is the big difference between the two conceptualizations, the significance of and the handling of the "exceptions." The older "exclusionary" point of view focuses on presumptive exclusion and then looks to see if the evidence can be fitted or pigeonholed into one or more of the recognized "exceptions." If it cannot, the exclusion holds. The "inclusionary" conceptualization, by contrast, focuses from the outset on whether the evidence has some special or substantial relevance other than the proof of propensity. If it has, the exclusionary rule is not even applicable.

The Maryland law, however, seems still to be stuck in the increasingly disfavored "exclusionary" tradition, as case after case has struggled to fit "other crimes" evidence into one or more of a finite number of increasingly rigid "exceptions." Ironically, the first two Maryland opinions to consider the question gave no sign of consigning Maryland to that more rigid conceptualization. They did not even consider conceptualization.

The first was Dobbs v. State, 148 Md. 34, 129 A. 275 in 1925. The Court of Appeals there recognized that there was no general exclusionary rule for "other crimes" evidence but only a limited one where such evidence was offered solely to show conduct in conformity with the bad character of the defendant. Judge Offutt's opinion, 148 Md. at 46, stated the rule:

> These general rules appear to be almost universally recognized, first, that the character of a defendant in a criminal case is not an issue until he puts it in issue; second, that evidence of unconnected and unrelated crimes which do not show knowledge, motive, intent, a common scheme, or identification, is inadmissible against a defendant in a criminal case as tending to show that he committed the crime whereof he stands indicted in such case.

(Emphasis supplied.)

The only other Court of Appeals opinion to touch upon the subject prior to 1976 was that of Chief Judge Sobeloff in Lowery v. State, 202 Md. 314, 96 A.2d 20 (1953). Judge Sobeloff explained, in scrupulously neutral terms, that evidence of "other unrelated crimes or misconduct" is inadmissible for the purpose of attacking the character of the accused but is admissible to show motive or intent. It was inadmissible for one purpose and admissible for others. Neither statement was an exception to the other. The criterion for determining admissibility or inadmissibility was simply the purpose for which the evidence was offered:

> As a general rule, it is reversible error for the prosecution to attack the character of the accused before it has been put in issue by him, or to show other unrelated crimes or misconduct likely to cause prejudice against him. Dobbs v. State, 148 Md. 34, 129 A. 275. But the rule is equally established that where the testimony shows motive or intent it is entitled to be admitted.

202 Md. at 318.

Maryland may have seemed to have locked itself into the "exclusionary" conceptualization, however, with its reference to a "general exclusionary rule" and a list of "well recognized" exceptions in Ross v. State, 276 Md. 664, 669-70, 350 A.2d 680 (1976):

> There are exceptions to this general exclusionary rule, which, perhaps, are equally well-recognized. Thus, evidence of other crimes may be admitted when it tends to establish (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…The frequently enunciated general rule in this state, followed uniformly elsewhere, is that in a prosecution for a particular crime, evidence which in any manner shows or tends to show that the accused has committed another crime wholly independent of that for which he is on trial, even though it be a crime of the same type, is irrelevant and inadmissible.

(Emphasis supplied.)

In terms of resolving Maryland's commitment in the larger conceptualization controversy, however, the apparent tilt of Ross v. State was almost certainly inadvertent. The opinion gave no hint that it was even aware of any common law-wide conceptualization controversy that even called for resolving. The threshold applicability of the "other crimes" rule in the Ross case was simply taken for granted. The opinion then disposed directly of the case before the Court and did not engage in any more tangential speculation. As a rudimentary lesson from How Not To Overread An Appellate Opinion 101, Ross v. State cannot, therefore, be said to have resolved an issue, particularly such a stratospheric issue, that it gave no indication of ever having considered. Meaningful dicta is not delivered sub silentio.

The definition of the "other crimes" rule, moreover, was taken straight from the then recently promulgated (it was one year old at the time) Federal Rule of Evidence 404. Maryland was simply following the general common-law rule. It was not participating in the emerging philosophical debate that was not even mentioned in the opinion.

In the immediate wake of Ross, Cross v. State, 282 Md. 468, 473, 386 A.2d 757 (1978), spoke, if anything, in more absolute terms:

> There are few principles of American criminal jurisprudence more universally accepted than the rule that evidence which tends to show that the accused committed another crime independent of that for which he is on trial, even one of the same type, is inadmissible.

(Emphasis supplied.) The rule's applicability was taken for granted and the opinion focused exclusively on presumptive exclusion.

In then focusing in squarely on the exceptions to the presumptively exclusionary rule, both Ross and Cross listed the classic five exceptions that this Court later described in Solomon v. State, 101 Md. App. 331, 353-54, 646 A.2d 1064 (1994):

> On any list of the representative or illustrative types of issues that have regularly been found to possess substantial relevance, the first rank invariably consists of the quintet brought to the front of the mind by the mnemonic aid MIMIC:
>
> 1. MOTIVE
> 2. INTENT
> 3. Absence of MISTAKE or accident
> 4. IDENTITY
> 5. COMMON scheme or plan

1976 – 1985:
The MIMIC Generation

The next generation of the Maryland caselaw was obsessed with the MIMIC mnemonic device. As the Court of Appeals pointed out in McKnight v. State, 280 Md. 604, 613, 375 A.2d 551 (1977), the "exceptions" to the exclusionary rule, as had been pointed out in Ross v. State, 276 Md. at 669-70, were virtually as prominent as the rule itself.

In the Cross v. State case, the Court of Appeals agreed with the Court of Special Appeals that the "common scheme or plan" exception had not been satisfied. The rest of the opinion dealt with the "identity" exception. After examining it at length as a self-standing sub-genre of law, the Court concluded that the identity exception had not been satisfied and that the evidence, therefore, should not have been admitted. There was no discussion of special or substantial relevance as the key circumstance.

In Lebedun v. State, 283 Md. 257, 390 A.2d 64 (1978), the "other crimes" rule violation occurred in the context of a joinder-severance dispute. The Court held that because the "signature" exception had not been satisfied, the "other crimes" evidence would not have been admissible and the conviction was, therefore, reversed. There was no discussion of special or substantial relevance generally. The signature exception was its own self-contained body of law.

State v. Jones, 284 Md. 232, 395 A.2d 1182 (1979) was decided in the context of a joinder-severance dispute. The Court's opinion referred to Lebedun as "our most recent decision involving the exceptions to the "other crimes" rule, 284 Md. at 242. In State v. Jones, the Court agreed with the Court of Special Appeals that neither the "common scheme or plan" exception nor the "identity" exception had been satisfied. The conviction

was reversed. There was no consideration of the special or substantial relevance generally nor any recognition that it was the critical criterion.

In Tichnell v. State, 287 Md. 695, 415 A.2d 830 (1980), Chief Judge Murphy wrote for the Court of Appeals. The Court adopted the MIMIC list of exceptions. The "common scheme or plan" exception had not been violated and the conviction was affirmed. Again, there was no mention of special or substantial relevance as the pertinent criterion.

In Straughn v. State, 297 Md. 329, 465 A.2d 1166 (1983), the "identity" exception was not violated and the evidence was held to be admissible. The real issue in that case, however, was the discretionary balancing of the value of the evidence versus the risk of unfair prejudice, with what would become Faulkner's third step in its three-step analysis.

In Hoes v. State, 35 Md. App. 61, 368 A.2d 1080 (1977), the Court of Special Appeals noted, 35 Md. App. at 69 n.3, that while Ross "listed intent and absence of mistake as separate exceptions, they clearly often overlap, as here." The overlapping exceptions were satisfied and the conviction was affirmed.

In Moore v. State, 73 Md. App. 36, 533 A.2d 1 (1987), just beyond the end of the MIMIC decade, the Court of Special Appeals did step beyond the MIMIC exceptions to consider the "distinctive handiwork or signature" exception. It confined its analysis and its search of the caselaw, however, to that single exception. It found that the exception was satisfied, and the conviction was affirmed. The Court did note, 73 Md. App. at 44, "For the evidence even to qualify for admission, it must fall within one of the exceptions." Analytically, it had been essentially a "scissors and paste" decade. Each "exception" had

been not a mere example of a larger and more important principle but a distinct sub-genre of its own.

Fine-Tuning The Analysis: Anaweck v. State

After a near-decade of unwavering adherence to MIMIC and its rapidly ossifying list of rigid exceptions, an effort to fine-tune the analysis appeared in 1985. The difference between the two conceptualizations was too slight to warrant a term as extreme as "correction of course." What was needed was but a minor adjustment of emphasis or primary focus.

The Court of Special Appeals was dealing with an alleged violation of the "other crimes" rule in Anaweck v. State, 63 Md. App. 239, 492 A.2d 658 (1985). In the Anaweck case itself, this Court pointed out that "it is not necessary to be creative in searching for some new instance of relevance:"

> For the "other crimes" evidence to be shown to be relevant in any one of the five familiar ways would be enough to dictate its admissibility. The evidence in this case, however, is truly a classic embarrassment of riches in that it appears to qualify as relevant by each and every criterion.

63 Md. App. at 257. The Anaweck opinion then proceeded to address each of the familiar MIMIC exceptions, one by one, and dispatching each exception in no more than three or four sentences, showed how each had been generously satisfied. Rather than relying upon such an easy disposition of the case, however, Anaweck there went out of its way to disparage such a lock-step focus of analysis. In the first place, the list of exceptions should

be open-ended and is not always going to fit into be the neat list of five that Maryland had grown used to with the MIMIC mnemonic device:

> These five examples of relevance given by Ross and repeated by all of its progeny do not exhaust the category; it is an open-ended list always capable of expansion wherever a clear instance of relevance might arise that somehow fails to fit neatly into one of the pigeonholes. Even Ross itself and the cases that follow it acknowledge that additional exceptions have also been recognized.

Id. at 257. (Emphasis supplied.)

The "exceptions," moreover, be they few or be they many, are only helpful examples of relevance and fail to focus adequate attention on the core principle of special or substantial relevance itself:

> The list of instances of relevance given in Ross simply serves as a helpful frame of reference for organizing quickly fully 95% of the instances when evidence of "other crimes" will have substantial relevance. The decisive criterion nonetheless remains substantial relevance itself, not merely a convenient but coincidental identification with one of its familiar illustrative examples.

Id. (Emphasis supplied.)

With respect to the open-ended and necessarily flexible nature of the list of exceptions, what Anaweck predicted was shown to be true with a vengeance by Solomon v. State, 101 Md. App. 331, 646 A.2d 1064 (1994), a mere nine years later. Solomon began its compilation with the MIMIC quintet:

> On any list of the representative or illustrative types of issues that have regularly been found to possess substantial relevance, the first rank invariably consists of the quintet brought to the front of the mind by the mnemonic aid MIMIC:
>
> 1. MOTIVE
> 2. INTENT
> 3. Absence of MISTAKE or accident

4. IDENTITY
5. COMMON scheme or plan

101 Md. App. at 353.

Solomon then went on, "Those five, however, are by no means the only entries one finds even on the most ordinary of listings. Without benefit of mnemonic device, some of the other "regulars" are:." It then described 6. "when several offenses are so connected in point of time or circumstance that one cannot be fully shown without proving the other"; 7. "when the "other crime" tends to show a passion or propensity for illicit sexual relations with the particular person concerned in the crime on trial"; 8. "to show consciousness of guilt"; and 9. "other like crimes by the accused so nearly identical in method as to earmark them as the handiwork of the accused." Id. at 354. Solomon then concluded:

> With the passing years, the list of representative examples continues to grow. Taking their cue from Federal Rule of Evidence 404(b), the recent cases now routinely list as recognized exceptions:
>
> 10. Opportunity
> 11. Preparation
> 12. Plan
> 13. Knowledge
>
> The ever-growing list of illustrative examples or "exceptions" fulfills the prediction we made in Anaweck v. State.

101 Md. App. at 354-55. (Emphasis supplied.)

With respect to ever-growing lists of exceptions and mnemonic devices, it is interesting to note the exasperation of Prof. H. Richard Uviller, "Evidence of Character to

Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom," 130 U. Pa. L. Rev. 845 (1982):

> Indeed, its enumerated special purposes appear so arbitrarily collected in the rule that it is one of the few doctrines for which generations of law students have had to invent a mnemonic device to recall its elusive parts to mind. Let us look at it in the form given it by the Federal Rules of Evidence. Evidence of "other crimes, wrongs, or acts," while inadmissible to show character in order to prove conduct consistent therewith, is nonetheless allowed by rule 404(b) for "other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." (My acronym is "KIPPOMIA.")

(Emphasis supplied.)

A Conditional Preference: Linguistic Legerdemain

This survey of how Maryland has handled the nuanced difference in conceptualization brings us inevitably to the 1991 opinion of the Court of Appeals in Harris v. State, 324 Md. 490, 597 A.2d 956. That opinion purported to settle the "exclusionary" versus "inclusionary" controversy by opting in favor of the "exclusionary" approach:

> We believe the exclusionary approach is better calculated, however, to achieve that result.

324 Md. at 500.

Ironically, however, the Harris opinion only did so by exhibiting a masterful slight-of-hand, an act of linguistic legerdemain. Before opting in favor of the exclusionary approach, the opinion drastically redefined the exclusionary approach. It eliminated the characteristics that had occasioned most of the criticism of that approach and then incorporated into that approach the more benign and flexible characteristics of the inclusionary approach. The primary criticism that had been leveled at the exclusionary

approach had been the exaggerated significance it appeared to give to the finite list of exceptions. The Harris opinion sought to deflect that criticism:

> As we shall endeavor to make clear, admissibility of evidence of other bad acts is not confined to a finite list of exceptions, even under the exclusionary rule.

324 Md. at 497. (Emphasis supplied.)

Instead of being a finite list of increasingly rigid exceptions, moreover, the exceptions were then recharacterized as a mere "representative list of examples:"

> This is a representative list of examples in which evidence has been found to meet the exception to the general rule of exclusion; it is not a laundry list of finite exceptions.

Id. at 501. (Emphasis supplied.) The common denominator criterion should then be special and substantial relevance.

The primary virtue of the inclusionary approach had been that instead of focusing on a specific exception, it kept the focus on the general characteristic of evidentiary relevance for some purpose other than showing criminal propensity. The Harris opinion adopted that inclusionary focus as the primary focus of the exclusionary approach:

> Evidence of other bad acts may, however, be admissible if it is relevant to the offense charged on some basis other than mere propensity to commit crime, and if it passes muster under the ever-present test of balancing relevance against unfair prejudice.

Id. at 496-97. (Emphasis supplied.)

As thus dramatically and completely redefined, the exclusionary approach, of course, easily passed muster. Rather than resolving the admittedly modest but long standing difference in emphasis or tone between the two conceptualizations, the Harris

opinion simply avoided dealing with the difference by eliminating the difference. As redefined, the "exclusionary" approach was a composite of both Dr. Jekyll and Mr. Hyde.[12] It now embodied all of the benign characteristics of Dr. Jekyll, though it still bore the dreaded name of Mr. Hyde. Mr. Hyde, however, had assumed a new and non-threatening persona.

In practical effect, however, the problem went on, unabated. Harris v. State has proved to be a vexingly problematic opinion to follow. Is obeisance due to what it said or to what it actually did? Or to what it did not do? If the composite of Dr. Jekyll and Mr. Hyde proves to be ultimately unworkable (as seems definitely to be the case), is our allegiance due to the benign attributes of Dr. Jekyll, whatever they may be called, or do we owe allegiance to the name of Mr. Hyde, whatever his attributes may turn out to be? The opinion stated that it preferred the "exclusionary" rather than the "inclusionary" conceptualization of the "other crimes" rule. It only expressed that preference, however, in the conditional and expressly stated context of the redefined and ameliorated version of the "exclusionary" approach that it claimed to be championing. What if the ostensible beneficiary of Harris v. State's preference, to wit, a redefined and reformed "exclusionary" approach that is indistinguishable from the "inclusionary" approach, does not, in fact, exist? May a practitioner, for instance, cherry-pick the statement about Harris v. State's preference for the "exclusionary" approach while completely ignoring the conditional

[12] Robert Louis Stevenson, "The Strange Case of Dr. Jekyll and Mr. Hyde" (1886).

redefinition pursuant to which that statement had been made? May the cherry-picking practitioner follow Hyde and ignore Jekyll? We may say with certainty that it is, at the very least, a very interesting question.

If read carefully, Harris v. State did not announce an absolute preference for the exclusionary approach. It announced a conditional preference (If A, then B), conditioned upon its meticulously articulated redefinitions of certain critical terms. It announced a preference *mutatis mutandis*. A conditional preference, it must be carefully noted, is not an unconditional preference. Without the ameliorating redefinitions, there was no preference. A slipshod reading of Harris v. State, adopting part of it while conveniently ignoring other parts, must be scrupulously avoided.

In the last analysis, this enigmatic opinion is one that may not blithely be reduced to simplistic restatement. As the opinion sensitively dissected it, the "other crimes" rule in Maryland was re-defined in essentially inclusionary language in critical component after critical component. It remained "exclusionary" in name only. Consequently, Harris v. State is an exceedingly treacherous precedent even to discern, let alone to wield in argument with dogmatic certitude. Never should it be cherry-picked.

The resulting problem is that of how to handle Harris v. State's conditional preference. In Emory v. State, 101 Md. App. 585, 647 A.2d 1243 (1994), this Court reversed the convictions of two alleged drug kingpins, holding that "other crimes" evidence should not have been admitted. Instead of relying generally on the lack of any specific or

substantial relevance, we dutifully worked our way through each and every exception, now thirteen of them instead of the original five MIMIC exceptions, treating each as a distinct and free-standing legal issue. We noted that we felt compelled to do so because of Harris v. State, supra:

> If the "other crimes" evidence is relevant in any event, it does seem foolish to anguish over which label it depends upon for its admissibility. This, however, may be one of the costs attendant upon our conceptualization of the "other crimes" evidence rule as exclusionary rather than inclusionary.

101 Md. App. at 615. (Emphasis supplied.) Emory at least sounded an alarm.

With respect to the increasingly unmanageable length of the list of exceptions, moreover, it also noted:

> The ever-growing list of exceptions to the exclusionary rule for "other crimes" evidence is obviously becoming so long that it is virtually unmanageable. At the very least, the mnemonic acronym MIMIC has long since become so confusingly incomplete that it should be abandoned.

101 Md. App. at 620-21. (Emphasis supplied.) MIMIC, which had been a repetitive drumbeat in legal opinions for more than a decade, could now be quietly retired.

"The Winter Of Our Discontent":[13] The Continuing Tyranny Of A List Of Exceptions

Despite the best efforts of Harris v. State, supra, to redefine Maryland's "exclusionary" conceptualization of its "other crimes" rule so as to remove, or at least to mollify, its negative characteristics, those negative characteristics resurfaced with a vengeance in Wynn v. State, 351 Md. 307, 718 A.2d 588 (1998), a mere seven years later.

[13] Shakespeare, Richard III, Act I, Scene I.

The defendant was convicted of housebreaking and theft. At trial, the State introduced evidence showing that the defendant had earlier perpetrated a similar housebreaking. The evidence was offered and accepted at trial pursuant to the "absence of mistake" exception. The Court of Appeals held that the evidence should not have been received and reversed the convictions. That result itself may have been completely appropriate, but that is not the point.

In its analysis, the Court locked itself completely and mechanistically into the "absence of mistake" exception. It did not consider or even mention special or substantial relevance generally. It did not even consider any other of the recognized exceptions. The "absence of mistake" exception was treated as if it were a distinct body of caselaw existing unto itself, with its own rules of procedure and with its own body of precedential caselaw. At the very outset of the opinion, the Court announced its tightly limited focus:

> In this opinion, we shall address whether during a housebreaking and theft trial, the introduction of evidence that the defendant committed another housebreaking and theft came within the absence of mistake exception to the general rule prohibiting the introduction of "other crimes" evidence.

351 Md. at 312. (Emphasis supplied.) The issue on appeal was presented as one exclusively about that single exception:

> The State proffered only that this evidence was admissible because it came within an exception to the general rule of exclusion of evidence of other crimes because it was relevant to the issue of the absence of mistake. Petitioner argued that the evidence of the housebreaking of the Maples and Garrison residences was not admissible because it did not come within the absence of mistake exception.

Id. at 314. (Emphasis supplied.)

The Court of Special Appeals had held that the "other crimes" evidence was admissible. Both the grant of certiorari by the Court of Appeals and the ultimate reversal of the conviction was based on nothing other than a consideration of the "absence of mistake" exception:

> We granted a writ of certiorari to address whether the Court of Special Appeals misconstrued the "absence of mistake" exception in upholding the admission of "other crimes evidence." Under the circumstances here present, we hold that the evidence of the other housebreaking and theft was not admissible under the absence of mistake exception found in Maryland Rule 5-404(b).

Id. at 315-16. (Emphasis supplied.)

The "other crimes" rule was treated as one of presumptive exclusion subject to the evidence's being fitted into one of the exceptions:

> Initially, courts should exclude other crimes evidence. Only if it fits within an exception will this type of evidence be admissible.

Id. at 318. (Emphasis supplied.)

On appeal, the State tried to argue that the evidence may have been substantially relevant in order to show intent. The Court expressly forbade that argument, holding that the "absence of mistake" exception was a rigidly closed legal world:

> The State also argues that the evidence was admissible to show intent or some other issue substantially relevant to this case. Because, however, the State only asserted at trial that the other crimes evidence was admissible to show absence of mistake, the trial court based its ruling upon that exception and the absence of mistake exception is the only exception discussed in Wynn's petition for writ of certiorari, we need not determine whether any other exception is applicable.

Id. at 319. (Emphasis supplied.) The door was slammed shut.

If the "other crimes" rule itself was before the Court, as it was, then substantial relevance generally was necessarily before the Court. Notwithstanding such an argument, the Court refused to consider it:

> In the case *sub judice*, the only question presented in Wynn's petition for certiorari was narrow: "Did the Court of Special Appeals misconstrue the "absence of mistake" exception in upholding the admission of "other crimes" evidence?"

Id. at 323. (Emphasis supplied.) The Court squarely answered by pointing out the limited scope of its consideration:

> We shall, therefore, limit our determination to whether the absence of mistake exception applies under the circumstances of this case.

Id. at 325. (Emphasis supplied.)

The "absence of mistake" exception was no mere example of substantial relevance. It was a dispositive end, in and of itself. The earlier effort of Harris v. State to redefine and to mitigate the exclusionary approach had obviously failed and whatever Harris may have said may no longer be relied upon in such a circumstance. The necessary condition for its conditional preference was not being satisfied.

In then examining the caselaw, at home and abroad, the Wynn Court looked first at three decisions by the Court of Special Appeals. All three were examinations exclusively of the "absence of mistake" exception. The Court went on to survey the national caselaw, looking at cases from Montana, Nevada, North Carolina, Illinois, Nebraska, and New Hampshire. All were cases dealing only with the "absence of mistake" exception. Procedurally as well as substantively, that single exception was self-evidently treated as an

independent body of law all of its own. That single "exception" had become a self-contained legal universe.

Wynn v. State epitomized the "exclusionary" conceptualization at its most rigid and formulaic. Harris v. State's effort to ameliorate the mechanistic rigidity of the "exclusionary" conceptualization by redefining that conceptualization had obviously not succeeded on this occasion. It had failed abjectly. Notwithstanding the commendable effort of Harris v. State to ameliorate the extreme rigidity of the earlier "exclusionary" approach to the "other crimes" rule with its excessive reliance on formulaic exceptions, the personification of that approach that made an appearance in Wynn v. State was unmistakably Edward Hyde and not Henry Jekyll. Mr. Hyde had not mellowed into Dr. Jekyll and Harris's effort to give him a makeover had failed.

A Phoenix Rising From The Ashes: The Doctrine Of Chances

Like the legendary phoenix of Greek mythology, however, there may have arisen from the ashes of Wynn v. State the dawning of a more enlightened vision. In Wynn, the thoroughly researched and well-articulated dissenting opinion of Judge Irma Raker provided a cogent overview of the "other crimes" rule and of its core criterion of substantial relevance. She argued that in the Wynn case, the Court of Special Appeals had "applied the proper analysis as Judge Thieme wrote that "The evidence in the instant case was substantially relevant to a genuinely contested matter in this case." (Emphasis supplied.), 351 Md. at 333-34. The pivotal issue was not some "exception" or other. It was the core

principle of substantial relevance itself. Her opinion resonated with the more progressive and up-to-date thought about the "other crimes" rule in the leading cases, federal and state, and permeating the locally neglected analysis of the academic community. What Judge Raker did was to look beyond the routine parochial application of "scissors and paste" and to look to see what had been happening to the "other crimes" rule throughout the Anglo-American common law world, focusing significantly on the evolving analysis in the academic community.

She asserted the general rule that substantially relevant "other crimes" evidence is basically admissible (not presumptively inadmissible) just so long as it is not used solely to prove criminal propensity:

> The rule is declarative of the common law principle that evidence of other crimes or bad acts may be admitted if that evidence is substantially relevant to some contested issue in the case, and if that evidence is not offered to prove the criminal character of the defendant.

351 Md. at 339. (Emphasis supplied.)

The theory of relevance that the dissenting opinion then advanced as applicable to the Wynn case was one that had been advanced by Dean John Henry Wigmore and was generally known as the Doctrine of Chances:

> The theory of relevance underlying the admission of the other crimes evidence in this case is perhaps better, and more intuitively explained by the doctrine of chances, also known as the "doctrine of objective improbability," a doctrine first articulated by Professor Wigmore, and now recognized generally by courts and commentators.

Id. at 343. (Emphasis supplied.) Judge Raker cited the U.S. Courts of Appeal for the Second and Fourth Circuits and state court decisions from Michigan and Washington. Judge Raker, Id. at 344, went on:

> The doctrine of chances is based on probabilities, and is premised on the proposition that mere coincidence is less probable as the recurrence of similar events increases. See Westfield Ins. Co. v. Harris, 134 F.3d 608, 615 (4th Cir. 1998) ("The more often an accidental or infrequent incident occurs, the more likely it is that its subsequent reoccurrence is not accidental or fortuitous.")

(Emphasis supplied.)

Judge Raker's dissenting opinion, Id. at 344, quoted from 2 J. Wigmore, Evidence In Trials at Common Law, Sect. 302, at 241 (Chadbourn rev. ed. 1979), as Dean Wigmore explained that the Doctrine of Chances is:

> [T]he instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all. Without formulating any accurate test, and without attempting by numerous instances to secure absolute certainty of inference, the mind applies this rough and instinctive process of reasoning, namely, that an unusual and abnormal element might perhaps be present in one instance, but that the oftener similar instances occur with similar results, the less likely is the abnormal element likely to be the true explanation of them.

(Emphasis supplied.)

After pointing out that "[o]ther courts have similarly applied Wigmore's doctrine of chances in the context of the admissibility of other crimes evidence," Judge Raker cited cases from the Second, Fourth, and Seventh Federal Circuits and from Arizona, California, Louisiana, Michigan, Montana, New York, and Texas. The dissenting opinion, Id. at 344,

also quoted from Edward J. Imwinkelried, Uncharged Misconduct Evidence, Sect. 5:05 at 11 (1995):

> The fortuitous coincidence becomes too abnormal, bizarre, implausible, unusual, or objectively improbable to be believed. The coincidence becomes telling evidence of mens rea.

(Emphasis supplied.)

Judge Raker's dissent was also clear that the applicability of the Doctrine of Chances does not depend on any minimal number of unusual or bizarre circumstances:

> [T]he doctrine of chances rests on the trial court's assessment of the improbability that someone would be innocently involved in similar activity. In determining whether other crimes evidence is sufficiently probative, even one act may be sufficient. *See* Imwinkelried, *supra*, 51 OHIO ST. L.J. at 597-600 (1990). The proper focus is not necessarily quantitative; instead, the proper focus is the qualitative value of the evidence within the particular context of an individual case. Indeed, Professor Imwinkelried advises that "in analyzing the applicability of the doctrine of chances, it seems wrong-minded to focus on the absolute number of incidents. Rather, the focus should be on relative frequency." Similarly, [h]ow many similar events are enough depends on the complexity and relative frequency of the event rather than on the total number of occurrences.

Id. at 355. (Emphasis supplied.)

Judge Raker's dissenting opinion finally made it clear that the Doctrine of Chances represents simply the substantial relevance of the "other crimes" evidence to show something other than propensity and that it is not necessary, therefore, to fit it into one or more of the formal "exceptions:"

> [T]he doctrine of chances embodies a separate theory of relevance under which a court might admit other crimes evidence, such classification should present no bar to the admissibility of the evidence in this case. Any distinctions that might be made as to where in Rule 5-404(b) the doctrine of chances belongs are immaterial. This court has stated before that the list of enumerated exceptions in Rule 5-404(b) is not

> exclusive. *See* Harris, 324 Md. at 501, 597 A.2d at 962; Ross v. State, 276 Md. 664, 669-70, 350 A.2d 680, 684 (1976). The disputed evidence was substantially relevant to this case.

Id. at 357. (Emphasis supplied.)

As one final manifestation of the rigid over-compartmentalization of the exclusionary "list of exceptions" approach, the majority opinion in Wynn v. State, 351 Md. at 354 and n. 8, had declined even to consider the Doctrine of Chances theory of relevance, notwithstanding Judge Raker's articulate exposition of the doctrine:

> Additionally, the State did not, in any forum present the "doctrine of chances" relied upon extensively in the dissent. We considered the petition, the State's limited response, and quoted the writ as presented. In the exercise of our actual jurisdiction, we do not perceive any extraordinary facet of this case that leads us to consider an issue not properly presented.[(8)]
>
> > [(8)] This Court has not yet been presented with a "doctrine of chances" case. Because of this limitation of our certiorari jurisdiction, the issue is not properly now before us.

(Emphasis supplied.)

In the case now before us, by contrast with Wynn's decision to ignore it, Judge Peters, when the State in its argument cited Judge Raker's dissent in Wynn, quoted generously from her dissenting opinion and gave it serious consideration, notwithstanding his reticence about citing dissenting opinions:

> I will find that again, substantially relevant to not only identity, which the State was pursuing this doctrine of chances of which I was never particularly familiar with, and I'm always a little reluctant to cite a dissenting opinion, and the State cited Wynn v. State, 351 Md. 307, 1998 – it's a dissenting opinion by Judge Raker – I think it's only relevant not for precedent, but just for the – I'm sure Judge Raker is a very good historian or a collector of legal precedents and that's all it is, summarizing what, in fact, this is: The theory of relevance underlying the admission

> of other crimes evidence in this case – meaning Wynn v. State – is perhaps better and more intuitively explained by the doctrine of chances, also known as the "doctrine of objective improbability."
>
> And [she] goes on further to say, citing hornbook, Professor Wigmore, "The argument here," for this type of doctrine, "is purely from the point of view of the doctrine of chances – the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that the element cannot explain them all."
>
> [She] further on down, citing from another hornbook, "The fortuitous coincidence becomes too abnormal, bizarre, implausible, unusual, or objectively improbable to be believed. The coincidence becomes telling evidence of mens rea." Which I seem to find that that's basically identity evidence, nonetheless, I think it's relevant for that.

(Emphasis supplied.)

Although it is not authoritative, to be sure, we find Judge Raker's dissenting opinion to be highly and edifyingly persuasive. It simply makes good sense. That is the ultimate criterion.

A Harbinger Of Things To Come: The Answer Was "Blowin' In The Wind"[14]

Twenty-two years before Judge Raker's dissenting opinion, there had also been distant rumblings that the "other crimes" rule might be undergoing evolutionary rethinking, at least in other parts of the common law world. In 1976 the Court of Special Appeals had before it the case of Nasim v. State, 34 Md. App. 65, 366 A.2d 70. Although it had no occasion to mention the Doctrine of Chances by name, the case's fact pattern foretold the future value of such a doctrine. In order to prove a 1974 arson and insurance fraud, the

[14] From Bob Dylan, "*Blowin' In The Wind*," (1963).

State was permitted to introduce evidence of earlier cases of arson and insurance fraud perpetrated by the defendant in 1965 and in 1968. Due mention was made of the MIMIC exceptions and the conviction was routinely affirmed by the standard analysis

Judge Menchine's opinion, however, sensed a change in the air and then took pains to mention "an additional basis" for finding "substantial relevance." Intuitively, he took as his point of departure the landmark 1973 decision of the United States Court of Appeals for the Fourth Circuit in United States v. Woods, 484 F.2d 127, decided just three years earlier, the case which is now generally recognized as having introduced the Doctrine of Chances into American jurisprudence. Judge Menchine wrote:

> Moreover, the incidence of multiple fires in properties owned or occupied by Nasim furnishes an additional basis for their admission. In United States v. Woods, 484 F.2d 127 (4th Cir. 1973), in which the accused had been convicted of the first degree murder of a foster son, the trial court had admitted evidence as to what had happened to other children in the care of the accused. In affirming, the Court, after pointing out (at 133) that when the crime is one of infanticide or child abuse, evidence of repeated incidents is especially relevant because it may be the only evidence to prove the crime stated at 135:
>
> > [W]e think the incidents must be considered collectively, and when they are, an unmistakable pattern emerges. That pattern overwhelmingly establishes defendant's guilt.
>
> We think that the rationale for decision in Wood, supra, applies with equal force in the subject arson and fraud prosecutions. We believe that here too "an unmistakable pattern emerges" when the questioned evidence is considered collectively.

34 Md. App. at 78. (Emphasis supplied.) That was, indeed, an early alert to the first rumblings of an evolving analysis. Sensing the imminent significance of the Fourth Circuit's decision in United States v. Woods, Judge Menchine was, as was Judge Raker

twenty-two years later, able to read the wind like a wolf.[15] Analytic change was in the air, and the application of the "other crimes" rule could not just rigidly and idly stand pat.

The Academic Commentary

In retrospect we recognize that Judge Menchine and Judge Raker had read the wind accurately. In Edward J. Imwinkelried, "An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, The Doctrine of Chances," 40 U. of Richmond L. Rev. 419 (2006), (hereinafter, Imwinkelried, "Doctrine of Chances"), Prof. Imwinkelried attributes the introduction of the Doctrine of Chances into American law to the landmark decision of the United States Court of Appeals for the Fourth Circuit in United States v. Woods, 484 F.2d 127 in 1973, which we have previously discussed. This was the case that Judge Menchine had spotted just three years later. Prof. Imwinkelried characterized the opinion of Judge Harrison Winter for the Fourth Circuit in the following terms:

> Although Woods antedated the adoption of the Federal Rules of Evidence [by two years], Judge Winter embraced the inclusionary conception of the distinction between character and non-character theories, stating that "evidence of other offenses may be received, if relevant, for any purpose other than to show a mere propensity or disposition on the part of the defendant to commit the crime." The prosecution did not have to "fit" its evidence into a recognized "pigeonhole."

Id. at 435-36. (Emphasis supplied.)

[15] Or, perhaps, we should think of Judge Menchine and Judge Raker as canaries in a coal mine. Whatever the metaphor, the analytic alarm was clearly sounded.

The impact of United States v. Woods on the "other crimes" rule in America generally and on the recognition of the Doctrine of Chances as a big part of that development specifically was immediate and dramatic. Imwinkelried "Doctrine of Chances," 459 described the doctrinal sea change:

> When the defense submitted its brief in the Woods case thirty-two years ago, the defense counsel could accurately represent to the Court of Appeals that, as of that date, there were no published American decisions explicitly endorsing the doctrine of objective chances. There were only a few, isolated opinions containing "loose language" that appeared to approve "the divergent English rule."
>
> In the relatively short span of three decades, the state of the American case law has changed dramatically. The doctrine of chances is now a fixture in the American jurisprudence on uncharged misconduct evidence. The doctrine looms large.

(Emphasis supplied.)

Throughout the Woods opinion, Judge Winter had characterized the Doctrine of Chances as a non-character theory of relevance. The "other crimes" rule is presumptively an exclusionary rule when the evidence is for the purpose of showing the defendant's bad character, to wit, his propensity to commit crime. There are, however, exceptions to that exclusionary rule, permitting the introduction of the evidence, notwithstanding the inevitable showing of bad character, when there is also a showing of special or substantial relevance plus a persuasive need for the evidence.

The Doctrine of Chances, by way of critical distinction, is not one of those "exceptions" to presumptive exclusion. It is not offered to show anything about the character of the defendant. It is a non-character theory offered to prove the inherent improbability of the event itself. The doctrine focuses on the happening of the event, not

the character of the person. As a consequence, the otherwise exclusionary rule does not even apply in the first instance. An "exception" from the presumptive exclusion is not required. As Prof. Imwinkelried notes, "At common law, the [law] permits the proponent to introduce the evidence so long as there is a tenable non-character theory of logical relevance." Id. at 422. (Emphasis supplied.)

In United States v. York, 933 F.2d 1343 (7th Cir. 1991), the defendant was charged with attempting to defraud an insurance company in a case involving arson and the murder of his wife. Introduced against him was evidence that three years earlier, the defendant had been involved in the death of his first wife under very mysterious circumstances and had collected money from the insurance company following her death. The Seventh Circuit's opinion held that the evidence was admissible and that its relevance was in establishing the improbability of the second event rather than reflecting on the subjective assessment of the defendant's character. The Seventh Circuit held, 933 F.2d at 1350:

> Dean Wigmore's "doctrine of chances" tells us that highly unusual events are highly unlikely to repeat themselves; the recurrence of a similar result tends to establish the presence of the normal, i.e. criminal, intent accompanying such an act. 2 J. Wigmore, Evidence Section 302 at 241 (Chadbourn rev.1979). The man who wins the lottery once is envied; the one who wins it twice is investigated. It is not every day that one's wife is murdered; it is more uncommon still that the murder occurs after the wife says she wants a divorce; and more unusual still that the jilted husband collects on a life insurance policy with a double-indemnity provision. That the same individual should later collect on exactly the same sort of policy after the grisly death of a business partner who owed him money raises eyebrows; the odds of the same individual reaping the benefits, within the space of three years, of two grisly murders of people he had reason to be hostile toward seem incredibly low, certainly low enough to support an inference that the windfalls were the product of design rather than the vagaries of chance. This inference is purely objective, and has nothing to do with a subjective assessment of York's character.

(Emphasis supplied.)

Prof. Imwinkelried also cited as "one of the seminal English decisions" on the Doctrine of Chances the "celebrated case of Rex v. Smith, 84 L.J.K.B. 2153 (Crim. App. 1915). George Smith had married Bessie Mundy. She was later discovered drowned in her own bathtub. George Smith received a large sum of money from that deceased wife. He claimed that her death had been accidental and that he had not in any way been involved. The prosecution, however, offered uncharged misconduct evidence which showed that Smith had earlier been married to two other women, both of whom had been "found drowned in their bath in homes where they were living with" Smith. The defense claimed that the evidence was blatantly inadmissible as evidence of bad character. The trial judge admitted the evidence and Smith, following his conviction, appealed. The appeals court affirmed. Prof. Imwinkelried described the affirming decision:

> The court agreed with Smith that the prosecution could not introduce the evidence to show the defendant's personal bad character and to then invite the jury to treat that character as proof that he had perpetrated the charged murder. However, the court held that the evidence was properly admissible to shed light upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental. The court's reasoning focused on the objective improbability of so many similar accidents befalling Smith. Either Smith was one of the unluckiest persons alive, or one or some of the deaths in question were the product of an actus reus.

Id. at 434-35. (Emphasis supplied.)

As Imwinkelried "Doctrine of Chances," 437, points out:

> [T]he proponent offers the evidence to establish the objective improbability of so many accidents befalling the defendant or the defendant becoming innocently

> enmeshed in suspicious circumstances so frequently. The proponent must establish that, together with the uncharged incident, the charged incident would represent an extraordinary coincidence. In a fact situation such as Rex v. Smith, the jury hardly needs an expert's testimony to appreciate that, on average, finding one's spouse drowned in the family bathtub is at most a "once in a lifetime" experience.

(Emphasis supplied.)

In the landmark American decision of Woods v. State, already discussed, the opinion of Judge Winter for the Fourth Circuit accepted Rex v. Smith as "persuasive authority" and effectively introduced Rex v. Smith to American audiences as the common law's exemplar of the Doctrine of Chances.

In Mark Cammack, "Using the Doctrine of Chances to Prove Actus Reus in Child Abuse and Acquaintance Rape: People v. Ewoldt Reconsidered"; 29 U. of Cal. Davis 355 (1996), the author noted:

> The cogency of the similar acts or, more precisely, similar happenings evidence in Makin, Woods, and Smith has rarely been questioned. The non-character reasoning that underlies the use of similar happenings evidence as proof of actus reus in these types of situations is the same as that used in proving knowledge or intent through similar acts. It rests on the objective improbability of the same rare misfortune befalling one individual over and over. Wives sometimes accidently drown in bathtubs. But it does not happen often, and the likelihood of the same man losing three wives in accidental bathtub drownings is extremely remote.

Id. at 387-88. (Emphasis supplied.)

Prof. Cammack also noted that "focusing on whether the evidence falls within one of the 'exceptions'" probably impedes our proper understanding of the ban on character evidence:

> [T]he usual formulation of the rule for criminal cases as a list of permissible non-character uses probably impedes correct application by focusing attention on

> whether the evidence falls within one of the "exceptions" contained in the list rather than on whether the evidence violates the character ban.

Id. at 361. (Emphasis supplied.)

In applying the Doctrine of Chances rationale, the focus is not on the character of the defendant but on the improbability of the event itself. The propensity rule is not even involved:

> It is commonly recognized in both case law and commentary that the relevance of the defendant's commission of other similar acts to the question of his state of mind in committing the charged crime rests on assumptions about probability. The probative value of the similar act evidence in disproving the claim of innocence rests on the improbability of non-recurrent similar events recurring by chance. As described by Wigmore, who labeled the theory the doctrine of chances, the relevance of the similar acts evidence on the issue of knowledge or intent rests on that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all.

Id. at 379-80. (Emphasis supplied.)

With respect to the celebrity and the drama of the Rex v. Smith trial, incidentally, in Sean P. Sullivan, "Probative Inference from Phenomenal Coincidence: Demystifying the Doctrine of Chances," 14 Law, Probability and Risk 27 (2014), the author noted, Id. at 32:

> [T]he extensive focus given to the drowning deaths of Ms. Burnham and Ms. Lofty at trial. For example, all three bathtubs were brought into the courthouse so that the jury could inspect them and consider the possibility of accidental drowning with regard to each wife individually. One might well conclude, as counsel for the defendant objected on appeal, that the appellant had been tried practically for all three murders at the same time.

(Emphasis supplied.) In the case now before us, mercifully, there were no bathtubs offered as evidence.

It Only Takes Two To Tango

The author further noted, Id. at 389, that the loss of two wives in bathtub drownings, let alone three, would be a sufficiently rare event to trigger analysis pursuant to the Doctrine of Chances:

> The rarity of the event is certainly an important factor. Accidental deaths on the highway are sufficiently common that a husband could lose two wives in this way without raising an inference of culpable conduct. Bathtub drownings, by contrast, are so rare that losing even two wives through drowning is highly suspicious.

(Emphasis supplied.)

The author went on, Id. at 390-91, to cite the 1939 California case of People v. Lisenba as a Doctrine of Chances case involving the loss of two wives drowning in the bathtub:

> In People v. Lisenba, [94 P.2d 569 (Cal. 1939)], the American analogue of Rex v. Smith, the defendant was charged with murdering his wife by drowning her in the bathtub and then depositing her body in the backyard fishpond to create the appearance of an accident. At trial, the prosecution offered evidence that the defendant's previous wife also drowned in the bathtub under "similar and unusual circumstances." The California Supreme Court approved the admission of the similar act evidence as tending to establish that the death of the deceased in the present action was not accidental, as it might at first appear, and as claimed by the defendant, but was the result of a general plan or scheme. In support of its holding, the court cited Rex v. Smith…The court used doctrine of chances reasoning in reaching its conclusion that the defendant killed his wives pursuant to a plan. The improbability that the same rare accident would befall the same man twice underlies the court's conclusion that the defendant most likely drowned both women.

(Emphasis supplied.)

We believe that the death of two theretofore healthy infants entrusted to one's care due to sudden and unexplained causes, as in the case now before us, is a rarity comparable to losing two wives in a bathtub.

A Renegade "Exception": Threshold Inapplicability Masquerading As An Exemption From Exclusion

The juxtaposition in this case of the Doctrine of Chances, as a classic instance of the rule's inapplicability, and the so-called "absence of mistake or accident" exception suddenly gives rise to an intriguing observation. If our intriguing observation does not cover all of the factual instances of the rather broad exception "absence of mistake or accident," it does cover a significant percentage of those cases involving at least the "absence of accident" segment of the larger exception.

The primary function of the Doctrine of Chances is to show, through its showing of inherent improbability, that the recurrence of a second strange event was not an accident. The focus is on the event itself, and not on the character of the perpetrator of the event. Because of the non-character focus of that examination, the propensity rule is never even involved, let alone violated. The "other crimes" rule, by definition, simply did not apply. It is a classic case of the "other crimes" rule's inapplicability.

Many of the factual scenarios that have masqueraded over the decades under the "absence of accident" exception label functioned in exactly the same way. Exclusive focus was on the event itself and not on the defendant. The character of the defendant was never impugned and the propensity rule, therefore, was never violated. By definition, therefore,

those instances were cases of the "other crimes" rule's inapplicability and were not true "exceptions" at all. In a real sense, much of the familiar "absence of accident or mistake" exception was, for decades, an incognito precursor of the Doctrine of Chances, with no one being the wiser. A solid case under the Doctrine of Chances could, on its facts, have qualified as an "absence of mistake or mistake" exception, had we been indifferent as to where it should be properly placed in a larger and cogent analytic outline. Such an analytic outline, however, is not some random or haphazard thing and it makes a great deal of difference where an item is placed in it.

Despite its label, the so-called "absence of accident or mistake" exception is not a true "exception." It is a renegade "exception." If its nature is closely examined (which it seldom is), the basis which it establishes for evidentiary admissibility is frequently that of the "other crimes" rule's threshold inapplicability rather than that of the evidence's substantial value outweighing presumptive exclusion. It is on the wrong side of the exclusionary-inclusionary divide. Subconsciously accepting this rogue "exception" as simply one of the larger list of "exceptions," the caselaw never deeply examined its proper classification. The caselaw accordingly has treated the "absence of accident or mistake" as an ordinary "exception" even though it is truly not one.

Did this intriguing little analytical quirk ever actually make any difference? Probably not. Disputes over the rule's applicability and disputes over an "exception" to the rule's presumptive exclusion generally produce the same bottom-line consequence. The evidence in issue either comes in or it stays out. Under either microscope, the same factual

specimen will probably yield the same result. Only the analytic labels will be different. There are nonetheless conceptual differences into why those bottom-line consequences were reached. Prosecuting attorneys, defense attorneys, judges, and defendants may, as a practical matter, be indifferent to the distinction as unnecessarily esoteric. Only a small handful of legal philosophers have anguished over the distinction. The distinction, however, is now before us in this case, and it behooves us to address it. An arcane question is still a question.

What Does It Mean To Be An "Exception"?

In the universe of the "other crimes" rule, the so-called "exceptions" are existential phenomena. They are not illusory or imaginary. The very concept of an exception presupposes that there is something that one is taking exception to. The very *raison d'etre* for "exceptions" does not exist until there first comes into being the presumptive sanction of evidentiary exclusion. An "exception" is a response to that presumptive exclusion. It is not anticipatory or antecedent speculation. Until, therefore, it has first been determined that the propensity rule is being threatened by evidence of "other crimes," the presumptive sanction of exclusion has not even come into existence. Before that point, therefore, we have no business even talking in terms of "exceptions." An exception is a response. One does not respond until there is something to which to respond.

Eureka!
The Conceptualization Controversy Is Resolved

After endless tweaking back and forth over a mere nuance of difference and after endless anguishing over a seemingly insolvable problem, a fresh insight may be emerging out of the similarity between the more recently recognized Doctrine of Chances, an inclusionary principle, and many instances of the absence of accident, which for long masqueraded as an "exception" to presumptive exclusion. The similarity between the Doctrine of Chances and many instances of the so-called absence of accident exception may well augur a similarity between their respective animating principles.

The seemingly endless debate, in appellate reports and in law reviews, over whether the "other crimes" rule should be conceptualized as inclusionary or exclusionary may be amenable to the same resolution. We may have been faced with an impossible binary choice – exclusionary or inclusionary. Neither choice was ever ultimately satisfactory because neither conclusion was all inclusive. The long-sought answer to the conceptualization riddle is that the "other crimes" rule is neither exclusionary or inclusionary. It is neither because it is both. A single adjectival characteristic may not, therefore, define both inapplicability, where both of the justifications for the rule's very existence have not been established, and the exceptions to applicability, where evidentiary value may nonetheless outweigh evidentiary risk. The only proper answer to the deceptive binary question, therefore, should be, "It all depends. Which part of the two-step process are you talking about?"

When the State offers evidence of other crimes and the defense invokes the "other crimes" rule, it is first incumbent on the defense to establish that the rule does, indeed, apply. Evidence of other crimes alone will not do the trick. The defense must also establish that the proffered evidence will violate the propensity rule, by implicating the character of the defendant and thereby showing his propensity to commit the crime. Absent that necessary prerequisite for presumptive exclusion, relevant evidence of other crimes would naturally come into evidence, with no reason having been shown why it should not come in. That process, in its very nature, is inclusionary. It follows whenever the "other crimes" rule is determined to be inapplicable.

When, on the other hand, both prongs defining the "other crimes" rule have been established, the evidence of other crimes will presumptively be excluded. We say "presumptive" because the State will still have an opportunity to establish an "exception" to such presumptive exclusion by showing such special and substantial relevance that the evidentiary value of the evidence may outweigh the evidentiary risk. That entire process – presumptive exclusion and qualifying for an "exception" from such presumptive exclusion – is part of the exclusionary function.

There is an important conceptual difference between the rule's inclusionary function and its exclusionary function. In cases of the rule's inapplicability, relevant evidence presumptively comes in and the burden is on the defense to show that the evidence would violate the propensity rule. In cases involving an exception to the rule, by contrast, the

evidence presumptively stays out and the burden is on the State to qualify for an exception to that presumptive exclusion by showing substantial relevance. An "exception" to the exclusionary rule is far different from an instance of the rule's inapplicability. The big-picture jurisprudence of the "other crimes" rule, moreover, embraces both its inclusionary and its exclusionary functions. It is both.

A Deceptive Binary Question "Either A Or B"

We (including many outside Maryland) have misled ourselves over the years, on the basis of a deceptive binary question, into believing that the "other crimes" rule must be conceptualized as either inclusionary or exclusionary. The reality is that it is neither. It is neither because it is both. In a larger sense than that in which we are usually presented with the problem, an examination of the "other crimes" rule is a two-step inquiry, and the two steps are conceptually very different from each other.

The first step is an inquiry into whether the "other crimes" rule, as tightly defined, is even applicable. If it is not, the problem is solved and we go no further. If, on the other hand, the "other crimes" rule is applicable, then but only then, do we go on to the second step. The second step is then an inquiry into whether the rule's presumptive exclusion of the "other crimes" evidence will actually take place after a careful weighing of evidentiary value (substantial relevance) versus evidentiary risk (a violation of the propensity rule). The sets of possible circumstances that may give rise to substantial relevance and the weighing process have come to be known as the "exceptions" to the "other crimes" rule.

That entire second step of the inquiry – exclusion of the evidence versus exception from exclusion – is exclusionary in nature and may be properly conceptualized as an "exclusionary" procedure. The first step of the two-step inquiry, by sharp contrast, is not at all exclusionary. It is pre-exclusionary. The only way, therefore, to avoid linguistic trouble in this conceptual mish-mash is to recognize that the inquiry into threshold applicability and the inquiry into the exceptions are absolutely separate and distinct issues. The answer in one of these contexts will not be the correct answer in the other context. The problem is not one of getting the right answer. It is one of asking the right question. The false binary question deceptively operates on the assumption that one of its proffered choices is the correct answer, whereas neither is the correct answer. As a result, the law in this area has long been struggling in vain to answer a question that should never have been asked.

Answering The Question That Should Never Have Been Asked

What the longstanding debate between "exclusionary" and "inclusionary" has taught us is that whenever the "other crimes" rule is invoked to challenge the admissibility of evidence, the court is confronted not by a single inquiry but by a two-step inquiry. The first step of that inquiry – the threshold applicability of the rule – is in its very nature "inclusionary." If the evidence of other crimes does not violate the propensity rule, there is no reason why such relevant evidence should not be admitted. The objection to admissibility will be overruled and the problem facing the court will have been fully and

completely resolved. No exclusion of evidence is in any way involved. That analytic process may be fairly characterized as "inclusionary."

Limited applicability means limited applicability. The "other crimes" rule is not a broad prohibition of all evidence of other crimes. The "other crimes" rule is only applicable if the evidence of other crimes would actually violate the propensity rule. If the propensity rule would not be violated, relevant evidence of other crimes is just as admissible as any other relevant evidence.

If, on the other hand, that first step of the two-step inquiry concludes that the rule is applicable, to wit, that the "other crimes" evidence would, indeed, violate the propensity rule, then, but only then, would the court proceed to the second step of the inquiry, the question of whether the exclusion of the evidence would be the appropriate sanction. Good reason having initially been shown why the evidence should not be admitted, the evidence of "other crimes" will be presumptively excluded. Exclusion is only presumptive, however, because the State will still have an opportunity to show that the evidence possesses such substantial relevance that its evidentiary value outweighs the evidentiary risk and should therefore qualify as an "exception" to the presumptive exclusion. This second step of the two-step inquiry – presumptive exclusion and "exception" to exclusion – may fairly and obviously be characterized as "exclusionary."

Before one goes on even to consider the possibility of invoking an exception, it must first be determined that the evidence of other crimes would violate the propensity rule.

Only then does presumptive exclusion even come into play, and only then, of course, can the possible exceptions to that presumptive exclusion come into play. There cannot be an exception until there is something of which to take exception. The very process of adjudicating the existence of an exception consists essentially of balancing evidentiary value against evidentiary risk. Until a determination has been made that the evidence would violate the propensity rule, there is no evidentiary risk to enter into the balancing process. Without that preliminary determination, the "other crimes" rule does not exist.

The Bottom Line

What this exasperatingly protracted debate over the "exclusionary" versus "inclusionary" conceptualization has taught us is that the "other crimes" rule demands a very definite two-step inquiry. The threshold application of the "other crimes" rule and, if applicable, the ultimate execution of that rule are absolutely distinct functions.

The first step of the inquiry – threshold applicability – may not be blithely ignored. The proffering of evidence of another crime does not ipso facto energize the "other crimes" rule. Such evidence, in and of itself, does not activate some hair trigger mechanism. The very applicability of the "other crimes" rule is further contingent upon a threatened violation of the propensity rule. Absent such a threatened violation, relevant evidence of another crime is innocuously admissible. The two-step process has both an inclusionary step and an exclusionary step and neither may be ignored.

"…Through A Glass, Darkly"[16]

With the benefit of a little healthy distance, the source of the conceptualization problem becomes clear. A clear perception of the "other crimes" rule is obvious in macrocosm that is not permitted us in microcosm. As an almost Pavlovian reaction, practitioners (including courts and judges) have been obsessed with half of the "other crimes" rule, the second half, while largely ignoring the first half. At the mere mention of "other crimes" evidence, the instinctive Pavlovian reaction has been to presume exclusion and to search immediately for possible exceptions to that presumptive exclusion. An inquiry into whether the evidence of other crimes actually violated the propensity rule in the first place is a rarity. It has been quite natural, therefore, to assume that the character of the "other crimes" rule is "exclusionary" because the character of its highly visible second half is, by definition, "exclusionary." Our obsession with half of the rule has blinded us to the very existence of the other half. We have failed to see the bigger picture. We have failed to see the forest because of the trees.

The tendency has been to rush in so precipitously and to get so close to the second part of the "other crimes" rule that it is easy to lose sight of the rule as an entirety. For present purposes, the problem is that the Doctrine of Chances lies largely hidden in that first part of the "other crimes" rule that is so frequently overlooked. It is not an "exception" and should not be analyzed as an "exception." It is an antecedent issue that needs to be

[16] The Bible (King James Version), I Corinthians, 13:12.

addressed before we get to any consideration of "exceptions." The hidden snare has been in the very sequencing of our thinking process.

What Was An Issue In This Case?

In dealing with the "other crimes" rule, it is always necessary to ascertain whether a proffered theory of admissibility relates to something that is actually in issue in the case. Albeit in the context of considering it as an exception to presumptive exclusion, Judge Peters clearly found that the absence of accident was an issue before the court for determination. The possibility that 17-month-old Zaray died as a result of an accident was very definitely, Judge Peters ruled, a matter for jury consideration in this case.

The prominent event that began the final day of Zaray's life was his trip to the playground, under the care of the appellant and accompanied by his siblings, Zoe and Zakhi. In his statement to the police about that trip to the playground, the appellant described one particular incident. While his two siblings were elsewhere on the playground, Zaray, under the watchful eye of the appellant, was using the sliding board. At the bottom of one of his descents, Zaray fell off the sliding board and hit his head. Zoe also testified that Zaray fell off at the bottom of the slide but then got up on his own. Zakhi testified that Zaray fell off the bottom of the slide but did not cry. Zoe then picked him up.

To be sure, the defense never formally raised "accident" as an issue in this case, whatever such a formality might entail, but defense counsel, in closing argument to the jury, expressly suggested that "whatever might have happened to Zaray Gray would likely

have happened at the playground." In ruling on the State's Motion in Limine to introduce evidence of the earlier infanticide, Judge Peters ruled that the evidence would be relevant to prove the absence of accident:

> I would find that maybe not necessarily absence of mistake, but absence of accident. The defendant proffered to the police in his statement that in fact he believed that the – I can't imagine there was any other reason why he offered it to the police, but to explain possible reasons for the trauma that the victim had an accident on the playground and hurt his head and back. Again, not a mistake. The Defendant's not saying he did it, but he's saying that an accident occurred that may have resulted in these injuries. So I believe that the State has met its burden as to step one.

(Emphasis supplied.) That, of course, was an evidentiary ruling, subject to the deferential abuse of discretion standard of appellate review. We see no abuse.

In a larger sense, however, in the sense that the Doctrine of Chances is not in the same category as a mere "exception" to a presumptively exclusionary rule, the very question of whether the Doctrine of Chances refers to a matter in issue in this case illustrates the value, nay the necessity, of properly conceptualizing the "other crimes" rule in its entirety. The Doctrine of Chances is not one of a dozen or more of a list of "exceptions" to presumptive exclusion. With respect to "exceptions," there is obvious value in narrowing the field for consideration down to the one or two or three exceptions that actually bear on an issue in the case. This is not such a case. The Doctrine of Chances, by stark contrast, is an instance of the "other crimes" rule's very applicability. If the "other crimes" rule is invoked in a case, its applicability is, ipso facto, in issue. Applicability is

not presumed. It is tightly defined. It has to be proved. To invoke the "other crimes" rule, it is the appellant who must establish the rule's applicability.

In this case, the applicability of the "other crimes" rule was put in issue when the State filed its Motion in Limine, seeking the court's permission to introduce evidence of the 2012 infanticide. The obvious purpose of the Doctrine of Chances was to show that the "other crimes" rule was inapplicable, because one of its necessary preconditions had not been satisfied. The Doctrine of Chances was focused on the inherent improbability of the event itself and not upon the character of the appellant. As a result, the propensity rule could not be violated and the "other crimes" rule consequently would not apply. The Motion in Limine itself put the applicability of the "other crimes" rule in issue.

Contention One: "The Road Not Taken"[17]

At the trial of the appellant for the death of 17-month-old Zaray Gray in 2018, Judge Peters was not in error in admitting evidence of the appellant's conviction for the death of his own 7-month-old son in 2012. Were we prone to travel the more standard analytic pathways, we are confident that evidence of the 2012 infanticide of Kendall Browne would qualify comfortably within at least several of the routinely recited "exceptions" to the "other crimes" prohibition. Indeed, Judge Peters ruled that the evidence of that earlier crime fit easily into both the identity exception and the absence of mistake or accident exception.

[17] Robert Frost, "The Road Not Taken" (1915).

We affirm his rulings in that regard and, out of an abundance of caution, are content to rely upon them as an alternative or back-up holding.

Except as a back-up position, however, we eschew such cookie cutter analysis. We hold primarily that under the widely and increasingly recognized Doctrine of Chances, the evidence of the 2012 infanticide was an instance of the "other crimes" rule being inapplicable. That evidence of the earlier infanticide did not need to qualify pursuant to some well-recognized and formulaic "exception" to the presumptively exclusionary dictate of Rule 5-404(b) because that presumptively exclusionary dictate was in this case never applicable in the first place. Rule 5-404(b)'s exclusionary rule is only applicable when the evidence of another crime is offered expressly to prove the bad character of the defendant and the propensity, therefore, of the defendant to commit the current crime in conformity with such criminal propensity. As Prof. Imwinkelried has pointed out in another law-review article, "The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines that Threaten to Engulf the Character Evidence Prohibition," 130 Military L. Rev. 41, 56 (1990):

> [W]hen the trier engages in character reasoning, the initial decision facing the trier is whether to infer from the evidence that the accused has a bad character. [U]nder the doctrine of chances, the trier need not focus on the accused's subjective character. Under the doctrine of chances, the initial decision facing the trier is whether the uncharged incidents are so numerous that it is objectively improbable that so many accidents would befall the accused.

(Emphasis supplied.)

As Prof. Imwinkelried went on, id. at 57-58, "prosecutors properly may rely on the Doctrine of Chances as a non-character theory for satisfying Rule 404(b)." (Emphasis supplied.) **UNDER THE DOCTRINE OF CHANCES, THE FOCUS IS NOT ON THE CHARACTER OF THE DEFENDANT. IT IS ON THE INHERENT IMPROBABILITY OF THE EVENT ITSELF.** The character of the defendant is simply not involved. By its very terms, therefore, Rule 5-404(b) is not applicable.

In terms of establishing foundational relevance, Prof. Imwinkelried, id. at 67, has also explained that although the "other crime" and the "crime on trial" need to be similar, their circumstances need not be identical:

> While the physical elements must be similar, the courts apply the similarity requirement laxly. Suppose, for example, that the accused is charged with knowing possession of heroin and defends on the basis that he was unaware that the substance in his possession was a contraband drug. In all likelihood, the court would permit the prosecutor to introduce testimony about uncharged incidents in which the accused was found in possession of marijuana or amphetamines. In short, the physical elements of the charged and uncharged events need not be identical.

(Emphasis supplied.)

It was inherently improbable that this appellant would by random chance have had two infants – first his 7-month-old son and, within several years, the 17-month-old son of his live-in girlfriend – both within his essentially exclusive adult care and both in apparent good health, mysteriously and inexplicably die under circumstances where the autopsies revealed blunt force trauma inflicted in all likelihood by an adult. Such a concatenation of bizarre and tragic circumstances would have been as inherently improbable as to have had two wives drown inexplicably in their own bathtubs. Such a concatenation would have

been as inherently improbable as to have won the lottery twice. That inherent improbability belies an innocent explanation. It was not an accident.

Are we pushing out the envelope unduly? Hardly. The sensitive alerts of Judge Raker and of Judge Menchine remind us that we are not here dealing with some localized procedure of narrow applicability that runs only from Deep Creek Lake to Assateague. We are considering a broad common law principle of far more venerable lineage and of far grander scope. We are not imprisoned within the inadvertently cramped wording of Ross v. State (1976) and Cross v. State (1978). Stare decisis contemplates that periodically we look beyond the immediate and inhibiting horizon. We reject the appellant's first contention. The evidence of the 2012 infanticide was admissible.

The rest of the common law world's perceptions and interpretations of our mutually shared "other crimes" rule are not, to be sure, authoritatively binding in Maryland. They are nonetheless powerfully persuasive and may not be casually ignored. We are not operating in a juridical vacuum.

An Unpreserved Appellate Afterthought

What we have strategically designated as the appellant's second contention (as opposed to a second factual scenario implicating his first contention) is nothing more than a trivial throwaway complaint after-the-fact that has not been remotely preserved for appellate review. We have heretofore examined at great, great length the appellant's genuine contention with respect to the application in Maryland of the common law's venerable "other crimes" rule. What the appellant here seeks to do is to piggy-back onto

that legitimate and serious contention a second factual scenario as an ostensible second violation of the "other crimes" rule that has no preserved connection with or relation to the "other crimes" rule.

At a pre-trial motions hearing on August 15, 2019, the State properly filed a motion in limine in which it requested the permission of the court to introduce in the trial evidence of the appellant's 2012 conviction for the infanticide of his son, Kendall. There were as yet, of course, no facts before the court concerning the case against the appellant. Judge Peters indicated, therefore, that he would "be taking the facts that are proffered in both of these pleadings [by the State and by the appellant] as the basis for my ruling and those, obviously, are part of the record and part of the court file." At the end of that hearing on August 15, Judge Peters made his ruling. The legal ruling with respect to Maryland Rule 5-404(b) and the "other crimes" rule was at that point a fait accompli. There was self-evidently no reference to what the appellant now attempts to portray as a second instance of a violation of the "other crimes" rule, for that second ostensible violation had not yet occurred. Judge Peter's ruling of August 15 that the evidence of the earlier crime would be received was the only ruling with respect to the "other crimes" rule that was ever made in the course of the case. It is the only ruling before us for judicial review.

What the appellant would now like to portray as a second violation of the "other crimes" (or in this case "other bad acts") rule did not occur until August 20, 2019, the third day of the trial. At one point during the State's redirect examination of Whitney West, the appellant's live-in girlfriend and the mother of the infanticide victim, the State asked Mrs.

West to describe an argument that she had had with the appellant, in front of the children, that occurred shortly before the death of Zaray. The details of the argument do not matter because the entire incident does not matter. What we are here looking for is simply the nature – the substance – of the appellant's actual objection to the evidentiary ruling.

As the State was asking Ms. West to describe the severity of the argument, defense counsel uttered a single word, "Objection." Thus far, that is very non-specific. Judge Peters responded, "Yes. Counsel, come on up. Please." There was then an extended but amicable exchange in which the State explained to the court the nature of the argument between the appellant and Ms. West. Defense counsel remained silent and still offered no basis for his objection. As the State concluded its explanation, it referred to the appellant as having shown an "eruption" of anger in front of the children. That at least caught the appellant's attention. As the State concluded, Judge Peters turned to defense counsel for her opinion:

> **THE COURT:** Okay. Counsel.
>
> **MS. STEWART-HILL:** Well, I think that's an exaggeration of what happened. I mean, my client bought the energy drink and then reimbursed her –
>
> **THE COURT:** Okay. Well, I don't know what she'll say, but –
>
> **MS. STEWART-HILL:** Reimbursed her for the money.
>
> **THE COURT:** Okay.
>
> **MS. STEWART-HILL:** I mean, they had an argument.
>
> **THE COURT:** I think that should –
>
> **MS. STEWART-HILL:** I think, to call it an eruption is a little –

> **THE COURT:** Well, I'll agree. I'm not going to call it an eruption. She can do – all right. I'll overrule the objection. All right. So the objection is overruled. Why don't you just re-ask the questions so Ms. West knows what she's answering.

(Emphasis supplied.)

The sum total of the defense argument was, "I think that's an exaggeration of what happened." The only elaboration on that argument was, "I think to call it an eruption is a little…" The use of the word "eruption" by the State was, we note, not before the jury but only in the privacy of the bench conference. Defense counsel seemed perfectly content with Judge Peter's ruling and nothing more was said about the matter. The "other crimes" rule was never mentioned nor remotely alluded to. Maryland Rule 5-404(b) was never mentioned nor remotely alluded to. The earlier motion in limine was never mentioned nor remotely alluded to.

For the appellant now to claim that this vague and ambiguous objection to the State's arguable "exaggeration" of the significance of an argument between Ms. West and the appellant was tantamount to a full-scale invocation of the "other crimes" rule and a clear call for Judge Peters to conduct the three-part examination of Faulkner v. State to determine the admissibility of the evidence is utterly without a shred of merit.

To register an objection that triggers a full analysis of a weighty legal doctrine, as was done with the evidence of the 2012 infanticide in this case, obviously requires something more substantial and more specific than a mere discernable wincing or an audible groan or a wry grimace. Such little more than visceral reactions to unwelcome evidence, in addition to numerous other inadequacies, are sadly lacking in specificity. The

issue now being advanced by the appellant on his appeal was not remotely raised nor preserved for appellate consideration at trial or on appeal.

Having tried and failed once, the appellant tried again. He now points to a passage in the State's closing argument to the jury that he claims both raises and preserves the issue for appellate review. His ostensible objection, however, consisted of nothing but stone silence. Nowhere was there so much as a wincing or a groan or a grimace to ruffle the unbroken tranquility of the State's jury argument. There was not so much as a quizzical raising of an eyebrow. If even a discernible wincing or audible groaning or wry grimace will not preserve an issue for appellate review, neither, a fortiori, will a non-wincing, a non-groaning, or a non-grimace. This contention was not remotely preserved for appellate review.

Motion For New Trial: Maryland Rule 4-331

The appellant's final contention was originally the basis for a separate appeal which has been consolidated with the appellant's appeal from the trial conviction proper. It was on January 19, 2021, over sixteen months after the jury reached its verdict in this case, that the appellant filed his motion for a new trial. A full hearing on the motion for a new trial was conducted by Judge Peters on May 6, 2021. On May 27, 2021, Judge Peters filed a Memorandum Opinion in which he denied the motion for a new trial. The appellant initially filed a separate appeal from that denial.

The new trial motion was filed on the basis of Maryland Rule of Procedure 4-331. The motion was analyzed by Judge Peters and decided on the basis of Rule 4-331. The opinion of this Court in Love v. State, 95 Md. App. 420, 621 A.2d 910 (1993) is a primary source of authority on the motion for a new trial and on Rule 4-331. Timing was the critical criterion in the analysis of the merits of that motion in this case. The observation made by this Court, 95 Md. App. at 423, may help to put the timing issue in this case in proper perspective:

> The Motion for New Trial is one of the post-trial remedies. It is by no means, however, a never-failing panacea available whenever and however outraged justice may beckon. It is designed to correct some, but not all, flaws that may have marred a trial. It is limited, moreover, by rigid filing deadlines and other formal constraints.

(Emphasis supplied.)

What are those "rigid filing deadlines?" As the Love opinion points out, the granting of a new trial in a criminal case is available, under Rule 4-331, "on three progressively narrower sets of grounds but over the course of three progressively larger time periods." Id. at 426. As to the first such set of grounds, Subsection (a) of Rule 4-331 provides:

> **Within Ten Days of Verdict.**-On motion of the defendant filed within ten days after a verdict, the court, in the interest of justice, may order a new trial.

(Emphasis supplied.)

As Love further points out, Id. at 427:

> The list of possible grounds for the granting of a new trial by the trial judge within ten days of the verdict is virtually open-ended.

(Emphasis supplied.) *See also* State v. Devers and Webster, 260 Md. 360, 374, 272 A.2d 794 (1971); In re Petition for Writ of Prohibition, 312 Md. 280, 326, 539 A.2d 664 (1988).

The availability of such broad relief, however, is "tightly circumscribed by the timeliness requirement that the Motion be filed 'within ten days after a verdict.'" In this case the verdict was rendered on August 26, 2019 and the motion for a new trial was filed on January 19, 2021, 511 days later. That did not even come close. The broad relief of Rule 4-331(a), therefore, was clearly unavailable to this appellant and will not further clutter our analysis.

The motion was based on a clerical mistake that had been made as the jury was being sent back to the jury room to begin its deliberation. In his Memorandum Opinion deciding the motion, Judge Peters described the mistake:

> Certain facts are agreed upon by the parties. During the State's case in Defendant's trial, a compact disk containing the body worn camera video from Baltimore City Police Officer Abimbola Odusanaya was admitted into evidence as State's Exhibit No. 3. Unfortunately, and inadvertently, the compact disk marked as State's Exhibit No. 3, which was submitted to the jury for deliberations, contained not only the video from Officer Odusanaya but two additional recordings that were never admitted into evidence. The two additional recordings were a body worn camera video from Detective Ryan Diener, and a video interview of the victim's father, Denardo Gray. This error was not discovered until the Defendant's appellate counsel reviewed State's Exhibit No. 3 in July or August of 2020, at least eight months after sentencing.[18]

[18] The transcript of the Memorandum Opinion only refers to one of the two "other recordings," the video-taped interview that Detective Diener had with Denardo Gray, the victim's natural father. The second "other recording" was a taped interview by Detective Diener with Ms. West, the infant victim's mother. It was a lengthy and largely innocuous conversation. The occasional passing references to the appellant were not complimentary to him to be sure, but neither were they devastating. Had this taped conversation been

(Emphasis supplied.)

With respect to these two videotaped interviews which were contained on the same disc that contained State's Exhibit No. 3, we have absolutely no idea whether the jury ever looked at them or not. No effort was made to determine if any of the jurors actually remembered having seen them. If they were ever actually seen by the jury (something we do not know), they were mildly prejudicial to the appellant – but only mildly so. Ms. West, of course, testified at the trial. The difference between what she said on the stand and what she told Detective Diener was inconsequential. On a prejudice scale of one to ten, it would have rated at most a one or a two (a two would be a stretch). The motion for a new trial was ultimately denied, however, not on substantive grounds but for procedural failures.

Love v. State, 95 Md. App. at 428, goes on to describe the second of the three time periods set out by Rule 4-331(b)(2) for the filing of a motion for a new trial:

> A narrower base for either revising a judgment or granting a new trial but one that is available over a longer period of time is that provided by subsection (b), which states, in pertinent part:
>
> > **Revisory Power.-**The court has revisory power and control over the judgment to set aside an unjust or improper verdict and grant a new trial:
> >
> > …..
> >
> > (2) in the circuit courts, on motion filed within 90 days after its imposition of sentence.

introduced into the trial proper, it would have added nothing of significance to what was already before the jury.

> Thereafter, the court has revisory power and control over the judgment in case of fraud, mistake, or irregularity.
>
> In contrast with subsection (a), this power in a trial judge to set aside a verdict is generally available for ninety days rather than for ten days. The triggering event, moreover, is a later one – the imposition of a sentence rather than the rendering of a verdict.

(Emphasis supplied.)

For purposes of the filing of the new trial motion in this case, the sentence was imposed on November 7, 2019. The new trial motion was filed on January 19, 2021, 438 days later and well beyond subsection (b)'s 90 day finish line. Subsection (b) was not available to the appellant except for a case involving "fraud, mistake, or irregularity." Neither "fraud" nor "mistake" was ever alleged by the appellant.

Maryland Rule 4-331(b)(2)

The appellant's claim that Judge Peters erroneously denied his motion for a new trial is a two-pronged contention. The first of those prongs is based on Maryland Rule of Procedure 4-331(b)(2). The second prong is based on Rule 4-331(c). Ordinarily, a motion for a new trial pursuant to Rule 4-331(b) must be filed within 90 days after the imposition of sentence. The motion was not so timely filed in that case. After the passage of 90 days, the court only retains its authority to grant a new trial in case of "fraud, mistake, or irregularity." In pertinent part, the Rule provides:

> **(b) Revisory Power.** The court has revisory power and control over the judgment to set aside an unjust or improper verdict and grant a new trial:
>
> …..

> (2) in the circuit courts, on motion filed within 90 days after its imposition of sentence. Thereafter, the court has revisory power and control over the judgment in case of fraud, mistake, or irregularity.

(Emphasis supplied.)

On this first prong of the new trial motion contention, the appellant makes no argument with respect to either "fraud" or "mistake." The claim is based exclusively on his argument that the erroneous submission of the unredacted disc to the jury constituted an "irregularity" within the contemplation of Rule 4-331(b)(2).

The appellant bases this prong of his contention essentially on the decision of the Court of Appeals in Merritt v. State, 367 Md. 17, 785 A.2d 756 (2001). The facts of Merritt, to be sure, lend it an apparent surface appeal. In Merritt, a case of first-degree murder, an exhibit that had been marked for identification only and had not been received in evidence was erroneously allowed to go into the jury room during the jury's deliberation. The motion for a new trial in that case was granted.

Very similar to Merritt was the case of Cutchin v. State, 143 Md. App. 81, 792 A.2d 359 (2002), a case in which this Court granted the new trial motion. In Cutchin, the court had redacted certain documents before admitting them into evidence. Through an inadvertent error, however, the unredacted documents were sent into the jury room. This Court held that a new trial should have been granted.

In Minger v. State, 157 Md. App. 157, 849 A.2d 1058 (2004), the appellant, then contending that his denial of his motion for a new trial had been reversible error, relied on Merritt and Cutchin in what initially might have appeared to be a pat hand. To avoid the

consequence of his late filing, he claimed that his new trial motion had been an instance of an "irregularity" within the contemplation of Rule 4-331(b). The precise issue before the court in Minger was framed by Judge Salmon, 157 Md. App. at 163, in these terms as:

> Did Minger's Rule 4-331(b) motion allege facts demonstrating either "mistake" or "irregularity" within the meaning of Maryland Rule 4-331?

Even as does the appellant here, Minger relied on Merritt to label the error in the case as an "irregularity" within the contemplation of Rule 4-331(b):

> In support of his contention that an erroneous jury instruction constituted either a "mistake" or an "irregularity" within the meaning of Rule 4-331(b), appellant relies on Merritt v. State and Cutchin v. State.

157 Md. App. at 164.

Minger then held squarely, 157 Md. App. at 164, that neither Merritt nor Cutchin ever touched on the subject of what constitutes an "irregularity" within the contemplation of Rule 4-331(b) and, therefore, stood for nothing in that regard:

> Neither Cutchin nor Merritt even mention the "fraud, mistake, or irregularity" standard. There is a simple explanation for this. In both of those cases the new trial motion was filed within ten days of trial. New trial motions filed within ten days after a verdict are governed by Rule 4-331(a).

(Emphasis supplied.) The appellant's reliance on Merritt as supporting authority was completely misplaced.

Factually, moreover, the circumstances in this case and those in Merritt are not in any way comparable. There was a chasm of difference in terms of the juror's possible perception that an error had even occurred. In this case, there was no indication that the jury was even aware of the fact that the disc contained two other conversations that had

never been introduced in evidence. In Merritt, by dramatic contrast, it was one of the jurors who, two days after the verdict had been rendered, informed the State that numerous items had been present in the jury room where they could be seen and touched and physically examined. In this case, what was erroneously in the jury's presence was a disc, that, unexamined, did not speak for itself. What was erroneously but visually in the presence of the jury in Merritt was the application for a search warrant to search Merritt's home, the subsequently issued search warrant itself, an affidavit offered in support of the warrant application, the inventory return following the execution of the warrant, and a copy of an unredacted statement that Merritt had given to the police.

There was an even more massive difference in the potential prejudicial impacts of the two erroneously submitted repositories of possible evidence. In the present case, the arguable prejudice was essentially peripheral – an uncomplimentary characterization or two of the appellant.[19] In the Merritt case, the prejudicial impact was direct and

[19] As Chief Judge Bell pointed out for the Court of Appeals in Argyrou v. State, 349 Md. 587, 601, 709 A.2d 1194 (1998), it is not all erroneously submitted evidence that calls for the award of a new trial:

> The evidence offered as newly discovered must be material to the result and that inquiry is a threshold question. That means that it must be more than "merely cumulative or impeaching." In addition, the trial court must determine that the newly discovered evidence may well have produced a different result, that is, there was a substantial or significant possibility that the verdict of the trier of fact would have been affected.

(Emphasis supplied.) The erroneously admitted evidence in this case, even if it had ever been seen by the jury, was more in the lesser category of being "merely cumulative or impeaching." Improper perhaps, but less than dynamic. As this Court pointed out in

unequivocal. In the unredacted police interview, Merritt admitted to the ownership of both a .38 caliber handgun and a .380 caliber handgun, both of which weapons were involved in the murder. On the unredacted tapes, Merritt also admitted to having sold drugs immediately prior to the murder. The inventory return following the execution of the search warrant revealed the recovery from Merritt's home of a shoe box containing a green leafy substance, plastic baggies, and rolling papers. Those items had not been admitted into evidence. This case and the Merritt case could not be more dissimilar.

With respect to subsection 4-331(b), however, the failure to qualify for the "fraud, mistake, or irregularity" exemption from the 90-day time limit was not only substantive,

---

Jackson v. State, 164 Md. App. 679, 697, 884 A.2d 694 (2005), "The distinction between 'impeaching' and 'merely impeaching,' albeit nuanced, is pivotally important."

In Campbell v. State, 373 Md. 637, 670, 821 A.2d 1 (2003), Judge Harrell wrote for the Court of Appeals in quoting with approval from this Court's statement in Love v. State, 95 Md. App. at 433:

> The Court of Special Appeals stated in Love v. State, that the difference between evidence that is "impeaching" and evidence that is "merely impeaching" is that the latter includes "collateral impeachment and peripheral contradiction."

(Emphasis supplied.) The Court of Appeals then provided definitive descriptions of "collateral impeachment" and "peripheral contradiction," examples of less significant evidence which would be "merely impeaching." As this Court held in Jackson, 164 Md. App. at 699:

> Evidence that is merely impeaching does not reach critical mass, at least in terms of permitting an appellate court to hold that a trial judge abused his discretion in denying a new trial motion resting on such a predicate.

(Emphasis supplied.)

but also procedural. To qualify for the exemption from subsection 4-331(b)'s 90 day filing requirement, a new trial motion based on "fraud, mistake, or irregularity" must also satisfy the "ordinary diligence" requirement that is a major factor in resolving questions involving subsection 4-331(c). As Judge Salmon pointed out in Minger, 157 Md. App. at 175:

> Aside from failing to allege fraud, mistake, or irregularity in his Rule 4-331(b) motion, Minger's motion was also fatally defective because he failed to allege or in any way demonstrate that he acted with ordinary diligence. This is a prerequisite to a successful 4-331(b) motion filed outside the ninety-day limit. *See* Skok, 124 Md. App. at 241-44, 721 A,2d 259. *See also* Rodriguez, 125 Md. App. at 448-49, 725 A.2d 635, which, relying on Skok *supra*, adopted a "due diligence" requirement when applying the "fraud, mistake or irregularity" standard under Rule 4-345(b).

(Emphasis supplied.)

Maryland Rule 4-331(c): Due Diligence As An Objective Phenomenon

It is with respect to subsection 4-331(c) and a new trial motion based on newly discovered evidence, however, that the issue of diligence looms as the decisive criterion. As to subsection (c) itself, Love, 95 Md. App. at 428-29, sets it out:

> It is the third of the new trial provisions that is before us in this case. This is a form of relief available over a far more extended period of time, one year rather than the ninety days available under subsection (b) or the ten days available under subsection (a). There is, moreover, the possibility of two triggering events – the imposition of sentence or the receipt of an appellate mandate-for the running of the one-year clock, and a defendant is permitted to take advantage of the more favorable. This form of relief on the other hand, rests upon a far more narrow substantive base, Subsection (c) provides, in pertinent part:
>
> **Newly Discovered Evidence.**-The court may grant a new trial or other appropriate relief on the ground of newly discovered evidence which could not have been discovered by due diligence in time to move for a new trial pursuant to section (a) of this Rule.

> …..
>
> (2) in the circuit courts, on motion filed within one year after its imposition for sentence or its receipt of a mandate issued by the Court of Appeals of the [Court] of Special Appeals, whichever is later.

(Emphasis supplied.)

Love then, 95 Md. App. at 429, carefully and critically pointed out that it is not newly discovered evidence per se that triggers the grant of a new trial but only newly discovered evidence in the indispensable context of due diligence:

> Let it be carefully noted that the exclusive predicate for new trial relief under subsection (c) is not merely "newly discovered evidence." It is, rather, "newly discovered evidence which could not have been discovered by due diligence." Even if, for stylistic reasons, we occasionally resort to the convenient shorthand form of "newly discovered evidence," it is nonetheless implicit that an indispensable part of the definitional predicate for this form of relief is the further and invariable *proviso*: "which could not have been discovered by due diligence."

(Emphasis supplied.) Newly discovered evidence in and of itself, no matter how grave and sweeping its possible impact, is meaningless in the absence of due diligence.

It was here, on the fulcrum of due diligence, that the appellant failed to pry open the door to a new trial in this case. In his Memorandum Opinion, Judge Peters recounted precisely what it was that he had directed counsel to do by way of "double checking" the exhibits that would be permitted to go to the jury room. Judge Peters was also very clear as to precisely why he wanted such a meticulous "double checking:"

> At the conclusion of the Defendant's trial, but before the start of deliberations, the Court requested that counsel "double check" the exhibits, and sit down with madame clerk just to make sure what's in evidence. Such a request was made precisely to avoid the issue now facing the Court.

(Emphasis supplied.) That was no mere casual suggestion. The key words of the directive, in the imperative mood, were "**DOUBLE-CHECK** the exhibits."

Instead of following the Court's direction, counsel for the appellant presumed to make her own assessment of what she deemed to be the required level of scrutiny that she believed was necessary under the circumstances. That, of course, was not her assessment to make. Judge Peters had already determined the degree of diligence that he was ordering in this case. Judge Peters ruled that defense counsel had failed to exercise that degree of diligence:

> Unfortunately, defense counsel, as well as the State, failed to exercise any diligence. Defense counsel failed to simply open the compact disk in question and verify what was actually on the disk. Had this simple, prudent act been done, the error would have been easily found and corrected.

(Emphasis supplied.)

The appellant goes to great lengths in his brief to argue that defense counsel had acted with respect to the evidence that was submitted to the jury "reasonably all in good faith…in light of totality of the circumstances and the facts known to him or her."

> "Browne's trial attorney had no reason to believe that there was additional videos on the disc, and therefore she acted reasonably and in good faith by not verifying the contents of the exhibit before it was given to the jury."
>
> "Counsel did not have any reason to believe that anything was amiss with State's Exhibit 3."
>
> "A reasonable defense attorney acting in good faith would not think she had to do any further investigation."
>
> "Thus, defense counsel had no reason to double-check the disc's contents."

Perhaps a good "reason to have double-checked the disc's contents" would have been that Judge Peters had ordered counsel to double-check the exhibits being submitted to the jury. This was not the appellant's call to make. It was certainly not the appellant's call to overrule or to second-guess Judge Peters.

To demonstrate irrefutably a case of non-diligence, the evidence managed to stick a perfect landing. At one point when at trial the State was playing State's exhibit #3 for the jury, the television screen actually displayed a list of the other items on that disc. What appellant's counsel did not do is a quintessential example of what due diligence is not. As the television screen revealed that the disc contained other items, defense counsel was busy taking notes and missed it. Counsel now argues, "[T]here was at most three seconds during which the television screen showed a list of the tracks on the disc [and] during this time, defense counsel was writing notes." (Emphasis supplied.) Such a lapse, of course, is precisely why Judge Peters directed counsel, at the end of the trial, to double-check all of the evidence being submitted to the jury – to overcome such inadvertent lapses during the course of the trial itself. In Love v. State, 95 Md. App. at 436, this Court dealt with just such an effort to wriggle out from under the foreclosing effect of non-diligence:

> The appellant makes several efforts to wriggle out from under the foreclosing effect of not having interviewed Clarissa Hubbert and then calling her as a defense witness. He states that the Assistant Public Defender handling his case determined, as "the best trial tactic," to demur to the facts and to make three procedural arguments. The wriggle is unavailing. Even a good explanation for not having exercised due diligence is not the same thing as the actual exercise of that due diligence. It is the latter that is required, not the former. The modifying clause "which could not have been discovered by due diligence…" is an *in rem*

> characterization of the evidence itself, not an *in personam* comment upon the lawyerly performance….The arguable absence of blameworthiness on the part of counsel does not transmute even understandable nondiligence into diligence.

(Emphasis supplied.) We repeat: "Even a good explanation for not having exercised due diligence is not the same thing as the actual exercise of that due diligence." Love v. State, 95 Md. App. at 436.

The catalogue of explanations for not having exercised due diligence goes on. For the second time, the appellant sought to bolster his entitlement to a new trial not by a proffer of actual diligence but by proffering instead a reasonable explanation for non-diligence. Deeming a different potential problem to have been more needful of extra scrutiny than the problem now before us, defense counsel exerted her extra scrutiny in that other direction. She did not, however, double-check the disc now in issue. As the appellant explained in his brief, "When it came time to review the exhibits before they were given to the jury, defense counsel examined the contents of a different exhibit, because there had been an issue regarding its redactions."

Assuming, of course, that extra scrutiny can be exerted only in one direction, to wit, that extra scrutiny is somehow in finite supply, that explanation for the non-diligence now before us might be deemed reasonable. Then again, it might not. The law, however, demands actual diligence, not a reasonable explanation for non-diligence. They are not the same thing. In this case, Judge Peters' clear and express directive to counsel had been, moreover, "double-check the exhibits." It had not been "double-check the exhibits or give

me a reasonable explanation for not double-checking them." The exclusive focus is, objectively, on what did or did not actually happen. It is not, subjectively, on the quality of the lawyer's decision making. Non-diligence is non-diligence, regardless of whether there is a good explanation for it or not. On this issue, a good explanation simply does not count. Once again, "Even a good explanation for not having exercised due diligence is not the same thing as the actual exercise of that due diligence." Love v. State, 95 Md. App. at 436. *See also* Jackson v. State, 164 Md. App. 679, 690, 884 A.2d 694 (2005) ("The test, of course, is whether the evidence was, in fact, discoverable and not whether the appellant or appellant's counsel was at fault for not discovering it.").

What Was Done Today Could And Should Have Been Done Yesterday

In terms of dispositive non-diligence, the appellant, ironically, is the decisive witness against himself. This issue is now before us for resolution only because the appellant in August of 2020, on his own initiative and through his own investigative talents, discovered that the contaminated disc had, indeed, been sent into the jury room. A full year after having been directed to do so, the appellant doublechecked the exhibit. There is in this case, however, not so much as a suggestion that what the appellant ultimately did in August of 2020 was not the very thing that he, in precisely the same way, could have done and should have done on August 19, 2019, one year earlier – or in the days immediately after August 19, 2019. The discovery of the error was not "newly discovered evidence" which, in the precise words of Rule 4-331(c), "could not have been discovered by due

diligence" in a more timely fashion. In the precise terms of Love, 95 Md. App. at 436, "the modifying clause 'which could not have been discovered by due diligence' is an in rem characterization of the evidence itself, not an in personam comment upon the lawyerly performance." This is an objective criterion, not a subjective one. What the appellant ultimately did at a later time is, by definition, the diligence that was due at an earlier time. In the simplest of terms, what was actually done later both could have been done and should have been done sooner. Ironically, the adroit investigative performance by appellant's counsel is the dispositive exemplar of what in this case due diligence was capable of accomplishing. The irrefutable proof that the evidence was discoverable is that defense counsel discovered it. Q.E.D.

A Deferential Standard Of Review: The Abuse Of Discretion

In a nutshell, Judge Peters ruled that the motion for a new trial would be denied because, inter alia, defense counsel had not acted with due diligence in discovering the fact that the disc containing the videotapes that had not been evidence at the trial had erroneously been sent into the jury room. In reviewing that ruling, our standard of review is the highly deferential abuse of discretion standard. As this Court held in Jackson v. State, 164 Md. App. 679, 695, 884 A.2d 694 (2005):

> It is well established that the granting or denial of a motion for a new trial lies within the sound discretion of the trial court and the action of the trial court upon such a motion will not be disturbed on appeal except under the most extraordinary and compelling reasons.

(Emphasis supplied.) *See also* Carr v. State, 39 Md. App. 478, 483, 387 A.2d 302 (1978).

There were no such "most extraordinary and compelling reasons" here. As the Court of Appeals observed in Mack v. State, 300 Md. 583, 600, 479 A.2d 1344 (1984), "[A]n appellate court does not generally disturb the exercise of a trial court's discretion in denying a motion for a new trial." We hold that Judge Peters did not abuse his discretion in denying the appellant's motion for a new trial.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT

Circuit Court for Baltimore City

Case No. 118232001

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1892

September Term, 2019

No. 0495

September Term, 2021

FRANCOIS BROWNE

V.

STATE OF MARYLAND

Arthur,
Tang,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Dissenting Opinion by Arthur, J.

Filed: December 7, 2022

At the defendant's trial for the murder of Zaray Gray, a 17-month-old child, the court admitted evidence that the defendant had killed his own infant son, Kendall Browne, six years earlier. According to trial counsel for the defense, members of the jury "audibly gasped" when they first heard that the defendant had been convicted of killing his own son. The State has not disputed this assertion.

Presenting its case over three days, the State devoted nearly one full day to proving that the defendant had killed Kendall Browne. The jury heard extensive testimony from the detective who investigated the death of Kendall Browne and from the medical examiner who performed the autopsy of Kendall Browne. The judge informed the jury that the defendant had been found guilty beyond a reasonable doubt of first-degree child abuse resulting in the death of Kendall Browne. Referring to this evidence in closing arguments, the prosecutor told the jurors that the defendant "has patterns." The jury found the defendant guilty of the murder of Zaray Gray.

The trial court admitted the evidence that the defendant killed Kendall Browne on the theory that this evidence possessed special relevance on the issues of "identity, intent, knowledge, and lack of accident" with respect to the murder of Zaray Gray. Perceiving a "necessity" for this evidence, the trial court concluded that the probative value of this evidence outweighed the risk of unfair prejudice. The majority of the members of this panel have endorsed the trial court's ruling.

Because I conclude that this ruling reflects a faulty application of the controlling principles and that the erroneous admission of this evidence deprived the defendant of a

fair trial, I respectfully dissent.

Evidence of Other Crimes

The evidentiary rules governing the exclusion of evidence of other crimes (i.e., crimes other than those for which a defendant is charged) are firmly established. This appeal presents no occasion for reinvention. Maryland Rule 5-404(b) provides:

> Evidence of other crimes, wrongs, or other acts . . . is not admissible to prove the character of a person in order to show action in the 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, absence of mistake or accident, or in conformity with Rule 5-413.

This Rule "embodies the common law rule of 'other crimes evidence.'" *Merzbacher v. State*, 346 Md. 391, 406 (1997). Generally, evidence of other crimes by the defendant "may not be introduced to prove guilt of the offense for which the defendant is on trial." *Terry v. State*, 332 Md. 329, 334 (1993) (citing *Cross v. State*, 282 Md. 468, 473-74 (1978)). Under this rule, "the prosecution may not introduce evidence of other criminal acts of the accused unless the evidence is introduced for some purpose other than to suggest that because the defendant is a person of criminal character, it is more probable that [the defendant] committed the crime for which [the defendant] is on trial." *Streater v. State*, 352 Md. 800, 806 (1999) (quoting John W. Strong, *McCormick on Evidence* § 190, at 798 (4th ed. 1992)). In general, therefore, "evidence which tends to show that the accused committed another crime independent of that for which [the accused] is on trial, even one of the same type, is inadmissible." *Id.* (quoting *State v.*

Taylor, 347 Md. 363, 369 (1997)) (quotation marks omitted).

"Rule 5-404(b) is a rule of exclusion, grounded in the reality that 'substantive and procedural protections are necessary to guard against the potential misuse of other crimes or bad acts evidence and avoid the risk that the evidence will be used improperly by the jury against a defendant.'" *Burris v. State*, 435 Md. 370, 385 (2013) (quoting *Streater v. State*, 352 Md. at 807) (other citations omitted). The other-crimes rule is "designed to ensure that a defendant is tried for the crime for which [the defendant] is on trial and to prevent a conviction based on reputation or propensity to commit crimes, rather than the facts of the present case." *Sessoms v. State*, 357 Md. 274, 281 (2000). "The primary concern underlying the Rule is a 'fear that jurors will conclude from evidence of other bad acts that the defendant is a "bad person" and should therefore be convicted, or deserves punishment for other bad conduct and so may be convicted even though the evidence is lacking.'" *Hurst v. State*, 400 Md. 397, 407 (2007) (quoting *Harris v. State*, 324 Md. 490, 496 (1991)). This type of evidence "is excluded because it may tend to confuse the jurors, predispose them to a belief in the defendant's guilt, or prejudice their minds against the defendant." *Terry v. State*, 332 Md. at 334 (citing *Ross v. State*, 276 Md. 664, 669 (1976)). "Stated otherwise, the exclusion of other crimes evidence is ordinarily compelled because it is often too prejudicial and may interfere with a defendant's Sixth Amendment right to a fair trial." *Merzbacher v. State*, 346 Md. at 407.

Notwithstanding the presumptive exclusion of other-crimes evidence, a trial court may admit evidence of other crimes as long as three requirements are satisfied. *See, e.g.,*

Gutierrez v. State, 423 Md. 476, 489 (2011) (citing *State v. Faulkner*, 314 Md. 630, 634-35 (1989)). First, the State must demonstrate that the evidence "possesses some 'special relevance, i.e.[,] is substantially relevant to some contested issue in the case and is not offered simply to prove criminal character.'" *Hurst v. State*, 400 Md. at 407-08 (quoting *Harris v. State*, 324 Md. at 500). The requirement "is not simply that the 'other crimes' evidence be technically or minimally relevant to some formal issue in the case other than criminal propensity, but further 1) that the relevance be *substantial* and further still 2) that it be with respect to a *genuinely contested issue* in the case." *Emory v. State*, 101 Md. App. 585, 602 (1994) (emphasis in original).[1] The Rule itself states that evidence of other crimes "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). This list "is a representative list of examples in which evidence has been found to meet the exception to the general rule of exclusion," rather than an exhaustive list. *Harris v. State*, 324 Md. at 501.

Second, even if the evidence qualifies for an exception to the general rule, the court must exclude the evidence unless the court finds by clear and convincing evidence that the defendant actually committed the other crimes. *See, e.g.*, *Whittlesey v. State*, 340 Md. 30, 59 (1995). This requirement "protects the defendant against the risk that

[1] In some cases, the requirement that other-crimes evidence relate to a genuinely contested issue may mean that the State will be unable to present other-crimes evidence until its rebuttal of the defense case. *Emory v. State*, 101 Md. App. at 603 (citing Charles McCormick, *Evidence* § 190, at 564-65 (3d ed. 1984)).

unsubstantiated charges of past misconduct will unduly influence the jury." *Streater v. State*, 352 Md. at 809.

Finally, the trial court must carefully weigh "the necessity for, and probative value of, the other crimes evidence against any undue prejudice likely to result from its admission." *Hurst v. State*, 400 Md. at 408 (citing *State v. Faulkner*, 314 Md. at 635). Thus, even "[w]hen special relevance has been demonstrated and an accused's involvement in a prior crime . . . has been established by clear and convincing evidence," the court still must consider whether the evidence should be excluded because of "its potential for unfair prejudice under Rule 5-403." *Burris v. State*, 435 Md. at 386. Maryland Rule 5-403 entrusts the court with discretion to exclude evidence "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." Underlying this final requirement "is the concern that other crimes or bad acts evidence 'is generally more prejudicial than probative.'" *Streater v. State*, 352 Md. at 810 (quoting *State v. Taylor*, 347 Md. at 369) (further quotation marks omitted).

In this appeal, appellant Francois Browne challenges the trial court's decision to admit evidence that he committed child abuse resulting in the death of his son, Kendall Browne, in 2012. Browne argues that evidence that he killed Kendall Browne possessed no special relevance to the contested issues at his trial for second-degree murder and first-degree child abuse resulting in the death of Zaray Gray in 2018. Browne argues that the

potential for unfair prejudice resulting from the admission of this evidence substantially outweighed any probative value that the evidence might have.

Maryland's Exclusionary Approach

The majority engages in a protracted exploration of what it calls the "problem" of "conceptualization." The majority ponders whether this Court should conceptualize the other-crimes rule as "a basically exclusionary rule, but one with a finite list of formal exceptions" or as "a rule of only limited applicability, aimed only at excluding evidence that is offered for and will probably have the effect of establishing a criminal defendant's character or criminal propensity[.]" Throughout its opinion, the majority expresses its disapproval of a broadly "exclusionary" approach, preferring to treat this rule as one of "limited applicability." The majority devotes as much attention to this subject as it does to any issue presented in this case.

The majority's choice of focus will come as a surprise to the parties to this appeal. When the State moved to introduce evidence that Browne had killed his son, the State did not argue that the trial court should reject the exclusionary approach to the other-crimes rule. When the trial court ruled on the motion, the court began with a correct description of the controlling principles. The court explained: "As to any ruling under admissibility of evidence under Rule 5-404(b), [the] starting point of any court in Maryland is that evidence of other crimes, wrongs, or bad acts is generally not admissible as substantive evidence and evidence cannot be admitted merely to show criminal propensity of the defendant." "However," the court continued, "there are certain exceptions to that rule."

The trial court, in other words, employed what is known as the exclusionary approach. In its appellate brief and at oral argument, the State did not suggest that the trial court was anything other than correct in treating the other-crimes rule as a rule of presumptive exclusion, subject to certain recognized exceptions.

Nonetheless, the majority has decided, on its own initiative, to raise and decide the issue of whether Maryland courts should continue to adhere to the exclusionary approach to the other-crimes rule. Ordinarily, this Court does not decide non-jurisdictional issues that have neither been raised in nor decided by the trial court. *See* Md. Rule 8-131(a). Moreover, this Court ordinarily does not entertain issues that are not raised in a party's appellate brief. *See* Md. Rule 8-504(a)(6). It is unusual for this Court to decide an issue, much less an issue of importance, without any briefing or argument on the issue.

One of the many reasons to refrain from deciding issues that are not properly raised is that doing so often produces unfairness. At trial, Browne was fully justified in expecting that the circuit court would employ the exclusionary approach, as it did. Likewise, on appeal, Browne was fully justified in expecting that this Court would review the trial court's ruling under the exclusionary approach. Browne never received notice that this Court might choose to employ a different approach, one that is more favorable to the admission of other-crimes evidence. The majority has deprived Browne of the opportunity to argue that this Court would be incorrect to abandon the exclusionary approach.

The majority appears to dismiss concerns that Browne may suffer prejudice from

its re-conceptualization of the other-crimes rule by asserting, in summary fashion, that the result in Browne's case would be no different under the established exclusionary approach. Thus, by its own admission, the majority believes that this appeal can be resolved without deciding whether Maryland courts should continue to employ the exclusionary approach. Normally, appellate courts strive to avoid deciding issues that are unnecessary to the resolution of an appeal.

The majority opinion is misguided, not merely in its exercise of principles of appellate jurisprudence, but in its analysis of the controlling precedents. According to the majority, the courts of Maryland have never "fully and consciously addressed" whether its courts should employ the exclusionary approach to the other-crimes rule. This statement is incorrect. The Court of Appeals fully and consciously addressed this subject in *Harris v. State* (*Harris II*), 324 Md. 490 (1991), *rev'g*, 81 Md. App. 247 (1989).

In *Harris v. State* (*Harris I*), 81 Md. App. 247, 265 (1989), *rev'd*, 324 Md. 490 (1991), this Court asserted that the evidentiary principle governing the exclusion of other-crimes evidence is "far more narrow" than language in some opinions by the Court of Appeals would indicate. After recounting the history and development of the rule, this Court observed that this rule "can take either of two diametrically opposed forms." *Id.* at 272. This Court said that the rule may be expressed either as "an exclusionary rule with a long and theoretically open-ended list of exceptions" or as "an inclusionary rule with a single exception when the evidence is offered to show propensity." *Id.* at 272-73. This Court declared: "Without changing Maryland's actual decisional law in any way (it is

neither our prerogative nor our desire to do so), our opinions explaining our decisions will be framed in inclusionary rather than exclusionary terms." *Id.* at 279.

When it reversed this Court's judgment from *Harris I*, the Court of Appeals considered and rejected criticisms of the exclusionary approach. *Harris II*, 324 Md. at 494-501. After "re-examin[ing] the principles governing admissibility of evidence of other bad acts" and "consider[ing] the current legal literature discussing the 'inclusionary' and 'exclusionary' approaches to the problem[,]" the Court "conclude[d] that continued adherence to the exclusionary approach is appropriate." *Id.* at 494-95. The Court recognized that "a potential vice of the exclusionary approach is that it suggests the existence of a finite number of 'exceptions' to inadmissibility" and further recognized that the "inclusionary approach has a certain appeal and a logical basis." *Id.* at 497-98. The Court determined, however, that "the exclusionary approach is better calculated" to "produce an appropriate ruling" in a given case. *Id.* at 500.

The Court explained:

> By stating the rule in exclusionary form—evidence of other bad acts is generally not admissible—followed by an exception for those instances in which the evidence 1) has special relevance, i.e. is substantially relevant to some contested issue in the case and is not offered simply to prove criminal character, and 2) has probative force that substantially outweighs its potential for unfair prejudice, the focus is correct, and the burden is where it belongs. Considering the universe of possibilities and the evidence of other bad acts that probably could be found and offered against any defendant, the likelihood is that the relevance of most of the evidence would be limited to that of criminal character, i.e. evidence that the defendant is a bad person. This type of evidence, as we have said, is inadmissible. Accordingly, it will be the exceptional, and not the usual, case where the evidence of other bad acts is substantially relevant for

> reasons other than proof of criminal character. If that assumption is correct, and we believe it is, the exclusionary approach is certainly logical.

Harris II, 324 Md. at 500.

After thus endorsing the exclusionary approach to Rule 5-404(b), the Court continued:

> But quite apart from that, and perhaps more compelling in our choice of the approach most likely to produce a just result, is the need to ensure that adequate consideration be given to the conceded, but sometimes overlooked, potential for unfair prejudice that invariably accompanies the introduction of evidence of other bad acts. The exclusionary form of the rule clearly serves to remind the bench and bar that, unlike most other evidence, this evidence carries with it heavy baggage that must be closely scrutinized before admissibility is warranted. Finally, by employing the exclusionary approach, it is immediately clear that the party offering the evidence has a hurdle to overcome and must shoulder the burden of demonstrating relevance other than criminal character, as well as the burden of demonstrating that the probative value substantially outweighs the potential for unfair prejudice.

Harris II, 324 Md. at 500-01.[2]

The majority's criticisms of the exclusionary approach amount to a restatement of the same points made by this Court in *Harris I*, which the Court of Appeals rejected as

[2] In *Harris I*, 81 Md. App. at 254, the defendant conceded that he possessed cocaine but contested whether he had the intent to distribute cocaine. This Court upheld the admission of evidence of the defendant's two prior convictions for possession of heroin with intent to distribute, roughly two-and-a-half years before the incident of cocaine possession. *Id.* at 300. Applying the exclusionary approach, the Court of Appeals reversed. *Harris II*, 324 Md. at 501. The Court concluded: "The other crimes evidence in the instant case, showing no more than the sale of a similar controlled dangerous substance two and one-half years before the event in question, possesse[d] no special relevance beyond general criminal propensity and should not have been admitted." *Id.* at 504.

part of the reversal in *Harris II*. Critiquing some aspects of the *Harris II* opinion, the majority questions whether it owes "allegiance" to the Court of Appeals' endorsement of the exclusionary approach in *Harris II*. Later in its opinion, the majority states that the other-crimes rule is "neither exclusionary [n]or inclusionary[,]" and opines that the choice between an exclusionary or inclusionary approach presents "a deceptive binary question."

This Court lacks the authority to depart from the *Harris II* opinion. The Court of Appeals, within certain limits, may overrule its own precedents in appropriate cases. *See generally Wadsworth v. Sharma*, 479 Md. 606, 630 (2022). Unless the Court of Appeals does so, this Court is bound to follow those precedents. *See, e.g.*, *Foster v. State*, 247 Md. App. 642, 651 (2020) (stating that "[i]t is not up to this Court . . . to overrule a decision of the Court of Appeals that is directly on point"); *Shaarei Tfiloh Congregation v. Mayor & City Council of Baltimore*, 237 Md. App. 102, 145 (2018) (stating that this Court "may not entertain" an "invitation to adopt and apply a new standard of law in contravention of existing Court of Appeals' precedent"); *Scarborough v. Altstatt*, 228 Md. App. 560, 577 (2016) (stating that, regardless of any "'criticisms which logic, semantics, policy and history permit to be directed against' a ruling adopted by the Court of Appeals, the ruling of the Court of Appeals remains the law of this State until and '[u]nless those decisions are either explained away or overruled by the Court of Appeals itself'") (quoting *Loyola Fed. Sav. & Loan Ass'n v. Trenchcraft, Inc.*, 17 Md. App. 646, 659 (1973)); *Marlin v. State*, 192 Md. App. 134, 151 (2010) (stating that "opinions

assented to by a majority of the Court [of Appeals], unless subsequently overruled in another case or by statute, are the law, and must be followed by this Court"); *Johns Hopkins Hosp. v. Correia*, 174 Md. App. 359, 382 (2007) (stating that "this Court does not have the option of disregarding Court of Appeals' decisions that have not been overruled, no matter how old the precedent may be"); *Halliday v. Sturm, Ruger & Co., Inc.*, 138 Md. App. 136, 169 (2001) (stating that it is "almost too elemental to mention" that, "when there has been a clear and unambiguous pronouncement issued by the Court of Appeals," the Court of Special Appeals is "bound to abide by that decision"), *aff'd*, 368 Md. 186 (2002).

In the three decades following *Harris II*, the Court of Appeals has had dozens of opportunities to discuss the other-crimes rule. The Court's opinions concerning Rule 5-404(b) contain nothing to suggest that the Court considers *Harris II* or the exclusionary approach to be "problematic." The Court has consistently reaffirmed that, under Maryland law, the other-crimes rule is a broadly exclusionary rule, subject to a non-exhaustive set of recognized exceptions. *See Wynn v. State*, 351 Md. 307, 311 (1998) (stating that, "[i]n Maryland," the other-crimes rule "is a rule of exclusion that recognizes the general exclusion of other crimes evidence with a group of stated, but not exhaustive, exceptions"); *accord Burris v. State*, 435 Md. 370, 385-86 (2013); *Hurst v. State*, 400 Md. 397, 406-07 (2007); *Streater v. State*, 352 Md. 800, 806 (1999); *Merzbacher v. State*, 346 Md. 391, 406-07 (1997). I see no support for the majority's theory that the Court of Appeals' frequent descriptions of the proper scope of this exclusionary rule are

"inadvertent[]."[3]

In my assessment, the majority's disagreement concerns more than mere doctrinal labels. To the extent that the majority opinion conflicts with *Harris II* and other Court of Appeals opinions, its statements are not binding. It would be unproductive to attempt to identify every statement from the majority opinion that strays from the approach to Rule 5-404(b) that is mandated by the Court of Appeals. Perhaps the most important substantive contradiction of the controlling precedent is the majority's assignment of the respective burdens of the State and a criminal defendant.

According to the majority:

> When the State offers evidence of other crimes and the defense invokes the "other crimes" rule, it is first incumbent on the defense to establish that the rule does, indeed, apply. Evidence of other crimes alone will not do the trick. The defense must also establish that the proffered evidence will violate the propensity rule, by implicating the character of the defendant and thereby showing his propensity to commit the crime.

The majority continues:

> If the "other crimes" rule is invoked in a case, its applicability is, ipso facto, in issue. Applicability is not presumed. It is tightly defined. It has to be proved. To invoke the "other crimes" rule, it is the appellant who must establish the rule's applicability.

[3] Repeating arguments from the reversed opinion from *Harris I*, 81 Md. App. at 265, the majority voices particular objection to statements from *Ross v. State*, 276 Md. 664, 669 (1976), and *Cross v. State*, 282 Md. 468, 473 (1978). The Court of Appeals has modified the *Ross* language in one respect, by clarifying that, "[w]hen evidence of other bad acts is excluded, it is not because that evidence is irrelevant." *Harris II*, 324 Md. at 495. Otherwise, the Court has continued to rely on the propositions to which the majority objects. *See, e.g.*, *Odum v. State*, 412 Md. 593, 610 (2010) (quoting *Ross v. State*, 276 Md. at 669); *Hurst v. State*, 400 Md. at 407 (quoting *State v. Taylor*, 347 Md. 363, 369 (1997) (quoting *Cross v. State*, 282 Md. at 473)).

Later, the majority adds:

> Rule 5-404(b)'s exclusionary rule is only applicable when the evidence of another crime is offered expressly to prove the bad character of the defendant and the propensity, therefore, of the defendant to commit the current crime in conformity with such criminal propensity.

The majority is mistaken. Through these and other statements, the majority proposes a burden for the defense that has no support in Maryland law. The exclusionary approach makes it "immediately clear that the party offering the evidence[,]" i.e., the State, "must shoulder the burden of demonstrating relevance other than criminal character, as well as the burden of demonstrating that the probative value substantially outweighs the potential for unfair prejudice." *Harris II*, 324 Md. at 500-01; *accord Emory v. State*, 101 Md. App. 585, 601 (1994) (explaining that, "pending proof of entitlement to one of the exceptions, the initial presumption is in favor of exclusion"). Thus, when a defendant objects to the introduction of evidence of crimes other than the alleged crimes for which the defendant is on trial, the initial burden has been satisfied. At that point, the defendant has no additional burden to show, for instance, that the State will argue expressly that the other crimes prove the defendant's propensity to commit a charged crime. Maryland law recognizes this initial presumption of exclusion because jurors are likely to use other-crimes evidence for a prohibited purpose, even without being expressly asked to do so by a prosecutor. "By stating the rule in exclusionary form—evidence of other bad acts is generally not admissible—followed by an exception" where the State can demonstrate special relevance, "the burden is where it belongs."

Harris II, 324 Md. at 500.

Identity Under Modus Operandi Theory

Because the majority creates its own mode of analysis, the majority downplays the purposes for which the State offered and the trial court actually admitted the other-crimes evidence against Browne. When the trial court granted the State's motion in limine, the court endorsed the State's argument that the evidence that Browne killed Kendall Browne had special relevance in proving his identity as the person who killed Zaray Gray. The trial court instructed the jurors that they could consider the evidence "on the question of identity." Without articulating its reasoning, the majority expresses its "confiden[ce]" that, if it were to analyze this part of the trial court's ruling, the evidence would fit "comfortably" within the identity exception.

In the context of Rule 5-404(b), "identity" is a wide-ranging concept that might implicate any number of distinct theories of relevance. *See generally State v. Faulkner*, 314 Md. 630, 637-38 (1989) (quoting *Cross v. State*, 282 Md. 468, 477-78 (1978)) (compiling list of 10 categories in which evidence of other crimes might be specially relevant for the purpose of proving identity). At trial and in this appeal, the State has attempted to rely on "the *modus operandi* exception," which is regarded as "a subset of the identity exception under Rule 5-404(b)." *Hurst v. State*, 400 Md. 397, 414 (2007). The State contends that the killing of 17-month-old Zaray Gray in 2018 shares a distinctive signature with the killing of seven-month-old Kendall Browne in 2012 by the defendant.

As the State acknowledges, "'[i]n order to establish *modus operandi*, the other crimes must be so nearly identical in method as to earmark them as the handiwork of the accused[.]'" *Hurst v. State*, 400 Md. at 414 (quoting *State v. Faulkner*, 314 Md. at 638) (further quotation marks omitted). "'Here much more is demanded than the mere repeated commission of crimes of the same class[.]'" *McKnight v. State*, 280 Md. 604, 613 (1977) (quoting Charles McCormick, *Evidence* § 190, at 449 (2d ed. 1972)). "[T]he indicated inference [of *modus operandi*] does not arise . . . from the mere fact that the charged and uncharged offenses share certain marks of similarity, for it may be that the marks in question are of such common occurrence that they are shared not only by the charged crime and defendant's prior offenses, but also by numerous other crimes committed by persons other than the defendant." *Brown v. State*, 85 Md. App. 523, 536 (1991) (quoting *Moore v. State*, 73 Md. App. 36, 41 (1987)), *aff'd*, 327 Md. 81 (1992). To qualify, "'[t]he device [used to commit the crime] must be so *unusual and distinctive* as to be like a signature.'" *Hurst v. State*, 400 Md. at 414 (emphasis in original) (quoting *State v. Faulkner*, 314 Md. at 638) (further quotation marks omitted). For example, "'[i]f on the prior occasions [the defendant] had used a unique way of defeating a burglar alarm, and the same method was used by the perpetrator of the crime with which he is charged, the evidence may be admitted as proof of identity.'" *Emory v. State*, 101 Md. App. 585, 611-12 (1994) (quoting Lynn McLain, *Maryland Evidence* § 404.11, at 367

(1987)).[4]

The State points out that, when considering whether two crimes are similar enough that they can be said to share the marks of a single perpetrator, the evidence "should be considered as a whole, instead of as a set of unrelated parts." *State v. Faulkner*, 314 Md. at 639. The State asserts that both Zaray Gray and Kendall Browne "died of blunt force trauma," "inflicted by an adult" "hours before their death and essentially outside the presence of witnesses." The State notes that both victims "were quite young" and "pre-verbal" and thus "unable to talk and tell [anyone] who had injured them." According the State: "That most of Kendall's injuries were to his head and face and most of Zaray's [injuries were] to his torso is not significant—the evidence established that both children were beaten."

Certainly, these two horrific crimes share a generic resemblance with each other: both are forceful beatings directed at the upper half of an infant child's body by an adult. Yet "[t]here is nothing particularly unusual or distinctive" about the overlapping features. *Lebedun v. State*, 283 Md. 257, 281 (1978). As noted in Browne's appellate brief, blunt-force trauma to an infant is, unfortunately, far from a unique cause of death. Examples of similar crimes are not difficult to find. *E.g.*, *Pinkney v. State*, 151 Md. App. 311, 317

[4] This Court has summarized the essential question as follows: "[D]o the 'marks,' considered singly or in combination 'logically operate to set the charged and uncharged offenses apart from other crimes of the same general variety and, in so doing, tend to suggest that the perpetrator of the uncharged offenses was the perpetrator of the charged offenses?'" *Moore v. State*, 73 Md. App. at 46 (quoting *People v. Haston*, 444 P.2d 91, 100 (Cal. 1968)).

(2003) (describing death of six-month-old child caused by multiple blunt-force injuries to the head); *Robey v. State*, 54 Md. App. 60, 68 (1983) (describing death of 10-month-old child caused by multiple blunt-force injuries to the chest and abdomen). The fact that both crimes occurred outside the view of witnesses is a common feature of physical child abuse, not the type of similarity that tends to establish a distinctive signature. *See Lebedun v. State*, 283 Md. at 281-82; *Cross v. State*, 282 Md. at 475-76; *McKnight v. State*, 280 Md. at 614; *Brown v. State*, 85 Md. App. at 537.

In its brief, the State cites cases holding that several overlapping features of crimes, in combination, may amount to a distinctive modus operandi. In *State v. Faulkner*, 314 Md. 630, 639 (1989), the same store was robbed four times on different Friday nights within a one-year period, each time by a robber armed with a handgun and wearing a mask and gloves. During each incident, the robber jumped onto a check-out stand, demanded bills in large denominations, and carried the cash away in a plastic bag. *Id.* In *Garcia-Perlera v. State*, 197 Md. App. 534, 548 (2011), four homes of elderly women, located within walking distance of each other, were invaded during a 13-month period. The three surviving victims gave consistent descriptions of the assailant's height and ethnicity. *Id.* at 540-41. "All of the victims were 'hog-tied' with their hands and feet bound together, and gagged." *Id.* at 548. In *Oesby v. State*, 142 Md. App. 144, 155 (2002), four women, living a short distance from each other, were attacked in the common areas of their garden style apartment complexes, all within a nine-day period. The victims each gave similar descriptions of their attackers. *Id.* at 156. Each time, the

attacker approached the victim in a friendly manner before raping the victim at knifepoint, brandishing a knife with a silver blade and brown handle. *Id.* at 156.

Unlike the evidence in cases cited by the State, the other-crimes evidence here does not involve close proximity of location and time, matching descriptions of the perpetrator, or the repeated use of a particular method of committing the crime. Here, the charged crime and the prior crime were committed against similar victims, apparently in a similar manner, six years apart. Overall, it cannot be said that these two crimes were "so nearly identical in method as to earmark them as the handiwork" of a singular perpetrator or "so unusual and distinctive as to be like a signature." *McKnight v. State*, 280 Md. at 613. The degree of similarity is not enough to support the inference that the same person probably committed both crimes. *See Hurst v. State*, 400 Md. at 415; *Lebedun v. State*, 283 Md. at 281; *McKnight v. State*, 280 Md. at 613-14; *Brown v. State*, 85 Md. App. at 537.

The broad similarities do, however, tend to show that the person who killed Zaray Gray and the person who killed Kendall Browne probably share a common propensity to beat small children. "'[An] important factor to remember is that a prior conviction which is similar to the crime for which the defendant is on trial may have a tendency to suggest to the jury that if the defendant did it before he probably did it this time.'" *Brown v. State*, 85 Md. App. at 537 (quoting *Prout v. State*, 311 Md. 348, 364 (1988)). When a prior crime is "similar in substance" to the charged offense, but the two crimes are "not unique in method," admitting evidence of the prior crime is "highly prejudicial." *Id.*

Admitting evidence of the prior crime here for the stated purpose of proving the perpetrator's "identity" invited the jury to use the evidence for its prohibited purpose of establishing guilt through propensity to commit similar crimes.

Absence of Accident

As a separate basis for admission, the State contends that the evidence that Browne killed Kendall Browne has special relevance for proving the "absence of accident" with respect to the death of Zaray Gray. The State asserts that the evidence of the earlier killing tends "to prove that the injuries suffered by Zaray were not accidentally caused[.]" The trial court admitted the evidence for the purpose of proving "lack of accident," and the majority of this panel has upheld that decision.

The majority opinion says little in response to Browne's main challenge to the admission of other-crimes evidence to prove the absence of accident. As he did in opposing the State's motion in limine, Browne maintains that he has never raised any claim of accident. Browne explains that his "theory of defense was that he did not cause Zaray Gray's injuries." Browne "never claimed that Zaray obtained his injuries by accident or mistake while under his care[.]"

Generally, "the situation or problem contemplated" by the absence of accident exception is one in which "'the defendant may claim the harm he or she is alleged to have caused was not at his or her hands, but was the result of an independent accident.'" *Emory v. State*, 101 Md. App. 585, 609 (1994) (quoting Lynn McLain, *Maryland Evidence* § 404.12, at 368 (1987)); *see also Wynn v. State*, 351 Md. 307, 326 (1998).

"'For example, if a defendant charged with child abuse contends that the child's injuries were caused by an accidental fall, evidence of prior beatings of the child by the defendant'" may have special relevance. *Emory v. State*, 101 Md. App. at 609 (quoting Lynn McLain, *Maryland Evidence* § 404.12, at 368 (1987)). Similarly, where a defendant is accused of intentionally shooting a victim, evidence that the defendant previously shot the same victim may have special relevance to refute the defendant's claim that the defendant's gun discharged accidentally. *See Hoes v. State*, 35 Md. App. 61, 69-70 (1977).

By contrast, other-crimes evidence is not admissible to prove absence of mistake or accident where the question of mistake or accident is not the subject of any genuine controversy. In *McKinney v. State*, 82 Md. App. 111, 123-26 (1990), this Court held that evidence that a defendant committed sexual offenses against three victims would not be mutually admissible at separate trials to show absence of mistake or accident. The Court explained: "The combined testimony of the three alleged victims might very well have tended to disprove any defense based on accident or mistake, but since no such defense was asserted, there was no material fact to be established by the other crimes evidence." *Id.* at 125. In *Emory v. State*, 101 Md. App. at 608-10, this Court held that, in a prosecution for a marijuana distribution conspiracy, evidence of the defendants' long history of drug-related activities was not admissible to prove absence of mistake or accident. Because the defendants "never argued that their apparent involvement with marijuana was somehow an inadvertent and bizarre mistake[,]" there was "no claim,

proffer, or theory of mistake that needed to be negated." *Id.* at 608.

The Court of Appeals discussed the "proper application" of the "absence of mistake or accident exception" in *Wynn v. State*, 351 Md. 307, 326 (1998). Analyzing authorities including this Court's opinions in *Emory* and *McKinney*, the Court of Appeals identified "a general prerequisite to the application of the absence of mistake exception." *Wynn v. State*, 351 Md. at 330. The Court observed that this exception has been found inapplicable in cases where "the defendant made no assertion or put forward no defense that he or she mistakenly committed the act for which he or she was on trial." *Id.* at 331 (emphasis omitted). The Court held: "In order for the exception to apply, the defendant generally must make some assertion or put on a defense that he or she committed the act for which he or she is on trial, but did so by mistake." *Id.* at 330-31; *see also Boyd v. State*, 399 Md. 457, 484-85 (2007); *Cousar v. State*, 198 Md. App. 486, 499-500 (2011).[5]

In the present case, Browne never raised any defense of accident or mistake. At trial, the State sought to show that Zaray Gray was in Browne's exclusive care during the

[5] In its brief, the State cites *State v. Taylor*, 347 Md. 363 (1997), an opinion that predates the *Wynn* opinion. In *Taylor*, a four-member majority of the Court of Appeals upheld a decision to consolidate the trials for five separate instances of physically abusing the same 14-year-old victim. *State v. Taylor*, 347 Md. at 365. The Court held that the evidence was mutually admissible in each of the five prosecutions as evidence of the defendant's intent. *Id.* at 377. Although the defendant did not expressly assert that he injured the victim accidentally (*id.* at 374), the defense contended that the alleged incidents were permissible disciplinary acts. *Id.* at 372. The Court reasoned that "the central issue in the case seemed to be whether the blows exceeded permissible parental discipline." *Id.* Under the facts of the present case, there is no possibility that a juror might attribute the 17-month-old child's blunt-force injuries to "permissible parental discipline."

hours before and after Zaray first showed outward signs of his injuries. During opening and closing statements, defense counsel asserted that the "most important fact" in the case was "the time line." The defense sought to show that, according to the findings of the medical examiners, it was "not all that clear when Zaray was injured." The defense theorized that Zaray sustained many of his injuries before the day of his death, during periods in which Browne had no contact with Zaray. Fairly understood, the defense strategy was to raise doubts about whether Zaray's injuries occurred during the time period when Zaray was in Browne's care, or during the periods when Zaray was in the care of other adults.

Although Browne did not testify, the State introduced recordings of statements that he made during two interrogations. In recounting events of the day of Zaray Gray's death, Browne denied causing Zaray's injuries and maintained that he had no idea how the injuries occurred. After the detective described some of the injuries, Browne agreed with the detective's observations that Zaray could not have caused the injuries by himself and that Zaray's two older siblings "couldn't have caused these types of injuries to this extent."

The State has argued that Browne raised the issue of accident when, during his interrogation, he mentioned that Zaray Gray fell off the bottom of a slide at a playground on the day of his death. In its motion in limine, the State argued that this statement generated "a defense that some, if not all, of Zaray's injuries were the result of a fall at the playground." Relying on the State's proffer, the circuit court concluded that

Browne's statement amounted to a claim that "an accident occurred that may have resulted in these injuries."

When the trial court concluded that Browne's statement amounted to a claim of accident, the court lacked the full context of the statement. During his first interrogation, Browne recalled that, on the morning of July 18, 2018, he walked with the three children to a nearby playground. Browne mentioned that, at one point, Zaray "kind of fell [inaudible] on his back" after going down a slide and possibly hit his head. Browne described the slide as a "medium slide" and said that the surface at the bottom of the slide was "something soft," but not a hard surface, such as cement.

At trial, Zaray's sister, who was six years old at the time of the events in question, and his brother, who was seven years old at that time, confirmed that they had seen Zaray fall off the bottom of the slide. Both children testified that Zaray did not cry after falling and that Zaray's sister helped Zaray get up afterward. Zaray's sister recalled that he landed on wood chips.

Although it was undisputed that this fall occurred, other evidence conclusively showed that the fall did not produce and could not have produced the extensive injuries that caused Zaray Gray's death. As the State notes in its brief, the autopsy "established" that Zaray's death was "not due to accidental causes," but was "due to blunt force trauma inflicted by an adult." The State explains: "Zaray's injuries were so extensive and horrific that they had to be inflicted at the hands of an adult directing blows or punches at Zaray's body."

The State's forensic pathology expert, Assistant Medical Examiner Diana Nointin, found abrasions and contusions to Zaray Gray's head, chin, mouth, neck, abdomen, back, hands, shoulder, and knees. Dr. Nointin opined that Zaray's broken collarbone resulted either from a direct impact or from pulling or twisting of his arm. According to Dr. Nointin, the external injuries to Zaray's torso and the internal injuries to his abdomen were consistent with being struck by a hand or fist. Dr. Nointin determined that the manner of death was homicide. Dr. Nointin concluded that Zaray "died of multiple injuries to the head, torso, and extremities," which were "consistent with two blunt-force impacts to the head and face and eight blunt-force impacts to the torso."[6]

At trial, Browne did nothing to contest Dr. Nointin's core findings that Zaray Gray died from multiple blunt-force injuries. The defense did, however, call into question when these injuries occurred. During the cross-examination of Dr. Nointin, defense counsel elicited testimony that Zaray had suffered not only "fresh" injuries "within hours" of his death, but various "older injuries," including cuts on his neck and cheeks and internal injuries in the small bowel, which, in her opinion, probably occurred "within days" of his death. In addition, the defense called its own expert, Dr. Amy Hawes, who testified that she "agree[d] with many conclusions" made by Dr. Nointin and considered

[6] When asked by the prosecutor, Dr. Nointin explained that these injuries were not consistent with falling off the bottom of a slide. Dr. Nointin also explained that, although an adult would be strong enough to inflict the injuries to Zaray, a child would not be able to cause the same injuries without generating "a lot of speed," such as "by jumping off[] the top of [a] bed and landing onto the baby" repeatedly.

the autopsy report to be "very thorough" and "very well documented." Dr. Hawes specifically agreed that the manner of death was "[h]omicide" and that the cause of death was "[b]lunt force injuries." Notably, Dr. Hawes attributed Zaray's death to "a continuum of injuries . . . in various stages of healing," some of which may have occurred days or even weeks before his death. Dr. Hawes opined that even the most acute injuries may have occurred before the day of his death.

In closing arguments, defense counsel relied on Dr. Hawes's testimony that Zaray Gray died from a combination of older and newer injuries. Counsel argued that Zaray was in the care of adults other than Browne (including Zaray's biological father) during the week before his death, and that Zaray was not in Browne's exclusive care during the 24-hour period before his death. In short, the defense thesis was that Zaray may have suffered his injuries before he was in Browne's care on July 18, 2018. The defense did not contest the forensic evidence showing that an adult intentionally injured Zaray, but did question whether all of the evidence proved beyond a reasonable doubt that the adult was Browne, as opposed to the other adults who had Zaray in their care at earlier times. At no point did defense counsel mention Zaray's fall off the bottom of a playground slide, let alone suggest that this incident caused Zaray's extensive injuries.

Considered in proper context, the statements mentioning Zaray's fall off the bottom of a slide are "not enough to constitute a genuine assertion of a defense based on mistake or accident." *Emory v. State*, 101 Md. App. at 609 (discussing *McKinney v. State*, 82 Md. App. at 125). In fact, Browne disavowed any reliance on a defense of

mistake or accident when he offered his own expert witness to testify that Zaray's death was a homicide caused by multiple blunt-force injuries. No justification existed for using other-crimes evidence to prove the absence of accident where the issue of "accident" was never a genuinely contested, material issue.

Reaching a contrary conclusion, the majority writes: "To be sure, the defense never formally raised 'accident' as an issue in this case, whatever such a formality might entail, but defense counsel, in closing argument to the jury, expressly suggested that 'whatever might have happened to Zaray Gray would likely have happened at the playground.'" In this section of its opinion, the majority "has simply misconstrued" (*McKinney v. State*, 82 Md. App. at 125) part of the closing argument by defense counsel. The selected quotation has nothing to do with Zaray's fall off the bottom of the slide.

In its closing argument, the defense sought to undermine the State's theory that Browne had the opportunity to assault Zaray Gray while walking back home from the playground. Specifically, the defense argued that Zaray's siblings recently fabricated a claim that Browne took Zaray on a shortcut to walk home from the playground, outside the view of his siblings who took a longer route. To that end, defense counsel noted that Detective Diener twice went to the "wrong playground" after interviewing Zaray's siblings in July 2018 and September 2018. Defense counsel asserted that the detective first began looking for a shortcut between the playground and the children's home after speaking with the children and their mother in July 2019. Defense counsel argued that the account of the shortcut was "something that the kids or somebody came up with a

month before this trial."

While describing the detective's investigation, counsel stated:

> So what does [Detective Diener] do in December three months after the second interviews of the children, he goes where? He goes back to the wrong playground. Surely by now, with all of these interviews and all this opportunity to do a follow-up investigation to determine the right playground. And why is it important? Because, if you look at the time line at least from the detective's point of view and the State's point of view, Zaray Gray vomits for the first time at 11:00 a.m. And so whatever might have happened to Zaray Gray would likely have happened, at least initially, before that. And where were they before that? The playground. And the detective is not looking or doesn't care about looking beyond the 18th of July. He's just focusing on the 18th of July.

To interpret this argument as a defense of accident is untenable, in my judgment. Defense counsel's specific point was that, "from the detective's point of view," the available information indicated that Zaray Gray suffered injuries sometime before he began vomiting at 11:00 a.m. on July 18, 2018. The detective, therefore, would have made it a priority to investigate "whatever might have happened to Zaray Gray . . . before" that time, including the trip to "[t]he playground." Defense counsel's eventual point was that, despite the apparent importance of investigating what occurred during the trip to the playground, the detective did not investigate the children's account of the shortcut between the playground and their home until a year after Zaray's death. This particular argument cannot be characterized as a genuine claim of accident.

The majority nonetheless says that it defers to the trial court's determination that accident was a genuinely contested issue in the case. The majority asserts that this determination was "an evidentiary ruling, subject to the deferential abuse of discretion

standard," and says that it "see[s] no abuse" of discretion. In doing so, the majority uses an incorrect standard. The determination of whether other-crimes evidence is substantially relevant to a contested issue "'is a legal determination and does not involve any exercise of discretion.'" *Streater v. State*, 352 Md. 800, 807 (1999) (quoting *State v. Faulkner*, 314 Md. 630, 634 (1989)); *Wynn v. State*, 351 Md. 307, 318 (1998) (same); *see also Oesby v. State*, 142 Md. App. 144, 159 (2002) (citing *Moore v. State*, 73 Md. App. 36, 44-45 (1987)); *Emory v. State*, 101 Md. App. at 604. This Court owes no deference to the trial court's erroneous determination that the other-crimes evidence had special relevance to prove the absence of accident.

Intent and Knowledge

In its motion in limine, the State did not offer the evidence of the prior killing of Kendall Browne for the purpose of proving either "intent" or "knowledge." The trial court nonetheless said that it "believe[d]" that this evidence was "relevant for intent and knowledge that in fact [Browne] knew what he was doing[.]" The trial court did not explain its reasoning for these theories of special relevance. The trial court later instructed the jurors that they could consider the other-crimes evidence for the purposes of proving "intent" and "knowledge."

On appeal, Browne contends that neither intent nor knowledge, properly understood, were genuinely contested issues in this case. Browne asserts that his defense was that he did not cause Zaray Gray's injuries, "not that he caused the injuries but lacked criminal intent" or "that he caused Zaray's injuries but somehow did not know

what he was doing[.]"

In response, the State offers no direct explanation of how the evidence of the other crime might have had special relevance on the issues of intent or knowledge. Rather, the State addresses the issues of intent and knowledge within its argument regarding absence of accident. The State asserts that the other-crimes evidence "had special relevance to establish absence of accident and, thus, intent and knowledge." The State notes that "proof of absence of mistake or accident is often, when looked at from the obverse, also proof of intent or knowledge." 5 Lynn McLain, *Maryland Evidence: State and Federal* § 404:12, at 803-04 (3d ed. 2013).[7]

Under the theory offered by the State, any inference of intent or knowledge depends on an earlier inference of absence of accident. The State does not offer any independent theory of how the other-crimes evidence might prove intent or knowledge. As explained previously, the issue of whether an "accident" caused the victim's injuries was not a genuinely contested issue in this case. I fail to see how the other-crimes evidence might tend to prove intent or knowledge by negating a claim of accident, where the defense made no claim of accident.

[7] The State's brief discusses the issue of "accident" in two different senses of that word. Primarily, the State refers to Zaray Gray's fall from the bottom of a slide as an "accident." The State argues that the other-crimes evidence undermines any claim that this inadvertent fall caused Zaray's injuries. Additionally, the State argues that the other-crimes evidence tends to prove that Browne "knew and intended what he was doing when he beat and punched Zaray." In doing so, the State alludes to an entirely different type of "accident." This case did not involve any claim that Browne performed the acts that caused Zaray's injuries, but did so unintentionally.

The Doctrine of Chances

Seeking to enhance its theories of special relevance, the State has pointed to the "doctrine of chances." The States asserts that it is "highly improbable" that Browne could be "innocently involved" in the death of Zaray Gray, "given the similarities" between Zaray's death and the death of Kendall Browne. The State argues that the evidence that Browne killed Kendall Browne tends to "refute an innocent explanation" for Zaray's death, in order to "establish[] that Zaray's death was a homicide and to identify [Browne] as the perpetrator[.]"

As Browne points out, Maryland appellate courts have not expressly approved the use of the doctrine of chances to admit other-crimes evidence. Browne argues that, even if the doctrine of chances offers a valid theory for demonstrating special relevance, the admission of evidence here "dangerously exceeds" the limits of the doctrine. Browne observes that, unlike other cases where doctrine-of-chances reasoning serves to negate a claim that a victim died through non-criminal means, "there was no question" here "that [the victim's] death was a homicide." Browne concludes that the State's invocation of the doctrine of chances—asking the jury to infer that, because Browne caused the death of Kendall Browne, he probably caused the death of Zaray Gray—amounts to propensity reasoning in disguise.

The extent to which the trial court relied on the doctrine of chances when it

admitted the other-crimes evidence is not entirely clear.[8] To uphold the trial court's ruling, however, the majority relies almost exclusively on the doctrine of chances. The majority opinion discusses some of the similarities between the death of Zaray Gray and the death of Kendall Browne.[9] The majority reasons that it is "inherently improbable" that, "by random chance," two infants in the same person's care would die from blunt-force injuries within a period of several years. On that basis, the majority deems the other-crimes evidence specially relevant.

I see little reason to doubt that the doctrine of chances, in an appropriate case, might be used to establish special relevance consistent with Maryland law. The doctrine of chances "purports to offer an explanation of the logical relevance of other incidents that does not rely upon character-based reasoning." *State v. Vuley*, 70 A.3d 940, 947 (Vt. 2013). The doctrine of chances "is not an independent ground upon which to admit other acts evidence, but is instead a theory why other acts evidence may be relevant to prove intent, knowledge, or identity and disprove accident or mistake." *State v. Atkins*, 819 S.E.2d 28, 37 (Ga. 2018). Properly conceived, the doctrine of chances may offer "a

[8] The trial court quoted authorities describing the use of the doctrine to prove mens rea, i.e., culpable mental state. The court then remarked: "I seem to find that that's basically identity evidence, nonetheless, I think it's relevant for that." The court went on to admit the evidence for the limited purposes of proving "identity, intent, knowledge, and lack of accident" with respect to the murder of Zaray Gray.

[9] The majority overstates these similarities in at least one important respect. The majority claims that Zaray Gray and Kendall Browne were "both within [Browne's] essentially exclusive adult care[.]" This statement is true with respect to Kendall Browne. This statement is not true with respect to Zaray Gray.

permissible path" to a factual inference that "one or some events in a group of unlikely events were not the result of chance." *State v. Jackson*, 498 P.3d 788, 802 (Or. 2021).

The majority accepts, without qualification, the view that the doctrine of chances provides a "non-character theory" supporting the admission of other-crimes evidence. This view is not universally shared. Some legal scholars dispute whether the doctrine of chances is truly independent of propensity-based reasoning. These critics observe that the probability assessments underlying the doctrine of chances require, or at least invite, assumptions that people tend to act in conformity with their past behavior.[10] Even those who claim that the doctrine of chances does not offend the prohibition on propensity-based reasoning admit that the distinction is remarkably subtle.[11] Courts that have accepted the basic validity of the doctrine have been cautious not to endorse its use simply because a defendant is accused of committing a crime similar to one that the defendant previously committed. *See, e.g.*, *State v. Argueta*, 469 P.3d 938, 946-47 (Utah 2020) (explaining that a court "cannot simply rely on the similarity between the charged

[10] *E.g.*, Frederic Bloom, *Character Flaws*, 89 U. Colo. L. Rev. 1101 (2018); Andrew Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 Rev. Litig. 181 (1998); Paul F. Rothstein, *Intellectual Coherence in an Evidence Code*, 28 Loy. L.A. L. Rev. 1259 (1995).

[11] *E.g.* David P. Leonard et al., *The New Wigmore: A Treatise on Evidence: Evidence of Other Misconduct and Similar Events* § 7.3.2 (2d ed. 2019) (opining that doctrine-of-chances reasoning "is close to the forbidden character-based reasoning, [but] it does not cross the line"); Edward J. Imwinkelried, *Uncharged Misconduct Evidence* § 4:1, at n.145 (rev. ed. 2022) (noting that "in a given case there can be a thin line between a bad character theory and an objective chances theory").

act and the prior bad acts" to decide that the doctrine of chances is applicable).

Courts have upheld the admission of evidence under the doctrine of chances for the purpose of showing that the harm allegedly caused by a defendant was not the result of a natural accident or some other rare misfortune. For instance, where a defendant is accused of drowning his spouse to create the appearance of an accidental death in order to trigger the double indemnity provision of a life insurance policy, the court might admit evidence that the defendant's previous spouse died under strikingly similar circumstances. *See People v. Lisenba*, 94 P.2d 569, 581-82 (Cal. 1939). Where a defendant is accused of defrauding insurers by murdering a business partner and leaving the body to be burned in a fire, the court might admit evidence that the defendant collected insurance proceeds under an almost identical policy after the murder of his spouse a few years earlier. *See United States v. York*, 933 F.2d 1343, 1349-50 (7th Cir. 1991). Where a defendant is accused of suffocating a child in the defendant's care, the court might admit evidence that other children in the defendant's care suffered unusually frequent episodes of cyanosis (breathing cessation) and suffocation deaths. *See United States v. Woods*, 484 F.2d 127, 135 (4th Cir. 1973).

In the present case, the State has relied on *United States v. Woods*. The *Woods* case is considered to be a paradigmatic illustration of the doctrine of chances even though the opinion does not mention the doctrine by name.

In *Woods* the defendant was accused of first-degree murder of her eight-month-old foster child. *United States v. Woods*, 484 F.2d at 128. Forensic evidence indicated that

the victim's death was probably a homicide caused by smothering, but the medical examiner could not rule out the significant possibility that death resulted from natural causes. *Id.* at 130. To produce evidence sufficient to prove the defendant's guilt beyond a reasonable doubt, the government offered evidence that, during the 25-year period preceding the victim's death, nine other children in the defendant's care had suffered episodes of cyanosis and seven of those children died as a result. *Id.* The Fourth Circuit held that this evidence was admissible to "prove that a crime had been committed because of the remoteness of the possibility that so many infants in the care and custody of defendant would suffer cyanotic episodes and respiratory difficulties if they were not induced by the defendant's wrongdoing[.]" *Id.* at 135. "[A]t the same time," the court added, the evidence of the other deaths "would prove the identity of defendant as the wrongdoer." *Id.*

The State has also cited *Wilson v. State*, 136 Md. App. 27 (2000), *rev'd on other grounds*, 370 Md. 191 (2002), an opinion that followed the reasoning of *Woods*. In *Wilson*, the defendant was accused of murdering his five-month-old child by smothering the child, but there was "little to no physical evidence" to support that allegation. *Id.* at 88. The State offered evidence that, several years earlier, another child of the defendant had also died in her crib when she was two months old. *Id.* at 37. Before each death, the defendant had purchased two separate life insurance policies on each child's life, designating himself as the beneficiary, without informing the mothers of the children or notifying the insurers of the dual policies. *Id.* at 36, 38. Citing "'the striking similarity'"

between the two incidents, the trial court admitted the evidence for the purposes of "'proving the identity of the killer,'" and "'proving that the [d]efendant had a motive to commit the crime, [thus] demonstrating both intent and identity.'" *Id.* at 87. The trial court reasoned that the evidence would "'aid[] the State in proving the *actus reus* of the crime itself[,]'" by showing that the victim "'did not die from natural or accidental causes.'" *Id*. Citing the *Woods* opinion, this Court agreed with the trial court's determination that evidence of the other child's death was relevant to "'disprove an innocent explanation'" for the victim's death. *Id.* at 90.[12]

This Court also cited *Woods* favorably in *Nasim v. State*, 34 Md. App. 65 (1976), where the defendant was accused of committing arson and insurance fraud. The trial court admitted evidence that two other properties occupied by the defendant had been destroyed in fires, after which the defendant collected fire insurance proceeds. *Id.* at 73-74. Pointing to similarities between the charged incident and the previous fires, this Court held that the evidence relating to the other fires was admissible under the exception for signature crimes. *Id.* at 77. Citing *Woods*, this Court concluded that "the incidence of

[12] The Court of Appeals reversed this Court's judgment in *Wilson*, concluding that the circuit court erred in admitting expert testimony about the probability of two children dying of Sudden Infant Death Syndrome. *Wilson v. State*, 370 Md. 191, 195 (2002). The Court also held that the prosecutor made impermissible closing arguments about the statistical probability of the defendant's innocence. *Id.* at 214. The Court expressed no opinion on whether the evidence of the first child's death had special relevance under Md. Rule 5-404(b). *Id.* at 217. The Court nevertheless pointed to *Woods* as an authority discussing the admissibility of other crimes evidence "to prove the *corpus delicti*'" of a crime. *Id.* at 217 n.13.

multiple fires in properties owned or occupied by [the defendant] furnishe[d] an additional basis for their admission." *Id.* at 78. The Court stated that "the rationale for decision in *Woods*, [484 F.2d at 135], applies with equal force in the subject arson and fraud prosecutions." *Id.*

Building fires, drowning deaths, and unexplained infant deaths all share a common feature. Sometimes, these events are the products of intentional human action, but sometimes these events occur entirely because of random misfortune. Moreover, when these events occur, there is often little physical evidence that might prove whether the event occurred because of human wrongdoing or because of pure chance.

As Professor Edward Imwinkelried explains, courts have allowed the use of other-crimes evidence for the purpose of "establishing an *actus reus*—a social loss or harm caused by human agency." Edward J. Imwinkelried, *The Use of Evidence of An Accused's Uncharged Misconduct to Prove* Mens Rea*: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 Ohio St. L.J. 575, 586 (1991) (footnotes omitted). In child physical abuse cases, even where medical evidence demonstrates that a child sustained an injury, "the accused often defends on the theory that the child sustained the injury accidentally." *Id.* "For example, the accused might contend that the child incurred the injury by falling off a swing set or down a flight of stairs." *Id.* "At trial, the principal challenge facing the prosecution will be convincing the jury that the child's injury resulted from the intervention of another human being." *Id.* If there is evidence that implicates the accused in many other similar incidents, a fact-finder might

conclude that it is "objectively improbable that so many accidents would befall the accused." *Id.* at 586-87. By effectively ruling out an accident as a potential explanation, the fact-finder might reason that "the more likely cause of the victim's injury is the act of another human being." *Id.* at 587.

Professor Imwinkelried explains that, "[i]n theory, there is a distinction between character reasoning and the use of the doctrine of chances to establish the *actus reus*." Edward J. Imwinkelried, *The Use of Evidence of An Accused's Uncharged Misconduct to Prove* Mens Rea*: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 Ohio St. L.J. at 588. "However, in practice the distinction can be a thin, difficult line for the jurors to draw; while the two doctrines posit different intermediate inferences, under both doctrines the jurors draw an ultimate inference of conduct." *Id.* (footnote omitted). "Moreover, the lax application of the doctrine of chances can eviscerate the character evidence prohibition." *Id.* Professor Imwinkelried cautions: "Before admitting evidence of the accused's uncharged crimes to establish the *actus* under the doctrine of chances," courts "must ensure that the prosecutor has strictly satisfied" three "foundational requirements." *Id.*

First, "[e]ach uncharged incident must be roughly similar to the charged crime." Edward J. Imwinkelried, *The Use of Evidence of An Accused's Uncharged Misconduct to Prove* Mens Rea*: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 Ohio St. L.J. at 589. Second, "[c]onsidering the losses in both the charged and uncharged incidents, the accused has suffered the loss more frequently than

the typical person endures such losses accidentally." *Id.* at 590. Third, "[t]he issue of the occurrence of an *actus reus* must be in bona fide dispute; the prosecution must have a legitimate need to resort to the uncharged misconduct to prove the *actus reus*." *Id.* at 592.

Courts in other jurisdictions have adopted these "foundational requirements" for employing the doctrine of chances to prove the occurrence of an actus reus. *E.g.*, *State v. Verde*, 296 P.3d 673, 686-87 (Utah 2012); *People v. Everett*, 250 P.3d 649, 658 (Colo. App. 2010). Similarly, in a dissenting opinion arguing that the Court of Appeals should adopt the doctrine of chances, Judge Raker emphasized the importance of these requirements. Judge Raker agreed that, to guard against "the potential for abuse" of the doctrine, trial courts should not admit other-crimes evidence under the doctrine unless the prosecution can "satisfy certain foundational requirements[.]" *Wynn v. State*, 351 Md. 307, 355-56 (1998) (Raker, J., dissenting). Judge Raker proposed the following four requirements: "(1) the uncharged incident must be similar, although not necessarily identical, to the charged crime; (2) an assessment of improbability; (3) a bona fide need for the evidence; and (4) a temporal relationship between the uncharged misconduct and the act charged." *Id.* I am unconvinced that the other-crimes evidence offered here satisfies these requirements.

I agree that, to meet the required showing of improbability, the prosecution does not necessarily need to offer evidence of more than one instance of prior conduct. "Depending upon the circumstances of the case, sometimes one prior similar act will be

sufficiently relevant for admissibility and sometimes not." *State v. Johns*, 725 P.2d 312, 324 (Or. 1986). "How many similar events are enough depends on the complexity and relative frequency of the event rather than on the total number of occurrences." *State v. Sullivan*, 576 N.W.2d 30, 39 (Wis. 1998). "A simple, unremarkable single instance of prior conduct probably will not qualify, but a complex act requiring several steps, particularly premeditated, may well qualify." *State v. Johns*, 725 P.2d at 324; *accord People v. Robbins*, 755 P.2d 355, 363 n.5 (Cal. 1988); *State v. Sadowski*, 805 P.2d 537, 543 (Mont. 1991).

By that standard, the present case is a poor candidate for using the doctrine of chances. Neither Browne's prior crime nor the alleged crime are particularly complex. This case is unlike *Wilson*, 136 Md. App. at 36-39, for instance, where the defendant had secretly purchased two life insurance policies on each child victim's life and, on the night that each child died, volunteered to watch the child alone even though he had never done so previously. Premeditation is not even alleged here. The State theorized that Browne's "motive" for abusing Zaray Gray was a character flaw, namely, his inability to control his "temper."

Even if the other-crimes evidence here possesses the requisite combination similarity, frequency, and complexity, the State has failed to demonstrate any bona fide need for the evidence. Before the prosecution may resort to other-crimes evidence to prove the actus reus, "the *actus reus* . . . must genuinely be in dispute." *Wynn v. State*, 351 Md. at 355 (Raker, J., dissenting). This requirement is consistent with the

overarching rule that, "[f]or other crimes evidence to be admissible . . . , the evidence must be substantially relevant to a genuinely contested issue in the case." *Id.* (citing *Harris v. State*, 324 Md. 490, 500 (1991)).

With respect to this third requirement, Professor Imwinkelried explains: "If the judge admits uncharged misconduct to prove the *actus reus* when the evidence has only tenuous probative value for that purpose, there is a significant risk that the jurors will misuse the evidence by drawing the forbidden character inference." Edward J. Imwinkelried, *The Use of Evidence of An Accused's Uncharged Misconduct to Prove* Mens Rea*: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 Ohio St. L.J. at 593 (footnote omitted). He concludes: "Unless the prosecution has a bona fide need to use the evidence to prove the occurrence of an *actus reus*, the predominant effect on the jurors' minds may be to 'serve mostly to demonstrate that the [d]efendant had the propensity to commit the crime charged, the one impermissible use of such evidence.'" *Id.* (footnote omitted) (quoting *United States v. Anthony*, 712 F. Supp. 112, 117 (N.D. Ohio 1989)).

There is no need to use doctrine-of-chances reasoning, which focuses on the improbability of some non-criminal explanation for the incident, to establish that a crime occurred here. At Browne's trial, there was no genuine dispute that Zaray Gray died as the result of a criminal act. The defense did not claim, nor did the evidence suggest, that Zaray died as the result of an accident or natural causes. Experts for both the State and the defense agreed that Zaray died because an adult struck him forcefully and repeatedly.

This event itself belies any innocent explanation. The unanswered factual question was whether the guilty actor was Francois Browne or some other adult. It would be pointless, therefore, to try to assess the probability that Zaray Gray and Kendall Browne both died as the result of an accident. That assessment could, at best, only circle back to a conclusion that Zaray's death was not an accident, an issue that was not in dispute in the case.

In its brief, the State claims that the doctrine of chances may be used not only to establish criminality but also to establish the identity of the criminal actor. The State does not elaborate on this claim. In the authorities cited by the State concerning the doctrine of chances, the only inference of "identity" is an indirect one. In *Woods*, evidence relating to prior victims was admissible to "prove that a crime had been committed . . . , and at the same time, . . . prove the identity of [the] defendant as the wrongdoer." *United States v. Woods*, 484 F.2d at 135. By using the doctrine of chances to discount one explanation (the possibility that the victim and others died of natural causes), the alternative explanations (including the possibility that the victim died because of the defendant's wrongdoing) become more plausible. "The only direct inference from the doctrine of chances is that one or some of the incidents were not accidents." Edward J. Imwinkelried, *Uncharged Misconduct Evidence* § 4:1 (rev. ed. 2022).

The authorities cited by the State do not explain how the doctrine of chances might be used to establish identity where there is no dispute that the actus reus occurred, but

only a dispute over whether the defendant was the perpetrator.[13] Any attempt to use doctrine-of-chances reasoning here must follow a different path from the one used in *Woods*. The suggested inference might take the following form: given that Browne previously killed Kendall Browne under circumstances similar to the killing of Zaray Gray, it is unlikely that anyone other than Browne killed Zaray Gray.

As discussed previously, the degree of similarity between the killing of Zaray Gray and the killing of Kendall Browne is not enough to establish a distinctive signature, which might support an inference that it is unlikely that two different persons committed these crimes. The most natural way to reach a conclusion that it is unlikely that anyone other than Browne killed Zaray Gray is through character reasoning. Using their common sense, jurors understand that only a small percentage of adults are disposed to beat a defenseless infant child. If Browne is one of the persons who could have beaten Zaray, and if Browne is the only one known to possess the propensity to beat infants, then the chances are that he is the culprit. This reasoning is precisely the type of reasoning forbidden by the exclusionary rule for other-crimes evidence.

In his brief, Browne argues that, at his trial, the State used the evidence of the

[13] Professor Imwinkelried notes: "Although American courts have often invoked the doctrine of chances as a justification for admitting uncharged misconduct to show actus reus or mens rea, they have been reluctant to admit uncharged misconduct for the purpose of showing the defendant's identity as the perpetrator." Edward J. Imwinkelried, *Uncharged Misconduct Evidence* § 3:7 (rev. ed. 2022). For instance, in Utah, where appellate courts have upheld the use of the doctrine of chances for a variety of purposes, "[i]t is currently unclear whether the doctrine of chances may be applied to show identity." *State v. Murphy*, 441 P.3d 787, 796 n.10 (Utah Ct. App. 2019).

killing of Kendall Browne "as a basis to argue that Browne had the propensity to hurt Zaray." Browne points to the following exchange, from the State's rebuttal closing argument:

> [PROSECUTOR:] And the bottom line, ladies and gentlemen, this is not us saying, oh, he's a bad guy.
>
> What I'm telling you is, that this is evidence. Let's talk about the evidence. Francois Brown[e] has patterns. Kendall Brown[e]. Young baby. Infant. Can't tell anyone what's going on with him. What's happening to him. Zaray, young infant. Can't tell anyone what's happening to him. Evidence. Not a coincidence. Blunt force trauma, Kendall Brown[e]. Blunt force trauma, Zaray Gray. Evidence, not a coincidence.
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> THE COURT: Overruled.
>
> [PROSECUTOR:] Older and fresh injuries to both babies. Hmm. Kendall had just started spending weekends with Francois. Hmm.
>
> THE COURT: Counsel, let's move on. Okay.
>
> [PROSECUTOR:] It is evidence, ladies and gentlemen. It is evidence. It is not a coincidence. I am telling you this because what are the odds?

At that point, defense counsel objected again. The court convened a bench conference at the request of the defense. Defense counsel asserted that the State's line of argument was "impermissible[.]" Defense counsel told the court that, if the State added "one more word in the direction of propensity," the defense would move for a mistrial. The court suggested that the prosecutor move on, stating, "whatever points you made, I think they've been made." The prosecutor agreed to move on, but noted, for the record, that she believed that her argument was "in line with" the court's ruling on the

permissible uses of the other-crimes evidence.

Browne argues that the prosecutor's remarks invited the jury to use the evidence of the killing of Kendall Browne to conclude that Browne has a propensity to beat infant children. In its appellate brief, the State insists that the prosecutor's remarks "were consistent with the court's instructions" on the permissible uses of the other-crimes evidence. The truth is that both arguments are correct: the prosecutor's remarks were materially indistinguishable from propensity-based arguments, and those remarks were consistent with the court's instructions concerning the purpose of the other-crimes evidence. The problem here is not that the closing remarks impermissibly strayed from the court's ruling, but that the court's ruling invited the type of argument made by the prosecutor.

In summary, I conclude that in this case the State stretched the doctrine of chances beyond its limits. The prior crime was broadly similar, but not strikingly similar, to the alleged crime. These crimes were not complex acts requiring multiple steps, nor did they involve premeditation. Most important, because there was no genuine dispute that Zaray Gray died in a homicide, the State had no legitimate need to resort to other-crimes evidence to prove that a criminal act occurred here.

Weighing of Probative Value of Evidence and Potential for Unfair Prejudice

Even where other-crimes evidence is "independently and substantially relevant to some contested issue," the evidence "may be excluded if its probative value is exceeded by potential jury hostility or unfair prejudice." *State v. Faulkner*, 314 Md. 630, 641

(1989). "A decision to admit other crimes evidence which is clearly incorrect 'on this question of balancing probative value against danger of prejudice will be corrected on appeal as an abuse of discretion.'" *Id.* (quoting *Brafman v. State*, 38 Md. App. 465, 476 (1978)). Reversal may be warranted where the trial court misapprehends the probative value of the other-crimes evidence. *See Burris v. State*, 435 Md. 370, 392 (2013); *Boyd v. State*, 399 Md. 457, 485-86 (2007); *Emory v. State*, 101 Md. App. 585, 624-25 (1994).

Browne contends that, even if the evidence of the killing of Kendall Browne had special relevance to a genuinely contested issue, the probative value of that evidence was so "minimal" that it "added nothing legitimate" to the State's case. Browne argues: "If the jury had any doubts about the State's case, this evidence was certain to tip the scales in favor of a conviction—not because it actually proved that Browne committed the crimes against Zaray, but because the jury was likely to overlook the gaps in the State's case and assume that Browne had a propensity to hurt children."

When it granted the State's motion in limine and allowed the State to introduce evidence of Kendall Browne's death, the trial court set forth its reasons for concluding that the probative value of the other-crimes evidence was not substantially outweighed by the danger of unfair prejudice. The majority rules "summarily" that the trial court did not abuse its discretion. I am unconvinced. In my judgment, the trial court's weighing of the probative value of the other-crimes evidence is flawed in at least two important ways.

First, the trial court expressed an incorrect understanding of the concept of "necessity" for the admission of other-crimes evidence. During arguments on the motion

in limine, the trial court told the prosecutor: "[I]f you're telling me your case is weak . . . or your case may be perceived to be weaker because some of your witnesses may be minors or small children, okay. That goes to necessity, meaning that's why [you] need this." Moments later, when announcing its ruling, the trial court said: "It seems to me the necessity for this particular evidence is strong[.]" The court said that the State's case relied on "mere circumstantial evidence" showing that the victim was in Browne's care "for parts of the time span [in] which the injuries occurred," along with "the testimony of an 8-year-old . . . that the Defendant may have been physically abusive to the victim."

From the trial court's statements, it is apparent that the court assessed the probative value of the evidence by considering the overall strength or weakness of the State's case. Some opinions from this Court have expressed the view that, "[i]n balancing the need for the other crime evidence, consideration is also given to whether, absent the other crime evidence, the State would have failed to persuade a jury unanimously and beyond a reasonable doubt that defendant was guilty of the crime for which he was on trial." *Faulkner v. State*, 73 Md. App. 511, 522-53 (1988) (citing *Anaweck v. State*, 63 Md. App. 239, 255 (1985)). The Court of Appeals, however, has expressly rejected that view. The Court has explained: "*Faulkner* and *Anaweck* are errant to the extent they purport to hold that a trial court must consider whether the State will or will not meet its burden of persuasion when weighing prejudice against probative value." *State v. Faulkner*, 314 Md. 630, 642 (1989).

Second, it is apparent that the trial court based its ruling on the premise that the

other-crimes evidence would be relevant to disprove a claim of accident. The trial court predicted that the State was "going to be required to show . . . absence of accident by the perpetrator in this particular case." Relying on the State's proffers, the trial court thought that Browne would be "claim[ing] that there was an accident" during the time period in which the victim suffered his injuries.

The trial court's predictions proved to be incorrect. The undisputed evidence at trial showed that an accident may have occurred when the victim fell off the bottom of a playground slide, but that this accident was not the cause of the victim's extensive injuries. Both the State and Browne presented evidence establishing that Zaray Gray's injuries did not result from an accident. To the extent that the other-crimes evidence had any relevance on the issue of absence of accident, it was entirely cumulative.

The trial court's assessment of the probative value of the evidence was fundamentally flawed. No appellate deference is owed to the resulting exercise of discretion. Under the facts presented, jurors were substantially more likely to use the evidence for its prohibited purpose than for any legitimate purpose. For this additional reason, I conclude that the court erred in permitting the State to introduce evidence of Kendall Browne's death.

Additional Contentions of Error

I do not join the majority's analysis of Browne's second and third contentions of error.

As his second contention, Browne argues that the trial court erred by permitting

the victim's mother to testify about an argument that she had with Browne. The prosecutor later argued to the jury that this episode revealed that Browne is a "quick-tempered" person, who "gets upset about small stuff." The prosecutor urged the jurors to conclude that Browne's "temper" would be "consistent with being annoyed" with the challenges of looking after a 17-month-old child, and thus make Browne more inclined to beat the victim.

The majority concludes that Browne's challenge to the admission of this evidence is unpreserved. The transcript shows that defense counsel made a general objection to the testimony, which the trial court quickly overruled. As a discussion at the bench continued, defense counsel voiced disagreement with the prosecutor's characterization of the witness's expected testimony, calling it an "exaggeration." The majority appears to have concluded that the initial, general objection to the testimony became a specific objection, limited to the ground that the prosecutor had "exaggerat[ed]" the testimony. Through this exercise of judicial alchemy, the general objection is deemed to have been waived.

As his third contention, Browne seeks a remedy for the submission to the jury of video recordings that were never admitted into evidence. During the trial, the State produced a disc marked as State's Exhibit 3, which the prosecutor described as a copy of an officer's body-worn camera footage. The actual disc included additional video recordings of two separate interviews with the victim's parents, neither of which had been admitted into evidence. One of the interviews was with Zaray's biological father,

whom the defense had identified as a possible culprit, but who appeared genuinely distraught on the video. During the other interview, Zaray's mother claimed that Browne had "told [her] so many lies" that she considered him to be a "[s]ociopath."[14] Relying on *Merritt v. State*, 367 Md. 17 (2001), Browne contends that the submission of the unadmitted evidence to the jury is a sufficient ground to require the grant of his motion for new trial (or, alternatively, for reversal of his convictions on direct appeal).

The majority disposes of this third contention by concluding that Browne's trial counsel did not exercise ordinary diligence in discovering the additional videos saved on the disc during the moments before deliberations. The majority focuses on the judge's instructions that counsel should "double-check as to what is in evidence that should go back" to the jury room. The majority does not interpret this statement as an instruction merely to ensure that the exhibits sent to the jury corresponded to the exhibits admitted into evidence (and not merely marked for identification). The majority treats this statement as a command, enforced on pain of waiver, to verify the contents of every exhibit admitted into evidence by, for instance, inserting each disc into a computer, examining the directories saved on each disc, opening every file, and perhaps even viewing the contents to ensure the disc contains only what it is said to contain.

In my view, it is unnecessary to decide these remaining issues. Browne's convictions should be reversed because the trial court committed prejudicial error when it

[14] The majority describes this interview as a "largely innocuous conversation" with "occasional passing references" to Browne that "were not complimentary to him[.]"

admitted evidence that he previously committed child abuse resulting in the death of Kendall Browne. Browne should be retried without the other-crimes evidence. The two remaining issues are unlikely to recur at a subsequent trial, and especially unlikely to recur in the particular context in which they occurred at his first trial.

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/1892s19cn.pdf