Circuit Court for Montgomery County
Case No. C-15-CR-21-000147

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1080

September Term, 2022

DAVID MILLER

v.

STATE OF MARYLAND

Beachley,
Zic,
Getty, Joseph M.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zic, J.

Filed: July 24, 2024

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Md. Rule 1-104(a)(2)(B).

David Miller, appellant, was convicted by a jury in the Circuit Court for Montgomery County for the first- and second-degree assault of a person we will refer to as "Ms. Doe." During Mr. Miller's trial, he testified that he "never" committed assaultive acts against Ms. Doe, and during cross-examination, Mr. Miller stated that he was "very passive." The circuit court allowed the State to rebut and impeach Mr. Miller's testimony under Maryland Rules 5-404(a)(2)(A) and 5-616(b) through testimony from Ms. Doe. Mr. Miller argues on appeal that the circuit court erred by allowing Ms. Doe to testify to his prior and subsequent bad acts.

QUESTIONS PRESENTED

Mr. Miller presents two questions for our review, which we repeat verbatim:[1]

1. Did the Circuit Court err when it permitted the State to introduce, under the opened-door doctrine, extrinsic evidence of Mr. Miller's alleged past assaults of the victim?

2. Did the Circuit Court err when it allowed the State to introduce, under the opened-door doctrine, extrinsic evidence of Mr. Miller allegedly shooting a rifle at a house occupied by the victim and others, eight months after the events in this case?

We hold that the circuit court was correct in finding that Mr. Miller opened the door for the State to present impeachment and rebuttal extrinsic evidence because Mr. Miller testified that he had never physically assaulted Ms. Doe and that he had a "very passive" nature. We also hold, however, that the circuit court erred in not conducting a

[1] The State consolidated the questions presented as follows:

> Did the court properly allow rebuttal testimony about Miller's prior assaultive behavior and his character for non-passivity?

Rule 5-403 balancing test and abused its discretion by allowing the State to include an impermissible level of detail based on extrinsic evidence in its rebuttal case. For the reasons that follow, we vacate and remand the judgment of the circuit court.

BACKGROUND

Factual Background

The assaults at issue occurred on May 31 and June 1, 2020 at Ms. Doe's residence in Potomac, Maryland. Mr. Miller and Ms. Doe met in 2002. The two had stayed in touch throughout the past 18 years. In March 2020, Mr. Miller moved into Ms. Doe's townhouse in Potomac. Mr. Miller testified that as of 2019, his relationship with Ms. Doe primarily involved him serving as Ms. Doe's financial manager.

According to Ms. Doe, on May 31, 2020, Mr. Miller and Ms. Doe had a disagreement, which led to Mr. Miller physically and verbally accosting her. Ms. Doe claimed that on the next day, June 1, 2020, Mr. Miller hit her nose, arms, stomach, and legs, resulting in bleeding. Once she was able, Ms. Doe took photos of her face, grabbed her belongings and pets, and left the townhouse. She drove to a police station and was directed to the Montgomery County Family Justice Center where she was interviewed by Detective Anzenberger. She was referred to a local shelter and sent to a hospital, where more photos were taken.

According to Mr. Miller, he was not at Ms. Doe's home on May 31, 2020 or June 1, 2020. Mr. Miller claims to have only texted Ms. Doe on June 1, 2020 concerning payments she owed him regarding the financial services he provided.

After his indictment for the assault charges but before his jury trial began, in February 2021, Mr. Miller was arrested for a separate incident in Prince George's County for allegedly shooting at a house in the middle of the night where Ms. Doe was staying with a friend in February 2021. In September 2022, the State entered a *nolle prosequi* regarding the shooting incident.

Trial

The jury trial for the assault charges began on July 25, 2022. Mr. Miller testified in his defense. During defense counsel's direct examination, Mr. Miller testified that he "never" "punch[ed]," "slap[ped]," "kick[ed]," or "thr[e]w Ms. [Doe] to the ground." He also testified that he did not assault her on May 31 or June 1. Before the State's cross-examination of Mr. Miller, the State requested a bench conference, arguing defense counsel's line of questioning opened the door to the use of "prior bad acts" in the State's case. Defense counsel objected, claiming that he intended to limit the questions to the events that took place on May 31 and June 1. The circuit court overruled the objection.

On cross-examination, Mr. Miller testified that he was "very passive." The State subsequently asked, "And prior to May 31st and June 1st of 2020, is it your testimony that nothing physical ever happened between you and Ms. Doe, in terms of punching, slapping, kicking?" Defense counsel objected to this question, and the court overruled. Mr. Miller responded, "That's correct." The State next asked Mr. Miller, "So you never put your hands on Ms. [Doe] even before May 31st, right?" Mr. Miller responded, "That is correct." He also testified that he "[had] never attacked [Ms. Doe] in [his] entire life."

The State continued, “You never attacked her ever in your life?” and Mr. Miller replied, “No.”

Following the defense’s redirect, the State sought to put on rebuttal testimony through Ms. Doe. The above lines of questioning provided the basis for this appeal. Because the State wanted Ms. Doe to testify to Mr. Miller’s other bad acts, Mr. Miller’s counsel requested a hearing during trial to determine whether under Rule 5-404(b) Ms. Doe could testify to Mr. Miller “never” physically assaulting her and Mr. Miller’s act of shooting at the Prince George’s County house. Defense counsel argued:

> Well, I think there’s a special issue if the State intends to produce previous evidence the Court needs to have a hearing and find by clear and convincing evidence that those things took place before you release them to the jury.

The court responded,

> Okay. That’s, I mean, that’s usually true when there’s a third-party witness testify[ing]. I’m not sure about whether it’s the same case when the victim is testifying, but we can deal with that in just a minute.

Shortly after, the State revisited the issue, asking,

> And Your Honor, do we need to -- [defense counsel] raised the issue of having Ms. [Doe], and out of presence of the jury, have prior bad acts, subsequent bad acts found by clear and convincing evidence by the Court. Is that something that Your Honor would like to do at a particular time?

The court responded,

> Well, so, at this point, these, this is impeachment evidence, not substantive evidence because, basically, he brought up, on direct, that he never did this. You are now

> bringing in evidence that shows that he did, which is impeachment, not substantive, so it's not really 404(b) evidence.

Defense counsel continued to press the circuit court to require the State to present clear and convincing evidence that the other bad acts occurred. Defense counsel also argued that there must be a Rule 5-403 hearing to determine whether Ms. Doe's testimony would be more prejudicial than probative. Finally, defense counsel argued that should Ms. Doe be allowed to testify to Mr. Miller's other bad acts, the details of her testimony should be limited.

Throughout the bench conferences, the circuit court ruled that Mr. Miller opened the door for the State to rebut Mr. Miller's testimony under Rules 5-616(b) and 5-404(a). Specifically, the court ruled that Mr. Miller's claim that he was "very passive" and "never" physically assaulted Ms. Doe was character evidence the State could rebut under Rule 5-404(a), and the statements could be impeached by the State under Rule 5-616(b). The court also ruled that because the State's evidence of Ms. Doe testifying was admitted under Rules 5-616(b) and 5-404(a), it was not admitted according to Rule 5-404(b), and accordingly, was not subject to a Rule 5-404(b) hearing.

Ms. Doe then testified that Mr. Miller physically assaulted her on multiple occasions prior to May 31, 2020. She also testified that Mr. Miller discharged a firearm in the middle of the night at the house where she was staying.

Mr. Miller was convicted of first- and second-degree assault. This appeal followed.

STANDARD OF REVIEW

We "generally" review a circuit court's ruling on the admissibility of evidence for abuse of discretion. *State v. Robertson*, 463 Md. 342, 351 (2019). When it comes to questions of evidentiary relevancy, however, we review a circuit court's decision *de novo* because relevancy is a question of law. *Id.* at 351-53 ("'[T]rial judges do not have discretion to admit irrelevant evidence.'") (internal citations omitted). The open door doctrine "'authorizes admitting evidence which otherwise would have been irrelevant'" and accordingly, it "'makes relevant what was irrelevant[.]'" *Id.* at 352 (internal citations omitted). We, therefore, analyze the open door doctrine under a *de novo* standard of review. *Id.* at 352-52.

Once the door is opened, there is a "separate question from whether the open door doctrine applies." *Id.* at 357. Namely, the level of permissible detail within the doctrine's scope—referred to as "proportionality." *Id.* 357-58. Proportionality, analyzed through the "subsequent use of the evidence," is reviewed for abuse of discretion, giving deference to the circuit court. *Id.* at 357-58.

Additionally, this Court reviews a trial court's ruling on whether evidence should be admitted on a non-collateral matter and under Rule 5-403 for abuse of discretion. *Aron v. Brock*, 118 Md. App. 475, 493 (1997); *Montague v. State*, 471 Md. 657, 673-74 (2020).

DISCUSSION

I. MR. MILLER OPENED THE DOOR FOR THE STATE TO INTRODUCE EXTRINSIC EVIDENCE OF HIS OTHER BAD ACTS.

Mr. Miller first argues that "the trial court erroneously applied the open door doctrine to permit the State to introduce extrinsic evidence in its rebuttal case of other crimes allegedly committed by Mr. Miller." Mr. Miller acknowledges that "[t]he doctrine holds that if a defendant opens the door to a line of questioning or evidence, the prosecution may introduce additional evidence that would otherwise be irrelevant." He argues, however, that "the opening of the door doctrine is not absolute, and its application can be subject to limitations." Mr. Miller then argues that "the prosecution must first establish that the defendant raised the issue on direct examination and that the prosecution's response is proportional."

The State argues that the circuit court "properly allowed rebuttal testimony about [Mr.] Miller's prior assaultive behavior and his character for non-passivity," and notes that "[w]hile [Mr.] Miller did 'open the door' in a colloquial sense, the testimony about the prior assaults and the discharging[[2]] was admitted as impeachment evidence under Maryland 5-616(b) and as character evidence under Maryland Rule 5-404(a)(2)(A)."

During direct examination, defense counsel asked Mr. Miller the following questions:

> [COUNSEL FOR MR. MILLER]: Mr. Miller, did you ever punch Ms. [Doe]?

[2] We understand "discharging" to mean discharging the firearm at the house in Prince George's County.

> [MR. MILLER]: Never.
>
> [COUNSEL FOR MR. MILLER]: Did you ever slap Ms. [Doe]?
>
> [MR. MILLER]: Never.
>
> [COUNSEL FOR MR. MILLER]: Did you ever kick Ms. [Doe]?
>
> [MR. MILLER]: Never.
>
> [COUNSEL FOR MR. MILLER]: Did you ever throw Ms. [Doe] to the ground?
>
> [MR. MILLER]: Never.
>
> [COUNSEL FOR MR. MILLER]: On May 31st of 2020, did you ever assault Ms. [Doe]?
>
> [MR. MILLER]: No.
>
> [COUNSEL FOR MR. MILLER]: On June 1st, 2020, did you ever assault Ms. [Doe]?
>
> [MR. MILLER]: No.

During cross-examination, Mr. Miller testified that he was "very passive:"

> [COUNSEL FOR THE STATE]: So your testimony is that you were never upset with Ms. [Doe] in how she interacted with you when you [sic] feeling so much --
>
> [MR. MILLER]: No, I was never --
>
> [COUNSEL FOR THE STATE]: -- pain during this time?
>
> [MR. MILLER]: I'm sorry. Did you finish? No, I, I was never upset with her. I, I didn't like living in a toxic environment, but I never argued. I was very passive.

[COUNSEL FOR THE STATE]: You were very passive?

[MR. MILLER]: Always, always been very passive . . . .

Based on Mr. Miller's testimony that he never punched, slapped, kicked, or threw Ms. Doe to the ground and was "very passive," the circuit court permitted the State to elicit substantive character evidence and impeachment testimony in rebuttal from Ms. Doe concerning Mr. Miller's prior and subsequent acts.

The circuit court made the following remarks:

> So first of all, we're talking about the testimony of the defendant; we're not talking about a third-party witness that was brought to court to testify about the character of the defendant, which is a different rule and a different thing altogether.
>
> We're talking about the defendant taking the stand and testifying and, on one hand, saying he never kicked, hit, punched, or slapped the victim; and then on another occasion, said he always acted passively towards her. So he's making specific assertions that he has never had any physical contact with her.
>
> And secondly, he's, by using the word passive towards her, he's injecting the nature of his character being, having peaceful character. And again, this is not an opinion or reputation evidence of a third party; this is his own testimony.

We agree with the circuit court. The open door doctrine permits the admission of "otherwise inadmissible evidence [] based on principles of fairness." *Little v. Schneider*, 434 Md. 150, 157 (2013). The doctrine "expands the rule of relevancy." *State v. Heath*, 464 Md. 445, 459 (2019). It "'authorizes admitting evidence which otherwise would have been irrelevant[.]'" *Little*, 434 Md. at 157 (quoting *Clark v. State*, 332 Md. 77, 84-85 (1993)). It is "simply a way of saying: 'My opponent has injected an issue into the case, and I ought to be able to introduce evidence on that issue.'" *Little*, 434 Md. at 157 (quoting *Clark*, 332 Md. at 85) (cleaned up).

We conclude that Mr. Miller opened the door during direct examination when his counsel did not limit the line of questioning to May 31 and June 1, and instead asked Mr. Miller whether he had *ever* punched, slapped, kicked, or threw Ms. Doe to the ground. Defense counsel did not mention May 31 or June 1 until after asking Mr. Miller if Mr. Miller had "ever" punched, slapped, kicked, or threw Ms. Doe to the ground. As the circuit court noted, Defense counsel "just asked [the questions] generally speaking" without limiting the scope to May 31 and June 1. Mr. Miller answering these questions with "never" is additional support for the conclusion that the answers were not limited to May 31 and June 1. "Never" and "ever" are not limited to any time period. Mr. Miller injected a claim that could be impeached and his character that could be rebutted—that he had never physically assaulted Ms. Doe because he is a passive person—into the case, and the State had a right to refute his claims. *See Little*, 434 Md. at 157. The State chose to do so by providing evidence through Ms. Doe's testimony that Mr. Miller assaulted her before and after May 31 and June 1, 2020.

Mr. Miller argues that the State must establish that Mr. Miller "raised the issue on direct examination[.]" Mr. Miller also argues that his testimony regarding his very passive character was a matter raised by the State, contending that "Mr. Miller's responses were directly responsive to the call of the prosecutor's questions [during cross-examination]." We disagree. The Supreme Court of Maryland has held that the door is opened when an "'opponent has injected an issue into the case[.]'" *Little*, 434 Md. at 157 (internal citation omitted). Mr. Miller injected the issue of his very passive nature into the case, and the State had a right to refute those claims. Mr. Miller was the first person to use the words "very passive" and voluntarily described himself as "very passive" during the State's cross-examination. Mr. Miller injected the issue of his very passive nature into the trial on his own accord.

We hold that the circuit court was correct to rule that Mr. Miller opened the door for the State to rebut his claims through substantive evidence and impeachment evidence that he had never physically assaulted Ms. Doe and that he was very passive.

II. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT THE STATE COULD INTRODUCE EVIDENCE PURSUANT TO RULE 5-616(b) FOR IMPEACHMENT.

Rule 5-616(b)(2) states: "Other extrinsic evidence contradicting a witness's testimony ordinarily may be admitted only on non-collateral matters. In the court's discretion, however, extrinsic evidence may be admitted on collateral matters." The circuit court admitted Ms. Doe's testimony as impeachment evidence under Rule 5-616(b) based on both of Mr. Miller's claims that he "never" physically assaulted Ms. Doe and was "very passive." As we have already concluded, Mr. Miller opened the door through his testimony, and we agree with the circuit court that the State could offer impeachment evidence under Rule 5-616(b).

Mr. Miller argues on appeal that extrinsic evidence admitted under Rule 5-616(b)(2) must be on a non-collateral issue, and Ms. Doe's testimony did not impeach a non-collateral issue. Mr. Miller further argues that "[t]he question is not whether Mr. Miller's credibility was a collateral issue; it is whether the fact or matter that was being used to impeach his credibility was a collateral issue." Mr. Miller relies upon *Smith v. State*, where the Supreme Court of Maryland held that "the proper test is whether the fact, as to which the error is predicated, could have been shown in evidence for any purpose independently of the self-contradiction." 273 Md. 152, 160 (1974). Rather than analyzing whether Mr. Miller's credibility was collateral, Mr. Miller argues that the circuit court should have analyzed whether the matter used to impeach his credibility—Ms. Doe's testimony regarding the uncharged bad acts—were themselves collateral issues. Mr. Miller also cites to *Anderson v. State*, which states:

> [d]etermining what is collateral requires a mental sleight-of-hand. The analysis is made by looking at the subject matter of the evidence as if it were being offered for substantive purposes, even though it is being offered only to impeach. One must look at the subject matter of the evidence offered and determine whether the subject matter is relevant and material to the substantive issues in the case[.]

220 Md. App. 509, 522-23 (2014).

The following bench conference occurred during trial:

> [THE COURT]: When you were indicating before that this is a different scenario because the State was offering extrinsic evidence as opposed to a statement, and that that would not be admissible, it's only admissible on a non-collateral matter, and you said this was a collateral matter. And so my question is, when is it that the credibility of witnesses is not considered a non-collateral matter?
>
> [COUNSEL FOR MR. MILLER]: Well, Your Honor, I apologize if I had misspoke. I think what I said to the Court

> was, this is a non-collateral[[3]] matter of these other acts, they're not directly tied to this incident. And so I understand the Court's question, but I think, just generally, the fact that the rule limits extrinsic evidence for impeachment. So there must be some times where there's impeachment on non-collateral matters that's not admissible. Otherwise, there's no reason to have this rule that restricts non-collateral impeachment.
>
> * * *
>
> [THE COURT]: So the general rule is that when it's a collateral matter, meaning not an important matter, that extrinsic evidence is generally not admissible, but it is admissible on a non-collateral matter which, in trials, means one of those is credibility. Credibility of witnesses is a non-collateral matter, it's an important matter. Right?
>
> [COUNSEL FOR MR. MILLER]: Yes, and I think I'm mixing up my collateral and non-collateral. I apologize, Your Honor, so, but I don't think it's admissible under 616(b). I understand the Court's question of, it's about credibility, isn't that always a non-collateral matter?
>
> [THE COURT]: Correct.
>
> [COUNSEL FOR MR. MILLER]: And I think impeachment is, deals with credibility, and so why have this rule limiting it if --
>
> * * *
>
> [THE COURT]: -- for example, a collateral matter would be, did it happen at 6:00 a.m. or did it happen at 6:15 a.m. on the morning of June 1st. That's a relatively collateral matter because the testimony was it happened in the morning on June 1st. So because that would be considered a collateral matter, not really important, that's the kind of thing where

[3] Taken in context with the rest of Mr. Miller's counsel's argument during this portion of the bench conference, we assume counsel meant to say that the matter was collateral.

> you wouldn't typically allow extrinsic evidence to come in and show that.
>
> However, in this case, in an assault case, where your client has gotten on the stand and says he's never assaulted her in his life, and he's passive with her, that's not a collateral matter. That's a non-collateral matter because now, he is trying to show the jury that he is a person of character that's non-violent as it relates to this person. So that is, I would consider that to be not a collateral matter, therefore, extrinsic evidence would be admissible to show, to disprove that statement in court.
>
> Because the whole purpose that you, that he made those statements was to convince the jury he's a person that's non-violent. He is a passive person. He has never assaulted her before. And he wants the jury to believe that that's his character.
>
> So the State now has evidence to the contrary to show that, well, maybe in the past, he was violent towards her, maybe he was non-passive towards her. So that's why I would view that to be -- and given the fact that he is the one that raised the issue of his character, that that now has become an important matter, not a collateral matter in this case.
>
> So I'm not aware, so I would say that, at this point, he's the one that raised the issue of his passive nature, his passive character, the passive way in which he deals with her, so the evidence that would now be admissible would be to impeach those statements, and I wouldn't find that to be a collateral matter, but really a seminal matter in this case, because he's now raised his own character as an issue in a criminal case. So the State is permitted to rebut that.

The circuit court found Mr. Miller's credibility as a witness and his passive character to be non-collateral matters, and thus, the State was able to offer evidence to impeach his statements. This Court held, relying upon *Smith*, 273 Md. at 162, that "the test of collateralness . . . means whether that fact could have been shown in evidence from the standpoint of relevancy." *Aron*, 118 Md. App. at 496 (quotation marks omitted). This Court further held that relevant evidence is non-collateral. *Id.* Rule 5-401 defines relevancy as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." We conclude that Mr. Miller's assertion of his "passive" character and credibility as a witness to be relevant to his case, and thus, a non-collateral matter. Accordingly, we hold that the trial court did not abuse its discretion by allowing Ms. Doe to testify.

Furthermore, even if we were to assume the evidence at issue—Ms. Doe's testimony—was a collateral matter, "Rule 5-616(b)(2) clearly permits the trial court, in its discretion, to admit [collateral] extrinsic evidence for purposes of impeachment." *Aron*, 118 Md. App. at 497. Accordingly, regardless of whether the matter was collateral, the circuit court did not abuse its discretion.

III. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT THE STATE COULD INTRODUCE EVIDENCE PURSUANT TO RULE 5-404(a)(2)(A) TO REBUT MR. MILLER'S CLAIM THAT HE WAS "VERY PASSIVE."

Rule 5-404(a)(2)(A) states: "An accused may offer evidence of the accused's pertinent trait of character. If the evidence is admitted, the prosecution may offer evidence to rebut it." Mr. Miller argues that Rule 5-404(a)(2)(A) does not apply because the "State's cross-examination generated the issue of 'passivity.'" The State argues that Mr. Miller's statement of his "passivity" was not responsive to the State's questioning; he offered it on his own.

We conclude that Mr. Miller described himself as "very passive" on his own accord. The State did not initially ask him if he is "passive" or "very passive." Mr. Miller volunteered the statement that he is very passive, and only after Mr. Miller described himself in that way did the State ask, "You are very passive?" Mr. Miller's volunteered statement that he is "very passive" is character evidence. Accordingly, because Mr. Miller is the accused in this case, he offered his own passivity as a pertinent character trait in accordance with Rule 5-404(a)(2)(A). We agree with the circuit court that the State then could offer evidence to rebut Mr. Miller's passive nature under Rule 5-404(a)(2)(A).

IV. THE CIRCUIT COURT DID NOT ERR BY NOT CONDUCTING A HEARING PURSUANT TO RULE 5-404(b).

Mr. Miller argues that the circuit court should have conducted a hearing pursuant to *State v. Faulkner*, 314 Md. 630 (1989)[4] to assess the admissibility of Ms. Doe's

[4] For evidence of other crimes to be admitted, the Supreme Court of Maryland created a test in *Faulkner*, which consists of:

> three procedural steps[] that a judge must apply before he or she may admit "other crimes" evidence. [*Faulkner*,] 314 Md. at 634-35[]. The first step is to determine whether the evidence is *prima facie* admissible because it fits within any exception to the presumptive rule of exclusion, *Faulkner*, 314 Md. at 634[], such as the exceptions discussed in *Solomon*. The second step is to determine "whether the accused's involvement in the other crimes is established by clear and convincing evidence." *Id.* Finally, the judge must weigh "[t]he necessity for and probative value of the 'other crimes' evidence . . . against any undue prejudice likely to result from its admission." *Faulkner*, 314 Md. at 635[].

Conyers v. State, 345 Md. 525, 550-51 (1997).

testimony under Rule 5-404(b). Mr. Miller additionally contends that the purpose for admitting Ms. Doe's testimony falls outside the permissible exceptions to the general rule against admitting "other crimes, wrongs, or acts" evidence under Rule 5-404(b).[5] The State argues that "Rule 5-404(b) does not apply because the evidence was admitted under other provisions." We agree with the State.

Mr. Miller's argument relies on the incorrect premise that Ms. Doe's testimony was admitted pursuant to Rule 5-404(b). The circuit court admitted her testimony pursuant to Rules 5-616(b) and 5-404(a)(2)(A), not Rule 5-404(b). Therefore, no Rule 5-404(b) analysis or hearing was required. *See Stoddard v. State*, 423 Md. 420, 442-44 (2011). As described below, however, the circuit court should have conducted a Rule 5-403 balancing test, and the court also admitted an impermissible level of detail through Ms. Doe's testimony.

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[5] Evidence of a defendant's bad acts is governed by Rule 5-404(b), which states:

> (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or other acts including delinquent acts as defined by Code, Courts Article § 3-8A-01 is not admissible to prove the character of a person in order to show action in 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.

V. THE CIRCUIT COURT ERRED BY ALLOWING THE STATE TO ELICIT AN IMPERMISSIBLE LEVEL OF DETAIL FROM MS. DOE'S TESTIMONY REGARDING MR. MILLER'S BAD ACTS.

Prior to Ms. Doe taking the stand to provide rebuttal character and impeachment evidence, the following bench conference took place:

> [COUNSEL FOR MR. MILLER]: Your Honor, I would ask the Court to limit those then under *State v. Robinson*.[[6]] It clearly says that the state's allowed to introduce the incidents, but not the details of the incidents. So I think, with understanding that my previous objections are still standing, but did he ever hit you previously? Yes. Did he ever assault you? Yes. But going into the details of what happened is not permissible under *State v. Robinson*. So that's my reading of the case at least.
>
> [THE COURT]: So I guess that the devil's in the details, of the details. So to say, for example, he hit me, it certainly would be proper to ask her, well, when did it happen? And given, it certainly would be proper to have her put some details on it, so I guess we'll just go question by question. If you object to a question she asks, we'll just deal with it that way.
>
> [COUNSEL FOR MR. MILLER]: Understood.

During the rebuttal direct examination, the State asked Ms. Doe, "[S]tarting in May 2019 and up until May 31st of 2020, were there other occasions where [Mr. Miller] became physical with you?" Ms. Doe answered affirmatively, and the State asked if Mr. Miller had ever punched Ms. Doe on those occasions. Ms. Doe responded that "there [were] two incidents that [were] really bad[,]" to which defense counsel objected and the court overruled. Ms. Doe took sick leave after one incident because "[her] face was

[6] *State v. Roberston*, 463 Md. 342 (2019).

swollen." Ms. Doe said "[Mr. Miller] hit [her] several times during that year." She indicated that the incident that resulted in her taking sick leave "surprised" her because "[h]e had never been physical before like that."

The State asked if there were other occasions when Mr. Miller had been physical with Ms. Doe, to which she replied, "[I]t was constant." The State then offered a series of pointed questions, asking Ms. Doe if Mr. Miller had ever "punch[ed]," "slap[ped]," "kick[ed]," or "throw[n] [her] to the ground." Ms. Doe responded "yes" to all of these questions. The State followed this line of questioning with, "[C]an you approximate how many times this happened, or how often it was happening?" and the court overruled defense counsel's subsequent objection. Ms. Doe said she could not "honestly" admit the incidents occurred "daily, but it was often."

The State then asked when the most recent incident occurred before May 31, 2020, and Ms. Doe replied that it was "about a week or so" prior, indicating that she had a swollen eye. After further questioning, Ms. Doe also noted that Mr. Miller did not cause her to bleed between June 2019 and May 31, 2020. Defense counsel objected to the State asking why Ms. Doe had not reported any of the incidents, which the court overruled. Ms. Doe said she did not think there was anything to report once her x-ray showed nothing was broken. The State continued, asking Ms. Doe why she did not go to the police before June 1, 2020 about the "physical contacts that were happening, . . . [the] assaults that were happening[.]" Ms. Doe said she was "scared," felt like there was nothing that she could say, and she thought "it was going to get worse." When she did report the May 31 and June 1 assaults, "[she] didn't feel like [she] had a choice at that point." The State asked why she felt like she did not have a choice, and she responded she had no choice but to say something, with her pets in her car and having no place to go. Defense counsel then objected, and the court sustained. The State then began asking about the types of pets and whether they were shared with Mr. Miller; defense counsel objected, and the court sustained the objection.

The State then moved on to questioning Ms. Doe about her living arrangements, specifically why Ms. Doe left her friend's house in Prince George's County in February 2021 after living there for approximately eight months. Ms. Doe responded, "There was a[n] incident [at] the house. There was a shooting." The following line of questioning occurred:

> [COUNSEL FOR THE STATE]: Okay. Can you tell us what, who was home at the time of this shooting?
>
> [MS. DOE]: Myself, Gretchen, and she has a roommate. They live on the upper floor.
>
> [COUNSEL FOR THE STATE]: So three of you were in the home at the time, and what time of day was this?
>
> [MS. DOE]: At like 2 o'clock in the morning.
>
> [COUNSEL FOR THE STATE]: And so the three of you were in the home around 2:00 a.m. when you said a shooting happened. Can you describe what exactly happened --
>
> * * *
>
> [MS. DOE]: Yes. I was, I was in the basement part because there's, it's, it's a little apartment without like the amenities. There's a bathroom downstairs or whatever. And her and her roommate only lived on the top floor in separate bedrooms.

And first, I was woken, I thought it was the TV at the time. Then my dog barked, and when I got up, I, the last I heard was like toof (phonetic sp.), toof, toof, and right at that time, I jumped up and as I was trying to catch my bearing, because I was coming out of my sleep, the guy that lives upstairs with Gretchen called me on my cell phone and said, [Ms. Doe], somebody just shot up –

[COUNSEL FOR MR. MILLER]: Objection, Your Honor.

[MS. DOE]: -- the house.

[THE COURT]: Overruled. Go ahead.

* * *

[MS. DOE]: He said, he said, [Ms. Doe], somebody, did you hear that? Somebody just shot up the house. And --

[COUNSEL FOR THE STATE]: And how many times did you hear that toof, that sound that you were --

[MS. DOE]: That was like at the end that I --

[COUNSEL FOR THE STATE]: Okay.

[MS. DOE]: -- I heard it. But I'm in the basement part in the back of the house.

[COUNSEL FOR THE STATE]: And is this like a two-, three-, single-story home? How many stories --

[MS. DOE]: Three.

[COUNSEL FOR THE STATE]: And is it a single-family home or is it like a townhouse?

[MS. DOE]: No. It's a single-family home.

[COUNSEL FOR THE STATE]: Okay. A detached home?

[MS. DOE]: Yes.

[COUNSEL FOR THE STATE]: Now, when you got that call from your friend's roommate, what did you do next?

[MS. DOE]: I went up the stairs and, at that time, he, they had already called the police.

[COUNSEL FOR THE STATE]: Okay. And did the police arrive?

[MS. DOE]: Yes.

[COUNSEL FOR THE STATE]: And after the police arrived, or as you were waiting for them to arrive, were you able to see anything -- well, let me ask you this. Let's step back. As you were gathering yourself and speaking with your friend and the roommate, were you able to figure out whether those gunshots were coming from within the house, outside the house, or from where?

[MS. DOE]: It was coming, they told me it came from outside the house. I, I didn't know because of where I --

[COUNSEL FOR MR. MILLER]: Objection, Your Honor.

[MS. DOE]: -- I was.

[THE COURT]: All right. Sustained.

* * *

[COUNSEL FOR THE STATE]: And did the police arrive and conduct an investigation, to your knowledge?

[MS. DOE]: I don't know exactly what the police did. I was sitting in the living room. I was just like shaking. And because it wasn't my house, and because I had not called, they were talking to Gretchen mostly. At some point, the detective asked the question, is there anybody --

[COUNSEL FOR MR. MILLER]: Objection.

[THE COURT]: Go ahead.

> [MS. DOE]: Is there anybody in the house who has a domestic violence case going on or something? And then, of course, I have to speak up at that point.
>
> * * *
>
> [COUNSEL FOR THE STATE]: And you spoke up about the defendant?
>
> [MS. DOE]: Yes.
>
> [COUNSEL FOR THE STATE]: And were you able to, at any point after this, learn who had done the shooting?
>
> [MS. DOE]: I, well, we have a camera, security cameras, but the security cameras didn't record, but the next-door neighbor's security cameras record, and they had a much better system.
>
> [COUNSEL FOR THE STATE]: Okay. So did you ever end up viewing that system --
>
> [MS. DOE]: The detective --
>
> [COUNSEL FOR THE STATE]: -- recording?
>
> [MS. DOE]: Yes. Once the detective viewed the camera, then they called me over to, to see if I had, was able to identify the person on the camera.
>
> [COUNSEL FOR THE STATE]: Okay. And was that on the same, like within the same morning that this shooting happened, or was it sometime later?
>
> [MS. DOE]: That was like within 30 minutes.
>
> [COUNSEL FOR THE STATE]: That was within 30 minutes?
>
> [MS. DOE]: Of the police coming.
>
> [COUNSEL FOR THE STATE]: And after viewing -- did you view that footage?

> [MS. DOE]: Yes.
>
> [COUNSEL FOR THE STATE]: And were you able to identify the person that you saw, if you saw a person?
>
> [MS. DOE]: I, I, I'm, I told the, the detective that I thought it might be David Miller.
>
> [COUNSEL FOR THE STATE]: And was there anything else that indicated to you that it was the defendant?
>
> [MS. DOE]: Well, we saw his vehicle very clearly on the, or we saw the BMW that passed by the house, and we saw where it parked, and then we saw a person get out the car, walk back down the street, and from the, you could clearly see the person walking with the rifle. And, and I don't know how many rounds were in the magazine, and the detective, I think, found like 20 or 20-something. And then the next morning, Gretchen found 15, 20 more and took them to the police station. But --
>
> [COUNSEL FOR THE STATE]: Did you -- sorry?
>
> [MS. DOE]: And I was going to say, at that time, after viewing the camera, the, one of, the police officers took me down to the police station.
>
> [COUNSEL FOR THE STATE]: Okay. Were you hurt in this shooting? Were your friend or the roommate hurt in the shooting?
>
> [MS. DOE]: No.

Mr. Miller opened the door for the State to introduce the evidence. The State can only introduce evidence within the permissible scope of the doctrine, which can be exceeded when the State elicits details of other incidents. *State v. Robertson*, 463 Md. 342, 361 (2019).

In *Robertson*, the defendant opened the door when he answered on direct that he had never gotten "into any trouble" and had "[n]ever been arrested." 463 Md. at 359. The State, however, repeatedly asked the defendant in detail about a knife fight he was involved in that resulted in a suspension from his college. *Id.* at 363. Those details included whether the defendant had been suspended from school, whether the catalyst for the knife fight was a love triangle, whether the defendant had pulled out a knife, and whether the defendant liked to fight. *Id.* at 361-64. The Supreme Court of Maryland held that, while the State was entitled to rebut the defendant's claim of good character during his testimony on direct, it impermissibly elicited too many details regarding the incident. *Id.* at 363-64.

In *Khan v. State*, this Court found that the State did not exceed the scope of the open door doctrine. 213 Md. App. 554, 575 (2013). In that case, this Court concluded that the defendant's store manager opened the door for the State to introduce a prior customer complaint against the defendant through testimony to clarify the manager's "statement that she was pleased with [the defendant]'s work 'overall' by asking whether she had been informed by any specific misconduct." *Id.* at 574. The circuit court correctly sustained the defense counsel's objection as soon as the State attempted to elicit details about the incident for which the prior customer complaint was filed. *Id.* at 575. The only aspect of the prior bad act that was discussed was that the prior customer complaint existed, and this Court explained that "[t]he testimony elicited from [the manager] . . . was narrowly tailored to respond to her testimony . . . . [The manager] did not discuss the details of this complaint; her testimony was only that a complaint had been made." *Id.* Therefore, this Court held that the circuit court properly admitted the testimony regarding the prior customer complaint. *Id.*

In the present appeal, the circuit court allowed the State to elicit testimony from Ms. Doe concerning details of the prior alleged assaults and the alleged shooting after the charged acts.

Relating to the alleged prior assaults, the court allowed Ms. Doe to testify, over objection, that the beatings were "really bad," that they occurred several times, that they resulted in a swollen face requiring her to take sick leave, that they occurred "constant[ly]," that they resulted in her being unable to see, that they caused her to see blood, and her reasons for not reporting these incidents to the police. The State argues that by repeatedly denying that he ever hit, slapped, or kicked Ms. Doe, Mr. Miller opened the door to the degree that some limited details about him doing so were proportionate. Mr. Miller said he never hit Ms. Doe, so the State could discuss the multiple instances in which Mr. Miller did. To the State, given that the open door doctrine is one of fairness, the level of detail elicited was proportional to rebut Mr. Miller's denials. The State argues that the facts here do not rise to the level of repeated questioning at issue in *Robertson*.

Mr. Miller argues that while Ms. Doe may have been permitted to say that she was hit on her face and the day this occurred, the level of details actually included in Ms. Doe's testimony went beyond what is considered to be proportional under *Robertson*.

In Mr. Miller's case, and in *Robertson*, the circuit court allowed admission of details concerning the parties' motivations: why Ms. Doe did not go to the police and whether the defendant in *Robertson* was involved in a love triangle and whether he liked to fight. 463 Md. at 362. In both cases, the circuit courts allowed admission of details about the impact of these incidents: how Ms. Doe had a bruised face and had to call out sick from work; how the defendant in *Robertson* was suspended from school. 463 Md. at 361-62. This is in direct contrast to *Khan*, where the circuit court sustained defense counsel's objections to including evidence other than the mere existence of a prior incident. 214 Md. App. at 575.

Regarding the alleged subsequent shooting, the circuit court allowed testimony about the number of bullets shot at the house, that Ms. Doe was "shaking" after the shooting, and the circumstances in which Mr. Miller was accused of the shooting.

The State argues that by claiming to not only be passive, but "very passive," Mr. Miller opened the door to the degree that allowed the State to introduce limited details of an incident where Mr. Miller allegedly shot a firearm at a house in which Ms. Doe was staying. The State relies upon the open door doctrine being one of fairness, so the level of detail elicited was proportional to rebut Mr. Miller's claim of being "very passive."

Mr. Miller concedes that Ms. Doe may have been able to testify that there was a shooting, involving multiple shots at the house she was temporarily staying in; however, information concerning the number of rounds, the sound they made when hitting the house, Ms. Doe's reaction, and her interaction with the police exceeded the scope of the doctrine.

We agree with Mr. Miller. The circuit court allowed the State to introduce an impermissible level of detail through Ms. Doe's testimony. In both *Robertson* and Mr. Miller's case, the circuit court permitted discussion of the exigence of the incident: in *Robertson*, it was why the knife fight occurred, and for Mr. Miller, it was his motive for shooting at the house. 463 Md. at 362-63. Both circuit courts also allowed the introduction of the details of the incident: in *Robertson*, it was who pulled the knife out, and for Mr. Miller, it was how many rounds were fired. *Id.* Both circuit courts also allowed the consequences of the incident to be introduced: in *Robertson*, it was the defendant's suspension from school, and for Mr. Miller, it was Ms. Doe's shaking post-shooting and the proof that ultimately caused Mr. Miller to be accused of the incident. *Id.* at 361-62.

We hold that the circuit court abused its discretion in allowing the State to elicit a disproportionate and impermissible level of detail under the open door doctrine.

VI. THE CIRCUIT COURT ERRED BY NOT CONDUCTING A BALANCING TEST REQUIRED BY RULE 5-403.

Mr. Miller argues that the court failed to conduct a balancing test required under Rule 5-403. Rule 5-403 states that otherwise 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." This Court describes evidence to be "'prejudicial when it tends to have some adverse effect . . . beyond tending to prove the fact or issue that justified its admission.'" *Smith v. State*, 218 Md. App. 689, 705 (2014).

Mr. Miller argues that the circuit court "refused to undertake even a 5-403 analysis to balance the necessity for, and probative value of, the other crimes evidence against any undue prejudice likely to result from its presentment to the jury."

The State argues that circuit courts have discretion when to admit evidence under Rule 5-403, and they are not required to conduct the test on the record. *Montague*, 471 Md. at 673-74 (holding that the trial court's decision to admit evidence will be overturned only for an abuse of discretion); *Walker v. State*, 373 Md. 360, 391 (2003) (holding that trial courts are not required to perform a Rule 5-403 balancing test on the record). Further, the State notes that trial judges are presumed to know the law and apply it properly. *State v. Chaney*, 375 Md. 168, 181 (2003). Thus, according to the State, as long as the balancing was conducted, even if it was not explicit, the judge did not abuse his discretion.

The State contends that the record reflects that an implicit balancing of probative value versus the danger of unfair prejudice was conducted. The State continues, arguing that the probative value of challenging Mr. Miller's credibility was crucial and that the trial court was correct in concluding that "it is hard to imagine what unfair prejudice could be caused by allowing the State to contradict evidence raised by [Mr.] Miller himself."

As the reviewing court, we must determine whether a circuit court abused its discretion in its admittance of evidence. *See Montague*, 471 Md. at 673-74. The Supreme Court of Maryland explained that as long as the record indicates that the circuit court exercised discretion, the circuit court does not need to state it for the record. *Walker*, 373 Md. at 391.

Pursuant to Rule 5-403, "the trial court is required, as is the case with any evidence, to weigh the testimony's probative value against its tendency to prejudice the defendant unfairly or to confuse the jury." *Pickett v. State*, 120 Md. App. 597, 605 (1998) (internal citations omitted). As the State correctly contends, a circuit court does not have to explicitly conduct a Rule 5-403 balancing test, and it may be done implicitly through its rulings. *See Walker*, 373 Md. at 391. In *Walker*, the Supreme Court of Maryland relied upon the prosecutor's questions and bench conference to determine that the circuit court must have considered the prejudicial effect against the probative value of the testimony. *Id.* The impeachment testimony included statements that would indicate that the defendant had given the witness cocaine in exchange for money on the date and at the place of the alleged crime. *Id.* at 389-90. The Supreme Court concluded that "[i]t is equally clear from the record that the trial judge weighed the prejudicial effect of the impeachment testimony against the probative value of that testimony in permitting its use as impeachment evidence and properly exercised his discretion." *Id.* at 391.

In Mr. Miller's case, the circuit court was asked to consider the prejudicial effect of Ms. Doe's testimony during the following exchange:

> [COUNSEL FOR MR. MILLER]: So understanding that the Court is, you know, overruling my objections on that point, I would argue to the Court that there's also a 403 issue that this evidence is more, significantly more prejudicial than it is probative, in particular, in relation to the incident that the State is trying to ask about that allegedly occurred after the charges in this case.
>
> And I will tell the Court that I vehemently disagree with the State's assertions that Mr. -- I've seen the videos -- Mr. Miller can be identified from those videos, that a vehicle can be identified.
>
> My memory of that is that they're essentially a black-and-white grainy video of someone walking across the screen with no discerning features, and then walking back and getting into a car that you can't discern, again, what type of car and what it is, or any information about it, as it drives off.
>
> So certainly, on that, I think on both, but on that, I would argue to the Court that there's significantly more prejudicial than probative. I think the Court should certainly hold a hearing in that case to find that Mr. Miller was involved before admitting that. I mean, the fact that the State would try to introduce that my client is charged with attempted murder of the same victim is extremely, extremely, extremely prejudicial.
>
> [THE COURT]: Why did he bring it up?
>
> * * *
>
> [COUNSEL FOR MR. MILLER]: Your Honor, I can't answer that, but I don't think that it's admissible under 403, well --
>
> [THE COURT]: So he's the one that brought this up. He's the one that injected this whole issue into this trial. So I'm not sure how he can now claim prejudice since he brought it up, if he brought it up himself.

> [COUNSEL FOR MR. MILLER]: Well, I think part of my point, Your Honor, is that it's unfairly prejudicial in the sense that there's, the recitations of the evidence of what she would say are not accurate, in our opinion. And again, this is part of going down this rabbit hole. If the State introduced that testimony, then I think I, it's fair for me to play the video and point that out, and then we head down this rabbit hole. But I --
>
> [THE COURT]: That may be.
>
> [COUNSEL FOR MR. MILLER]: But I think that the Court should watch the video, hear the testimony from her, and decide if it's admissible or not first.
>
> [THE COURT]: Okay. Go ahead.

The bench conference continued with the State and defense counsel arguing about how Ms. Doe's testimony could be admitted through means other than a balancing test.

Based on the record, we conclude that the circuit court did not consider whether the probative value of Ms. Doe's testimony was outweighed by the danger of unfair prejudice. The only mention by the circuit court of the balancing test was the following:

> So he's the one that brought this up. He's the one that injected this whole issue into this trial. So I'm not sure how he can now claim prejudice since he brought it up, if he brought it up himself.

This was not an explicit or implicit Rule 5-403 balancing test. Instead, as we read it, it was a statement by the circuit court that it would not consider whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice because Mr. Miller had injected the issue into the trial. We hold that the circuit court erred by not conducting a Rule 5-403 balancing test.

CONCLUSION

The circuit court correctly concluded that Mr. Miller opened the door for the State to impeach and rebut his testimony, claiming he never punched, slapped, kicked, or threw Ms. Doe to the ground and that he was "very passive." The circuit court was correct to allow the State to admit evidence under Rules 5-616(b) and 5-404(a)(2)(A) and not conduct a Rule 5-404(b) hearing. The circuit court erred, however, in allowing an impermissible level of detail regarding Mr. Miller's bad acts and in not conducting a Rule 5-403 balancing test. Therefore, we must vacate Mr. Miller's convictions and remand.

CONVICTIONS VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR MONTGOMERY COUNTY FOR A NEW TRIAL NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY MONTGOMERY COUNTY.