Circuit Court for Wicomico County
Case No. C-22-CR-19-000191

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1399

September Term, 2019

LOUIS BURDEN, JR.

v.

STATE OF MARYLAND

Graeff,
Zic,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zic, J.

Filed: December 14, 2021

A jury sitting in the Circuit Court for Wicomico County found Louis Burden, Jr., appellant, guilty of assault in the second degree. The circuit court sentenced appellant to a term of eight years imprisonment. Appellant noted this appeal, contending that the court improperly allowed prior bad acts evidence. He presents one question for appellate review:

Did the circuit court err in denying multiple motions for mistrial?

For the reasons that follow, we affirm the judgment of the circuit court.

BACKGROUND

Appellant and the victim, Stephanie Cornell, had been in an "off and on" romantic relationship for six years. The two were engaged to marry at the time of the offense and lived together in Ms. Cornell's home in Salisbury, Maryland. On two occasions prior to the events at issue, Ms. Cornell obtained protective orders against appellant, although such an order was not in effect at the time of the offense.

On the evening of January 9, 2019, Ms. Cornell was in her bedroom using Facebook Live, a live streaming application. Appellant entered the room looking for a box of necklaces, which Ms. Cornell had taken inadvertently. After she retrieved the box of necklaces and returned them to appellant, an argument ensued and appellant chased Ms. Cornell out of the bedroom and down the stairs. He took her phones[1] and then grabbed her, pulling her up the stairs. Appellant began to choke her and let go when Ms. Cornell's pit bull lunged at him.

[1] Ms. Cornell testified that she had two cell phones.

Although the pit bull did not harm him, appellant became enraged. He grabbed a kitchen knife and threatened to kill Ms. Cornell and the dog. When appellant took the livestreaming phone from Ms. Cornell, he inadvertently posted the video recording to the internet.[2] Others who had been viewing these events on Ms. Cornell's livestreaming app called the police and a unit responded to her residence. When the police arrived, appellant held a knife to Ms. Cornell, preventing her from answering the door. The police eventually left, and Ms. Cornell returned to her bedroom while appellant stayed downstairs for the night.

Ms. Cornell went to work the following day. Upon the conclusion of her shift, a police officer tracked her down and offered to help her obtain a protective order against appellant. She declined the offer, remarking that "a restraining order is nothing but a piece of paper that this man would not be afraid of."

Three weeks later, on January 30, 2019, Ms. Cornell went to the Salisbury Police Department and reported the assault that took place on January 9. Appellant was arrested later that day and gave a statement to police, acknowledging that he and Ms. Cornell had engaged in a physical altercation but denying that he had choked her or used any weapons.

An eight-count criminal information was filed in the Circuit Court for Wicomico County, charging appellant with two counts each of first-degree assault, second-degree

[2] Police obtained a recording of the Facebook Live stream from that night and played it before the jury at appellant's trial. The stream ended prior to the assault with the knife.

assault, wearing and carrying a dangerous weapon with intent to injure, and false imprisonment. The matter proceeded to a jury trial where one count of each offense was presented to the jury.[3] The jury found appellant guilty of second-degree assault and acquitted him of first-degree assault, carrying a dangerous weapon with intent to injure, and false imprisonment. The circuit court sentenced appellant to eight years imprisonment. This timely appeal followed.

DISCUSSION

I. STANDARD OF REVIEW

We review a circuit court's denial of a motion for mistrial for an abuse of discretion. *Nash v. State*, 439 Md. 53, 66-67 (2014). We will not disturb the circuit court's ruling "simply because [we] would not have made the same ruling." *Id.* at 67 (quoting *North v. North*, 102 Md. App. 1, 14 (1994)). Rather, we reverse such a ruling only when it is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Nash*, 439 Md. at 67 (quoting *Gray v. State*, 388 Md. 366, 383 (2005)). In other words, "we will not interfere with the trial judge's decision unless appellant can show that there has been real and substantial prejudice to his case." *Bynes v. State*, 237 Md. App. 439, 456 (2018) (quoting *Wilson v. State*, 148 Md. App. 601, 666 (2002)).

[3] Appellant was originally charged in two separate incidents—one allegedly occurring on November 20, 2018 and the other on January 9, 2019. At the start of trial, the State entered a *nolle prosequi* as to the four counts arising from the November 20 incident.

II. THE PARTIES' CONTENTIONS

Appellant contends that the circuit court abused its discretion in denying his motions for mistrial, which were triggered by what he claims were "repeated references [by Ms. Cornell] to irrelevant, unfairly prejudicial bad-acts/other-crimes evidence." He cites three instances during Ms. Cornell's direct examination where she was permitted to testify, over objection, to what he asserts was inadmissible evidence of prior bad acts.

First, when asked why she neither left the house nor called the police after the assault, Ms. Cornell replied, "[b]ecause I was just scared and I had been through it before with him [i.e., appellant]." Second, when asked if a police officer, on the day after the assault, offered to help her obtain a protective order against appellant, Ms. Cornell testified that "a restraining order is nothing but a piece of paper that this man [i.e., appellant] would not be afraid of." And third, Ms. Cornell was permitted to testify that she had "a preexisting line of communication with" both the victim coordinator and the prosecutor in this case.

The State counters that the first instance of purportedly inadmissible testimony was too vague to suggest, as appellant claims, that he previously violated a protective order. Additionally, the State notes that even though appellant had the opportunity, he did not subsequently move to strike that testimony. As for the second instance, the State contends that Ms. Cornell's assertion that appellant would not be deterred by a protective order did not necessarily imply that he previously violated such an order. Regarding the third challenged remark, the State argues that because appellant did not request a mistrial

when that testimony was admitted, this claim is not preserved and, as for the merits, the State maintains that the disputed testimony was not evidence of a prior bad act.

III. ANALYSIS

Because Ms. Cornell did not press charges or seek a protective order until three weeks after the assault, the prosecutor sought to elicit testimony from her explaining the reasons for the delay. The prosecutor was in a position where she needed to elicit that testimony but avoid any testimony concerning previously issued protective orders and any previous domestic abuse. Appellant, for his part, wanted the jury to infer that Ms. Cornell was not a credible witness, a point he emphasized in his opening statement, referencing Ms. Cornell's delay in reporting the assault. This was the context in which all three challenged statements by Ms. Cornell were elicited by the prosecutor. We address each remark in turn.

A. The First Challenged Remark

During Ms. Cornell's direct examination, immediately after she described the assault, the following colloquy occurred:

> [THE STATE]: Why didn't you try to leave the house or call the police back?
>
> [MS. CORNELL]: Because I was just scared and I had been through it before with him.
>
> [DEFENSE COUNSEL]: Object, move to strike. Ask permission to approach.

Appellant then moved for a mistrial. He maintained that he would be unable to cross examine Ms. Cornell about this testimony because it would open the door to a pattern of

previous domestic abuse. The circuit court heard further arguments from both parties and denied the motion for mistrial. Then, the court conducted an evidentiary hearing, outside the jury's presence, in which the parties examined Ms. Cornell about her remark that had led to appellant's objection. After that examination concluded, the court declined to grant appellant's motion to strike.[4]

In reviewing claims related to the admission of other bad acts evidence, we apply Maryland Rule 5-404(b)[5] as interpreted in decisional law. We ordinarily follow a three-step analysis in doing so.[6] *See Burris v. State*, 435 Md. 370, 390 n.14 (2013). Prior

[4] After Ms. Cornell testified about "ha[ving] been through it before with [appellant]," the circuit court held a hearing, out of the jury's presence, during which Ms. Cornell was examined so the court could determine what testimony should be excluded. At that time, the court reserved ruling on the motion to strike until it could determine whether defense counsel's cross examination might open the door to the disputed statement. The defense did not thereafter renew its motion to strike.

[5] Maryland Rule 5-404(b) provides:

> 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.

[6] In *Sifrit v. State*, 383 Md. 116 (2004), the Court of Appeals explained:

> Before other crimes evidence is admitted, a three-part determination must be made by the trial court. The first required determination is whether the evidence fits within one or more of the stated exceptions to Rule 5-404(b). . . . The second requirement is that the trial court determine whether the defendant's involvement in the other act has been established by clear and convincing evidence. . . . Lastly, the

(continued)

to conducting such an analysis, we must first determine whether the evidence at issue qualifies as other bad acts evidence, which is defined as "an activity or conduct, not necessarily criminal, that tends to impugn or reflect adversely upon one's character, taking into consideration the facts of the underlying lawsuit." *Brice v. State*, 225 Md. App. 666, 692 (2015) (quoting *Klauenberg v. State*, 355 Md. 528, 549 (1999)). In *Brice v. State*, 225 Md. App. 666 (2015), the defendant was charged with unlawful possession of a regulated firearm. *Id.* at 673. During direct examination, a police officer was asked why he responded to a specific address to which he replied that "[t]here was a call for service at that location for a domestic disturbance." *Id.* at 690. This Court held that the officer's remark about a domestic disturbance, "without more detail," did not fall within the definition of other bad acts evidence. *Id.* at 692. We reasoned that "[t]here was nothing in the record showing what the alleged 'act' was" and that the remark "did not indicate that [the defendant] was in any way involved in the domestic disturbance." *Id.*

Here, Ms. Cornell's reference to "ha[ving] been through it before with him" could be considered too vague and insufficiently detailed to come within the definition of other bad acts evidence. In that respect, her remark could be analogized to the police officer's testimony in *Brice* referring to a "domestic disturbance," which we held did not qualify as other bad acts evidence because it lacked specificity. *Brice*, 225 Md. App. at 692. But

> trial court must weigh the probative value of the evidence against any undue prejudice that may result from its admission.

Id. at 133 (citations omitted).

unlike the statement at issue in *Brice*, Ms. Cornell's remark does expressly implicate appellant. And considering that she was responding to the State's question about her actions following the altercation that occurred on January 9, 2019, her reference to "it" could be understood as an allusion to a previous domestic abuse incident involving appellant and thus evidence of a prior bad act. For purposes of this appeal, we shall assume, without deciding, that the statement constituted inadmissible other bad acts evidence.

Assuming that the circuit court erred in admitting Ms. Cornell's remark that she "had been through it before with him," we next consider whether the admission of that statement required a mistrial. "[A] mistrial is an extreme remedy not to be ordered lightly." *Vaise v. State*, 246 Md. App. 188, 239 (2020) (quoting *Nash*, 439 Md. at 69). It is "resorted to when such overwhelming prejudice has occurred that no other remedy will suffice to cure the prejudice." *Burks v. State*, 96 Md. App. 173, 187 (1993).

In reviewing a circuit court's ruling on a motion for mistrial, we recognize that:

> The fundamental rationale in leaving the matter of prejudice *vel non* to the sound discretion of the trial judge is that the judge is in the best position to evaluate it. The judge is physically on the scene, able to observe matters not usually reflected in a cold record. The judge is able to ascertain the demeanor of the witnesses and to note the reaction of the jurors and counsel to inadmissible matters.

Georges v. State, 252 Md. App. 523, 535-36 (2021) (quoting *State v. Hawkins*, 326 Md. 270, 278 (1992)). Additionally, our review is guided by a number of factors, including:

> whether the reference . . . was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive

> statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; whether a great deal of other evidence exists.

Vaise, 246 Md. App. at 239-40 (quoting *Guesfeird v. State*, 300 Md. 653, 659 (1984)). We are mindful that no one factor is determinative. *See McIntyre v. State*, 168 Md. App. 504, 524 (2006).

We do not believe that the admission of Ms. Cornell's first remark was "so devastating to the prospects of a fair trial as to make the extreme sanction of declaring a mistrial imperatively necessary." *Georges*, 252 Md. App. at 529-30. We recognize that the credibility of Ms. Cornell was a factor in this case and that her remark appears to have been elicited by the State. But Ms. Cornell's testimony was not the sole evidence relied on by the State. *See Parker v. State*, 189 Md. App. 474, 494-96 (2009) (concluding that "[b]ecause this case turned upon whether the jury believed the testimony of Det. Dunkle or the contrary testimony of [Mr. Parker], '[i]t is highly probable that the [prosecutor's reference to Parker's prior conviction] had . . . a devastating and pervasive effect'" and thus a mistrial was necessary (third and fourth alterations in original) (quoting *Rainville v. State*, 328 Md. 398, 411 (1992))); *Behrel v. State*, 151 Md. App. 64, 145-46 (2003) (explaining, in holding that a mistrial was not warranted, that while "credibility was crucial to each side's position" in that the victim accused the appellant of sexual abuse while the appellant denied such a charge, "the State presented ample evidence independent of [the victim]'s credibility"). Rather, the jury viewed a Facebook Live video stream depicting much of what had happened on the night in question. And

appellant's statement to the police, which was admitted into evidence through testimony of a police officer, included an admission that he had "tussled" with Ms. Cornell. In light of this evidence, we do not believe that the drastic remedy of a mistrial was warranted. In our view, Ms. Cornell's statement that she "had been through it before with him" did not result in "prejudice to [appellant that] was so substantial that he was deprived of a fair trial." *Kosh v. State*, 382 Md. 218, 226 (2004) (quoting *Kosmas v. State*, 316 Md. 587, 595 (1989)). As such, we find no abuse of discretion by the circuit court in denying the motion for mistrial.

B. The Second Challenged Remark

During direct examination, Ms. Cornell was asked about a conversation she had with a police officer the day after the assault. The following ensued:

> [THE STATE]: Did that officer ask you or advise you to do things, like report or get a protective order or anything like that?
>
> [MS. CORNELL]: He asked me if I wanted to go to the Commissioner's Office to put a restraining order on him, to which I asked if he would be able to stand in my yard 24/7 to protect me because essentially a restraining order is nothing but a piece of paper that this man would not be afraid of.
>
> [DEFENSE COUNSEL]: I'm going to object, Your Honor, ask permission to approach.

Appellant moved to strike and for a mistrial, claiming that Ms. Cornell's testimony "implies very strongly that [appellant] has been nonresponsive in the face of a protective order previously." The court overruled the objection and denied the motion for mistrial, stating that "the fact that [Ms. Cormell's] belief was that [appellant] would not honor a

piece of paper [does not] suggest[] there was, in fact, a previous occasion where he did not."

We conclude that Ms. Cornell's remark that a protective order "is nothing but a piece of paper that [appellant] would not be afraid of" is not evidence of a prior bad act. No action or conduct is expressly referenced by Ms. Cornell. *See Vigna v. State*, 241 Md. App. 704, 727-28 (2019) (defining "bad act," for purposes of the rule governing other crimes evidence, as "*activity or conduct* . . . that tends to . . . reflect adversely upon one's character" (emphasis added) (quoting *Brice*, 225 Md. App. at 692)), *aff'd*, 470 Md. 418 (2020); *Khan v. State*, 213 Md. App. 554, 572-73 (2013) (holding that testimony concerning a customer's prior complaint about the defendant's unspecified conduct was not other acts evidence because the subject of that testimony "was not, in fact, a prior bad act"). Moreover, we do not believe that this statement necessarily implies that there was in fact a prior occasion where appellant violated a protective order. Rather, Ms. Cornell's statement may be fairly construed as an expression of her opinion about appellant's temperament based on years of personal knowledge. Thus, the circuit court did not abuse its discretion in denying appellant's motion for mistrial on the basis of this remark.

Ms. Cornell's statement is a far cry from the evidence at issue in *Streater v. State*, 352 Md. 800 (1999), on which appellant relies. There, the trial court admitted into evidence a copy of a protective order, unrelated to the charges in that case, which contained bad acts evidence. *See id.* at 804-05, 822-23. More specifically, the protective order contained findings made by the judge as the basis for issuing the order, including that the defendant "threatened to harm" the victim and "broke into the house and took

[the victim's] money." *Id.* at 805. Nothing of the sort occurred here. This case bears little resemblance to *Streater*.

C. The Third Challenged Remark

The prosecutor was permitted to elicit testimony, during direct examination of Ms. Cornell, that she had "a preexisting line of communication with" both her and the victim coordinator:

> [MS. CORNELL]: My plan was on my next day off, one of my next days off was to go to the State's Attorney's Office and either find Kim Lynch or yourself to talk about what had happened and, I don't know how to --
>
> [THE STATE]: Is Kim Lynch the victim coordinator for my office?
>
> [MS. CORNELL]: Yes.
>
> [THE STATE]: Did you have a preexisting communication --
>
> [DEFENSE COUNSEL]: I'm going to object, Your Honor.
>
> [THE COURT]: Do you want to wait until the question is finished?
>
> [DEFENSE COUNSEL]: No, I actually want to object right now.
>
> [THE COURT]: Overruled.
>
> [THE STATE]: Did you have a preexisting line of communication with Ms. Lynch?
>
> [MS. CORNELL]: Yes
>
> [DEFENSE COUNSEL]: Object.
>
> [THE COURT]: Overruled.

> [THE STATE]: Do you have a preexisting line of communication with me?
>
> [MS. CORNELL]: Yes
>
> [DEFENSE COUNSEL]: Object.
>
> [THE COURT]: Overruled.

Later, during a bench conference on a different matter, the court explained its ruling:

> [THE COURT]: So I didn't sustain your objection to the prior relationship with Kim Lynch or the State's Attorney because it did not suggest that it was due to [appellant]'s actions but I'm assuming it did not have anything to do.
>
> [THE STATE]: It did not have anything to do with it.
>
> [THE COURT]: Would you like that elicited that the previous lines of communication between State, Kim Lynch and the State and her had nothing to do with [appellant]?
>
> [DEFENSE COUNSEL]: If that's going to be her statement, sure. But I can't be certain that that's going to be her statement.
>
> [THE STATE]: I don't know why it wouldn't.
>
> [THE COURT]: All right.
>
> [DEFENSE COUNSEL]: That would cure my concern.
>
> [THE COURT]: That would cure your concern.
>
> [DEFENSE COUNSEL]: But I don't know that for sure.

Although defense counsel lodged a general objection, he did not, as alleged in appellant's brief, move for a mistrial. The circuit court thus did not decide whether a mistrial was warranted based on this particular statement—that Ms. Cornell had "a preexisting line of communication with" the prosecutor and the victim coordinator.

Given the absence of a ruling on the question of mistrial as it pertains to this remark and considering that the denial of a mistrial is the subject of this appeal, this issue is not properly before this Court. *See Fowlkes v. State*, 53 Md. App. 39, 45 (1982) (concluding that "[t]he question of mistrial [wa]s not properly before this Court" when the "[a]ppellant did not move for a mistrial after [the detective testified about his conviction rate] and hence this issue was not tried and decided by the lower court"); *see also Ramirez v. State*, 178 Md. App. 257, 278 (2008) ("A defendant who fails to make a timely motion for mistrial 'risks its proper denial on that ground alone.'" (quoting *Hill v. State*, 355 Md. 206, 220 (1999))).

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.