Circuit Court for Montgomery County
Case No. 133390C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1719

September Term, 2019

COLIN SIME BLACK

v.

STATE OF MARYLAND

Graeff,
Leahy,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: October 19, 2020

In March 2017, E.M. met Colin Black, appellant, using the online dating app "Tinder."[1] She went to his apartment, where he subjected E.M. to a non-consensual sexual act. On June 28, 2019, a jury in the Circuit Court for Montgomery County found appellant guilty of a second-degree sex offense. The court sentenced appellant to 20 years' imprisonment, all but 15 years suspended.

On appeal, appellant presents the following issues for this Court's review:

1. Did the circuit court err in permitting C.B. to testify to appellant's sexual actions against her?

2. Did the circuit court abuse its discretion in excluding impeachment evidence against C.B.?

3. Did the circuit court abuse its discretion in admitting evidence of internet searches for "forced anal" found on appellant's computer?

4. Did the circuit court abuse its discretion by striking testimony regarding E.M.'s depression?

5. Did the circuit court err in denying appellant credit for time-served while on GPS monitoring?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2017, E.M., a 30-year-old firefighter EMT, met appellant on the online dating application Tinder. They talked online for a few weeks using the messaging function on Tinder and eventually by text message. They agreed to meet for a date at appellant's home in Rockville on the evening of March 24, 2017.

[1] To protect the privacy of the victim, we will refer to her, as well as other sexual assault victims involved in this case, by initials.

Earlier that afternoon, appellant texted E.M. to ask whether she planned to stay over at his place, and she responded: "Ha ha, no. I won't spend the night. Figured first date we'd get to know each other. See if you actually enjoy my company." Appellant then asked if they could "make out" and "spoon," to which E.M. said: "I think we can manage that." Appellant stated that he was "getting turned on . . . [t]hinking about spooning with your ass pressed against me and my rock hard dick deep inside your pussy." He then messaged: "Whoops, that was TMI. Ha ha." She responded: "Nope, not at all. Sounds pretty amazing actually."

Appellant then asked whether she liked anal intercourse, to which E.M. responded: "LOL, maybe I should set you up with my best friend. You two sound perfect for each other." He responded: "Ha ha, bring her because that would be fun." E.M. then suggested that maybe they should break the plans for the evening because his comments regarding anal intercourse and her friend made her uncomfortable. She stated that it was obvious that he was under the impression that they would be having sex that evening, and "all [she] wanted was to get to know [him]." Appellant asked her to reconsider cancelling and said they could just "spoon" and "drink wine."

E.M. subsequently changed her mind about having sex with appellant, texting that things had changed. She indicated that she was on her way to his apartment, which was approximately two hours from her home.

The text exchange continued while E.M. was driving. E.M. messaged that she was "coming there to get laid" and asked whether he had condoms. Appellant told her that she

"never answered [his] anal question," to which E.M. said "no," and she "could put him in contact with someone else for that." He then stated that he hoped she "like[d] it rough," and she said: "[Y]es, I do." He replied that he would "have handcuffs ready." She stated that she hoped he would make it "worth [her] trip," to which appellant again suggested anal intercourse. E.M. told him that was "[n]ot going to happen" for the third time. She then made it clear that this was a "one night stand," stating: "You wanted an escort for the night. Well, you will get one as long as we fuck and then I'm out."

E.M. arrived at appellant's apartment at approximately 8:15 p.m. They sat down on the couch and began watching television. After a few minutes, they began kissing and eventually relocated to his bedroom. In the bedroom, they had consensual vaginal intercourse. Appellant repeatedly attempted to insert his fingers into E.M.'s anal cavity, and she told him to stop each time. Appellant then attempted to introduce handcuffs and a paddle, which E.M. was initially okay with, but then she told him to stop, which he did.

When the consensual sex had concluded, E.M. got up off the bed to get dressed, and appellant came up behind her and threw her face-down on the bed, pinning her in a position from which she could not move. He then forcibly inserted his penis into her anus. She "tried to fight a little bit," but she was unsuccessful, and she began crying and repeatedly asked him to stop. She testified that this non-consensual intercourse "went on for a little while."[2] Afterwards, while she was getting dressed, she told him that he was "sick," and

[2] In her interview with police directly following the encounter, E.M. told Detective Widup that appellant told her to look at him and kiss him, which she did, but she eventually

"something was wrong with him because [she] was crying and telling him to stop and he got off on [her] tears."

E.M. left appellant's apartment at approximately 9:00 p.m., approximately 45 minutes after she arrived. Appellant then texted her, saying: "I got off on your eyes and kiss, not your tears."

E.M. began driving home and called a friend, Megan Callaway. E.M. initially did not want to report the incident, but Ms. Callaway convinced her to call the police. E.M. eventually pulled into a Holiday Inn parking lot and called the police. The police and Ms. Callaway met E.M. at the parking lot, and she provided a brief statement. E.M. then went to the hospital for a SAFE exam. She told the nurse that her assailant had forced her to have anal intercourse.

In September 2017, another victim, C.B., told the police that appellant had forcibly engaged in anal intercourse with her in December 2016. C.B. had been arrested for possession of marijuana, and the police indicated that, if she could give them information about the person from whom she bought the drugs, they would drop the charges. When the police advised C.B. that the information she gave them wasn't "enough," she "broke down" and told them that she had been raped by appellant.[3]

stopped kissing him. At trial, E.M. testified that she did not remember kissing him during the forced sex.

[3] C.B. testified that she became upset because this was the first time she had been around police since the rape happened.

C.B. testified that she matched with appellant on Tinder in December 2016. They began messaging through the app, but soon exchanged phone numbers and communicated by text message. On December 16, 2016, they met at his apartment. After talking and watching some television in the living room, they began kissing and eventually moved to the bedroom, where they had consensual sex, both vaginal and anal. C.B. eventually told him to stop the anal intercourse, which he did. They also engaged in sexual acts in the bathroom. She described their encounter as "kinky," but she stated that it was "all consensual." C.B. spent the night at his apartment.

C.B. and appellant continued to communicate regularly, and they agreed to meet again on December 31, 2016, New Year's Eve. C.B. went to appellant's apartment at approximately 1:00 p.m. that day. When C.B. arrived, they began having consensual sex. While they were in the bathtub, appellant indicated that he wanted to urinate on C.B. She repeatedly told him no, but he proceeded to do so. Appellant then held C.B. from behind in a seated position and put his fingers down her throat to make her vomit. She testified that, by this time, she was crying and very upset and afraid.

They returned to the living room sofa dressed in towels, where he "flipped [her] over the couch" and forced her to have anal intercourse with him. She repeatedly told him "no" and that he was hurting her, but he did not respond. Afterwards, they remained on the couch, and he ordered Thai food. C.B. testified at trial that, when the food arrived, she wanted to run for the door or ask the delivery man for help, but she was afraid to do so.

After they ate, they went back to the bedroom, where C.B. hoped that appellant would fall asleep so she could get away, but she fell asleep instead. When she awoke, appellant was on top of her again, forcibly inserting his penis into her anus. C.B. then gathered her clothing and left appellant's apartment.

C.B. testified that she did not report the incident because she "wanted to be alone to try to heal," and she previously had accompanied a friend for a SAFE exam and "didn't want to go through it." Although she and appellant texted each other after this encounter, she did not see appellant again. C.B. sent appellant a text on New Year's Day, the day after the second encounter, stating: "[Y]ou heard me say no, you saw me crying, I was in pain, and you didn't stop." Appellant replied: "I'm sorry. I made a mistake. It was unintentional. I didn't know that you felt that way. I was blackout drunk."

On October 20, 2017, appellant was arrested and charged with two counts of second-degree sex offense and one count of second-degree assault for the incidents relating to C.B. and E.M. Following his arrest, a third victim, J.Y., contacted police after seeing the news reports. She stated that appellant had forced her to have anal intercourse after she met him on Tinder in May 2016.[4] Consequently, the State filed a superseding indictment on March

[4] Although J.Y. did not testify at trial, her account is part of the circuit court record because she testified at the January 18, 2019, hearing on the State's pre-trial motion to allow her to testify at E.M.'s trial pursuant to Md. Code Ann. Cts. & Jud. Proc. Article, § 10-923 (2019 Cum. Supp.). Nonetheless, her testimony ultimately was not used against appellant at trial, and therefore, we do not discuss the details of her encounter with appellant.

2, 2018, relating to all three victims. Appellant was charged with four counts of second-degree sex offense, two counts of second-degree assault, one count of second-degree rape, and one count of false imprisonment.[5] On July 6, 2018, the court granted appellant's motion to sever the charges, resulting in a separate trial for each victim.

On June 24–28, 2019, trial took place on the charge of second-degree sex offense against E.M. E.M. and C.B. testified, as set forth *supra*. Additional State witnesses included: E.M.'s friend Ms. Callaway; Detective Widup, a member of the Montgomery County Police Special Victims Investigations Division, who worked E.M.'s case; the nurse who conducted E.M.'s SAFE exam; the crime lab technician who tested the DNA evidence from appellant and the sexual assault kit and found inconclusive results; and the digital forensic expert who retrieved files from appellant's seized computers and phone. Appellant elected not to testify in his own defense or call any witnesses.

[5] The following chart shows the breakdown of the charges in the indictment:

COUNT	**OFFENSE**	**ALLEGED VICTIM**	**DATE OF INCIDENT**
1	Sex Offense Second-Degree	E.M.	3/24/2017
2	Sex Offense Second-Degree	C.B.	12/31/2016
3	Sex Offense Second-Degree	C.B.	12/31/2016
4	Assault Second-Degree	C.B.	12/31/2016
5	Assault Second-Degree	C.B.	12/31/2016
6	Rape Second-Degree	J.Y.	5/1–30/2016
7	Sex Offense Second-Degree	J.Y.	5/1/2016
8	False Imprisonment	J.Y.	5/1/2016

On June 28, 2019, the jury found appellant guilty of one count of second-degree sex offense against E.M. On July 8, 2019, appellant entered an *Alford* plea on the second-degree sex offense against C.B.[6] The court found him guilty on that count, and the State *nol prossed* the remaining counts relating to C.B. The counts relating to J.Y. were placed on the stet docket.

On October 11, 2019, the court sentenced appellant to 20 years' imprisonment, all but 15 years suspended, on the conviction of second-degree sex offense against E.M. It imposed a consecutive sentence of 20 years' imprisonment, all but 5 years suspended, on the conviction of second-degree sex offense against C.B.

This appeal, relating only to the judgment of second-degree sex offense against E.M., followed.

DISCUSSION

I.

Admission of Evidence of Black's Conduct Against C.B.

Appellant's first argument is that the circuit court erred by allowing C.B. to testify regarding her allegations that appellant sexually assaulted her. The State argues that the

[6] An *Alford* plea "lies somewhere between a plea of guilty and a plea of *nolo contendere*." *Bishop v. State*, 417 Md. 1, 19 (2010) (quoting *Rudman v. Md. State Bd. of Physicians*, 414 Md. 243, 260 (2010)). In an *Alford* plea, the defendant, "although pleading guilty, continues to deny his or her guilt, but enters the plea to avoid the threat of greater punishment." *Ward v. State*, 83 Md. App. 474, 478 (1990). "A defendant entering an *Alford* plea, while maintaining his or her innocence, agrees to a proffer of stipulated evidence or to an agreed statement of facts that provides a factual basis for a finding of guilt." *Faulkner v. State*, 468 Md. 418, 438 n.6 (2020).

court properly found that C.B.'s testimony was admissible under either of two grounds: (1) to prove lack of consent under Md. Code Ann., Cts. & Jud. Proc. Article ("CJP") § 10-923 (2019 Cum. Supp.), Maryland's Repeat Predator Prevention Act; or (2) for a non-propensity purpose under Maryland Rule 5-404(b).

A.

Pertinent Statute and Rule

CJP § 10-923 provides, in relevant part, as follows:

> (b) *In General*. — In a criminal trial for a sexual offense . . . evidence of other sexually assaultive behavior by the defendant occurring before or after the offense for which the defendant is on trial may be admissible, in accordance with this section.
>
> (c) *Motion of intent to introduce evidence*. — (1) The State shall file a motion of intent to introduce evidence of sexually assaultive behavior at least 90 days before trial or at a later time if authorized by the court for good cause.
>
> (2) A motion filed under paragraph (1) of this subsection shall include a description of the evidence.
>
> (3) The State shall provide a copy of a motion filed under paragraph (1) of this subsection to the defendant and include any other information required to be disclosed under Maryland Rule 4-262 or 4-263.
>
> (d) *Hearing*. — The court shall hold a hearing outside the presence of a jury to determine the admissibility of evidence of sexually assaultive behavior.
>
> (e) *Court may admit evidence*. — The court may admit evidence of sexually assaultive behavior if the court finds and states on the record that:
>
> (1) The evidence is being offered to:
>
> (i) Prove lack of consent; or
>
> (ii) Rebut an express or implied allegation that a minor victim fabricated the sexual offense;
>
> (2) The defendant had an opportunity to confront and cross-examine the witness or witnesses testifying to the sexually assaultive behavior;
>
> (3) The sexually assaultive behavior was proven by clear and convincing evidence; and

(4) The probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

Rule 5-404(b) 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.

B.

Proceedings Below

As indicated, the State originally filed a single indictment relating to all three victims. Appellant filed a motion to sever the trials relating to each victim on the ground that the evidence was not mutually admissible. The State agreed that J.Y.'s case should be severed. On July 6, 2018, after a hearing regarding the trials for C.B. and E.M., the circuit court granted appellant's motion to sever, finding that the evidence was not mutually admissible because evidence of E.M.'s allegations, which occurred after the actions testified to by C.B., would not be admissible in C.B.'s case.

The court ruled, however, that pursuant to Md. Rule 5-404(b), C.B. could testify at E.M.'s trial to show a "common scheme" and "knowledge." With regard to "common scheme," the court stated as follows:

> [T]he proffer that was given to me was that in both of these instances, the defendant met the victim through Tinder and that they met voluntarily and that I believe they met at the – well, they got together voluntarily and voluntarily engaged in vaginal intercourse and then the State alleges that following vaginal intercourse, that the defendant forcibly had anal intercourse with each of these victims. They also alleged that during the

> course of the anal intercourse, that both victims told him to stop, said no, you're hurting me, things of that sort, and the defendant continued on.
>
> So although I don't believe those would be considered signature crimes for the purposes of identification, I'm not sure that identification is an issue in this case, but rather because of the common way in which the defendant met these victims and got together on a voluntary basis and then proceeded with forcible anal intercourse and during which time both of the victims – according to the State, said no, I believe that would constitute a common plan by which the defendant was able to meet the victims, get together with the victims, engage in a voluntary sexual act and then lead to [a] forcible sexual act. So I believe that the events of December 31, 2016 would be admissible in the trial of Count 1 for that purpose.

With respect to "knowledge," the court relied on *Duckworth v. State*, 323 Md. 532, 544 (1991), in which the Court of Appeals upheld the admission of testimony regarding the defendant's prior reckless use of a firearm to show that he had knowledge about the consequences of improperly handling a loaded firearm. It explained:

> So based upon that sort of principle that was espoused in *Duckworth*, one of the things that struck me about these two cases is that the State's proffer is that in the December 31, 2016 event, the parties had met on Tinder. They had gotten together. They had consensual vaginal intercourse, and then according to the State, the defendant forced anal intercourse on the victim. During that time, the victim said no, stop, did not consent, and follow[ing] that, the defendant had sent an apology to her saying I never intended to hurt you, I didn't know I hurt you, sort of intimidating that if she said no, that no didn't mean no and he didn't understand that that was hurting her.
>
> And so I think that clearly put him on notice that [if] such a similar situation arise[s] in the future, that such conduct might be seen as forced and not consented to and harmful. So I think under the reasoning of the *Duckworth* case that the events of December 31, 2016 which certainly serve as a basis of knowledge to the defendant at any future encounter that following vaginal intercourse that in the event that anal intercourse was attempted and the victim said no, it's hurting me, that she might mean no, and it might be hurting her, in which case, he should be required to stop under the law.

After the court ruled that C.B.'s testimony was admissible to show common scheme or knowledge, defense counsel did not argue that the court needed to address whether the prejudice of the testimony outweighed its probative value.

On January 8, 2019, the State filed a motion to reconsider the court's ruling on severance and the admissibility of other crimes evidence in light of the recent enactment of CJP § 10-923, which allows "evidence of other sexually assaultive behavior" to be introduced against a criminal defendant to prove lack of consent when certain procedural protections are met.[7] It proffered that, at the May 17, 2018, hearing on appellant's severance motion, the State had asked the court to deny severance based on CJP § 10-923, which would go into effect July 1, 2018, but the court's July 6, 2018, ruling did not address CJP § 10-923, which was then in effect. At a motions hearing on January 18, 2019, the court granted the State's request to allow evidence of other sexual assaultive behavior pursuant to CJP § 10-923, but only with respect to J.Y.'s testimony at E.M.'s trial.

At a second hearing held on March 28, 2019, the court considered the admissibility of C.B.'s testimony at E.M.'s trial pursuant to CJP § 10-923. C.B. testified to her two encounters with appellant and was cross-examined by appellant's counsel. The court agreed to permit C.B.'s testimony at E.M.'s trial pursuant to CJP § 10-923, stating as follows:

> [O]n the issue of [C.B.], I'll make a similar finding that based upon the evidence presented here today, that there's clear and convincing evidence that sexually assaultive behavior occurred, that the defense had an

[7] Along with this motion, the State also filed the statutorily required notice of intent to introduce evidence of other sexually assaultive behavior pursuant to CJP § 10-923(c).

> opportunity to confront and cross-examine the witness, and that at this point it appears that consent will be an issue in the trials, and therefore lack of consent is an issue that needs to be proven by the State. And so, I'll find that the probative value of her evidence on the issue of consent outweighs the danger of unfair prejudice. So I would permit [C.B.'s] testimony to be admitted in . . . the trial of [E.M.] under this statute.

The court reiterated, at the conclusion of the State's case, that it had ruled that C.B.'s testimony was admissible on two grounds. First, it was admissible to show lack of consent pursuant to CJP § 10-923(e), and second, to show knowledge that, "when a woman said no, he should have stopped." Similarly, when the parties discussed jury instructions, the court stated that its pretrial ruling permitting C.B. to testify at E.M.'s trial was based on other crimes evidence "and the subsequent statute admitting other evidence of sexual conduct as it relates to lack of consent."

As appellant notes, however, the record reflects that, despite the court's ruling admitting the evidence on two grounds, the "prosecutors strategically decided to rely solely on Rule 5-404 to admit [C.B.'s] testimony." After C.B. testified on direct examination, and after the jury was excused for the court and counsel to discuss evidentiary matters, defense counsel indicated that it had listed four women to call in defense to say that appellant had engaged in sexual activity with them and been respectful of their requests. The prosecutor objected to the admissibility of this evidence, but the court indicated that it could be admissible to rebut evidence of lack of consent under the statute. The prosecutor then stated that, even if appellant were permitted to do that, it would become an issue only if J.Y. testified because C.B.'s testimony was coming in pursuant to Rule 5-404(b) for the

purpose of showing that appellant had knowledge to stop when a woman says no. The State ultimately did not call J.Y. to testify.

When the parties were discussing jury instructions, the prosecutor initially requested an instruction that C.B.'s testimony could be considered on the issue of lack of consent. When reminded, however, that she had stated that she was offering C.B.'s testimony only pursuant to Rule 5-404(b), she did not object to the judge declining to give an instruction pursuant to the statute.

The court then instructed the jury as follows:

> You have heard evidence that the defendant committed the crime of second degree sex offense against [C.B.] However, there is not a charge for that event in this case. You may consider this evidence only on the question of a common scheme of the defendant or of knowledge of the defendant. However, you may not consider this evidence for any other purpose. Specifically, you may not consider [it] as evidence that the defendant is of bad character or that he has a tendency to commit crime.

Based on this record, it is clear that C.B.'s testimony ultimately was presented to the jury solely pursuant to Md. Rule 5-404(b). Based on the State's strategic decision in this regard, the defense did not pursue its stated intent to call other women with whom appellant had sexual encounters. Accordingly, we will consider the admission of C.B.'s testimony only with respect to Rule 5-404(b).[8]

[8] Appellant also argues that he was prejudiced by the court's ruling that the testimony of J.Y. and C.B. was admissible pursuant to the statute. Because J.Y. did not testify and the State did not offer C.B.'s testimony on that basis, this contention is devoid of merit.

Appellant contends that the court erred in allowing C.B. to testify about her unrelated rape allegations pursuant to Md. Rule 5-404(b). He asserts that the court wrongfully concluded that the evidence was admissible to show a "common scheme" or knowledge that "no" indicates withdrawn consent. Moreover, he argues that C.B.'s testimony was "grievously prejudicial" because it could lead jurors to consider him to be "misogynistically violent."

The State contends that the court properly admitted C.B.'s testimony for a non-propensity purpose under Md. Rule 5-404(b). Specifically, it argues that the testimony was admissible to show that appellant had "knowledge" that E.M.'s requests to stop constituted a lack of consent "because he had apologized to C.B. after failing to treat *her* repeated pleas to stop as expressions of lack of consent less than three months earlier." The State notes that appellant, in addition to asserting the defense of consent, was pursuing a defense of mistake, i.e., that even if E.M. had not consented to anal intercourse, he reasonably believed otherwise. Accordingly, it argues that C.B.'s testimony, explaining her requests to stop and appellant's subsequent texts apologizing and suggesting the use of a "safe word," was "relevant to conveying just how *unreasonable* such a mistake would have been at the time of [appellant's] encounter with E.M."[9]

[9] The State does not argue that C.B.'s testimony was properly admitted under the common scheme exception. We agree that the evidence was not admissible under this exception. *See Reidnauer v. State*, 133 Md. App. 311, 322 (quoting *Emory v. State*, 101 Md. App. 585, 613 (1994)) (In order to qualify as a "common scheme," when identity is not an issue, there must be evidence of "one grand plan; the commission of each is merely a step toward the realization of that goal. The fact that the crimes are similar to each other or occurred close in time to each other is insufficient."), *cert. denied*, 361 Md. 233 (2000).

As indicated, Rule 5-404(b) provides that evidence of other crimes or acts, although not admissible to show a person's propensity to commit a crime, "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." "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.'" *Winston v. State*, 235 Md. App. 540, 562 (quoting *Hurst v. State*, 400 Md. 397, 407 (2007)), *cert. dismissed*, 461 Md. 509 (2018). The rule does, however, allow "bad act" evidence that has "special relevance," i.e., it is "substantially relevant to some contested issue," such as evidence showing "notice, intent, preparation, common scheme or plan, knowledge, identity or absence of mistake or accident." *Smith v. State*, 218 Md. App. 689, 710 (2014) (quoting *Wynn v. State*, 351 Md. 307, 316 (1998)); Md. Rule 5-404(b).

The analysis for the admission of this type of evidence is as follows:

> Trial courts analyze proposed prior bad acts evidence using a three-part test. *State v. Faulkner*, 314 Md. 630, 634, 552 A.2d 896 (1989). The court must determine first whether the proffered evidence fits into one of the Rule's exceptions. *Id.* We review that decision *de novo*. *Behrel v. State*, 151 Md. App. 64, 125, 823 A.2d 696 (2003). The court then must assess "whether the accused's involvement in the other crimes is established by clear and convincing evidence." *Faulkner*, 314 Md. at 634, 552 A.2d 896. Finally, the trial court must weigh "[t]he necessity for and probative value of the 'other crimes' evidence . . . against any undue prejudice likely to result from its admission." *Id.* at 635, 552 A.2d 896. We review the circuit court's balancing of probative value against undue prejudice for abuse of discretion. *Smith v. State*, 218 Md. App. 689, 710, 98 A.3d 444 (2014).

Vigna v. State, 241 Md. App. 704, 727 (2019), *aff'd on other grounds by Vigna v. State*, 470 Md. 418 (2020).

With respect to the first prong of the test, the State argues that C.B.'s testimony had special relevance to show that appellant had "knowledge" that E.M.'s repeated requests for him to stop "were expressions of lack of consent, which appellant should have recognized because he had apologized to C.B. after failing to treat *her* repeated pleas to stop as expressions of lack of consent less than three months earlier." It asserts that the testimony was admissible to rebut appellant's defense that, even if E.M. had not consented to anal intercourse, appellant reasonably believed otherwise, despite her repeated requests to stop, due to her willingness to engage in "rough sex."

We agree that C.B.'s testimony was "substantially relevant" on the basis that it showed that appellant was on notice of what withdrawn consent looked like under similar circumstances. Although it should be clear that no means no, the evidence was relevant here to show appellant's suggested defense that he believed that E.M. consented to the anal intercourse, despite repeated requests to stop, was unreasonable. *See Vigna*, 241 Md. App. at 727–28 (Evidence that defendant had previously been reprimanded by the school for inappropriate behavior with students was properly admitted to show that he was "on notice that his actions were wrongful."); *Smith*, 218 Md. App. at 710–12 (Accidental discharge of a weapon that injured a person the prior year was admissible at the manslaughter trial relating to a different shooting victim to show that defendant was on notice that he should have handled the firearm more carefully.); *Duckworth*, 323 Md. at 544 (Testimony by

child's mother that defendant accidently shot the child with a BB gun the week before the charged battery occurred was admissible to show his knowledge that it was reckless to point the gun at the child.).

After the court ruled that C.B.'s testimony was relevant and admissible under Rule 5-404(b), that was the end of the discussion. Defense counsel did not argue that the court needed to make a finding that appellant's involvement in that crime was established by clear and convincing evidence or that the probative value of the evidence outweighed the prejudice. Under these circumstances, any contention of error regarding these two components of the analysis pursuant to Rule 5-404 is not preserved for appellate review. *See, e.g., Williams v. State*, 344 Md. 358, 370–72 (1996) (Appellant's claim that the trial court failed to conduct the required balancing of prejudice and probative value was not preserved for appellate review because it was not raised at trial).

Even if an argument relating to these two prongs were preserved for appeal, appellant would not prevail. The clear and convincing standard requires that the witness must be found to be credible, and "that the facts to which [she] ha[s] testified are distinctly remembered and the details thereof narrated exactly and in due order, so as to enable the trier of the facts to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *Thompson v. State*, 181 Md. App. 74, 89–90 (2008) (quoting *Goroum v. Rynarzewski*, 89 Md. App. 676, 684–85 (1991)), *aff'd*, 412 Md. 497 (2010). "We review the trial court's decision in this regard 'to determine whether the evidence was sufficient to support the [trial court's] finding.'" *Id.* at 90 (quoting *Faulkner*, 314 Md. at 635).

At the July 6, 2018, hearing, when the court ruled that C.B.'s testimony was admissible pursuant to Md. Rule 5-404(b), the State proffered the basic facts regarding C.B.'s encounter with appellant, including the text message she received from appellant the day after in which he said that he did not mean to hurt her, and he apologized. At the hearing on the State's motion to allow testimony pursuant to CJP § 10-923 on March 28, 2019, C.B. testified extensively about what appellant did to her. At the conclusion of the hearing, the court stated that it found, based on her testimony, that there was "clear and convincing evidence that sexually assaultive behavior occurred." The evidence was sufficient to support this finding.

With respect to the weighing of any undue prejudice likely to result from the admission of C.B.'s testimony against its probative value, we review the court's determination in that regard for an abuse of discretion. *Vigna*, 241 Md. App. at 727. Here, although there was not a specific balancing of those interests in the context of admissibility under Rule 5-404, the court did address the issue in the context of admissibility under the statute. The court stated that "the probative value of [C.B.'s] evidence on the issue of consent outweighs the danger of unfair prejudice."[10]

In assessing whether the court's ruling was an abuse of discretion, we assess whether the finding is "well removed from any center mark imagined by the reviewing

[10] There is no suggestion that the conclusion would have been different in the context of Rule 5-404, when the value was in showing that appellant should have known to stop when E.M. said no.

court and beyond the fringe of what the court deems minimally acceptable," or when "no reasonable person would take the view adopted by the [trial] court." *Jackson v. State*, 216 Md. App. 347, 363–64 (cleaned up), *cert. denied*, 438 Md. 347 (2014). We cannot conclude that the court's ruling that the probative value of the evidence outweighed any undue prejudice was an abuse of discretion under the facts of this case.[11]

II.

Impeachment Evidence

Appellant contends that the circuit court abused its discretion in limiting his cross-examination of C.B. Specifically, he complains that the court denied his request to admit into evidence two videos depicting consensual acts of urination and anal sex during C.B.'s first encounter with appellant.

The State contends that the court properly exercised its discretion in excluding the video for several reasons. First, they had not previously been disclosed, in violation of the discovery rules. Second, once the court mistakenly allowed the videos to be used for impeachment purposes, C.B. "described in graphic detail" what occurred and that the first encounter was consensual, and under those circumstances, the court properly precluded defense counsel from admitting the videos. It contends that "appellant's indignation at not

[11] Appellant argues on appeal that much of C.B.'s testimony was beyond the scope of showing knowledge or mistake of fact. Appellant, however, failed to make that argument below, and therefore, he has waived that contention on appeal. *See Cousar v. State*, 198 Md. App. 486, 508–11 (2011) (Defendant failed to preserve objection to other crimes testimony because, although he objected to the witness testifying in general, he did not object to the scope of her testimony.).

being permitted to publish videos of C.B. 'on her knees in the bathroom, [while] [appellant] is urinating in her mouth,' after C.B. had admitted to the events depicted in open court, has no legal merit."

A.

Proceedings Below

Following direct examination of C.B., and outside the presence of the jury, appellant's counsel proffered that he intended to introduce two videos taken from appellant's cell phone showing consensual sexual acts, including urination and anal intercourse, between appellant and C.B. on their first encounter on December 20, 2016. Counsel stated that the videos were intended to impeach C.B.'s prior statement that no urination acts occurred during that encounter and that they had attempted anal sex on that night but stopped it. Counsel proffered that the videos showed C.B. consensually engaging in these activities and telling appellant "how much she loves it."

The State objected to the admission of the videos because C.B. had already testified that everything was consensual on that date. Moreover, the State argued that the videos should be excluded because appellant had failed to disclosure them to the State during discovery in violation of Md. Rule 4-263(e).

The court directed counsel to proceed with C.B.'s cross-examination, stating that, if the videos became relevant for impeachment purposes, it would make a ruling at that time. During cross-examination, appellant's counsel asked C.B. whether she remembered allowing appellant to urinate on her during the first encounter and whether she told him

that evening that she enjoyed anal intercourse. C.B. responded that she did not fully recall, but that everything on the first date was consensual. The court then excused the jury and directed C.B. to privately view the videos using headphones. C.B. confirmed that this refreshed her recollection of that night. After the jury was brought back in, the following exchange occurred:

> [DEFENSE COUNSEL]: [O]utside the presence of the jury, you watched two videos. Is that right?
>
> [C.B.]: Yes.
>
> [DEFENSE COUNSEL]: The one video with regards to my questions about whether or not you had a consensual encounter with [appellant] on the first date in which you and him engaged in an act where consensually he urinated in your mouth.
>
> [C.B.]: Yes.
>
> [DEFENSE COUNSEL]: Do you recall that happening?
>
> [C.B.]: I do, yes, now.
>
> [DEFENSE COUNSEL]: All right. With regards to the second video, did that refresh your recollection as to what occurred?
>
> [C.B.]: Yes.
>
> [DEFENSE COUNSEL]: And so, in fact, you did not tell him to cease the anal sex. Is that right?
>
> [C.B.]: I believe at some point I did, not in the video. And, when it stopped, I, we did have the conversation of this is not what I enjoy.
>
> [DEFENSE COUNSEL]: And in the video, though, you say to him while you're having anal sex with him, you're telling him how much you enjoy it. Is that right?

> [C.B.]: He does ask me do you enjoy it, and I say yes in a sexual, like sexually speaking, just kinky talk, yes.
>
> [DEFENSE COUNSEL]: And you told him that you love it in your ass?
>
> [C.B.]: Yes.
>
> [DEFENSE COUNSEL]: And then you knew you were being videotaped, and you then said you were signing off. Is that right?
>
> [C.B.]: I, I guess so. He asked me to say that, yes, and I, I said it.
>
> [DEFENSE COUNSEL]: And, the Court's brief indulgence. So with regard to the anal sex part, or that video, that video depicts what occurred, right?
>
> [C.B.]: I believe so. I don't think the video is for the whole time, but yes.

Appellant then offered the videos into evidence, but the trial court denied the request. It found that, because appellant was offering the videos for impeachment purposes only, there was no basis to admit them because C.B.'s memory had already been refreshed, and she had admitted that the acts in question were consensual on the first night. It explained as follows:

> So, the whole reason why this is relevant is because she said in direct exam that she said I don't like it, stop. She's now seen the video, and she has now admitted that that didn't happen. So that impeachment has occurred. The second thing was that she said the urination never happened on the first day. She's now admitted that it did. She said that she never consented to urination on the first day, and now she said she has. And the other, the last thing was that she didn't recall oral sex on the first day, and now she says she does.
>
> So, everything that she initially said has now been impeached, and she's admitted that, of the prior statement. So therefore, extrinsic evidence is only admissible if she denies that she made the prior statement, and now she has admitted it. So therefore, the extrinsic evidence, which is the video, is not admissible. It's only, the content is only admissible for impeachment, not for substantive evidence.

B.

Analysis

We agree with the State that the court properly excluded the defense from admitting the videos, for either of two reasons. First, appellant violated the discovery rules by not disclosing the videos prior to trial. Second, the court did not abuse its discretion in excluding this extrinsic impeachment evidence.

1.

Discovery

Md. Rule 4-273(e)(7) provides as follows:

> Without the necessity of a request, the defense shall provide to the State's Attorney . . . [t]he opportunity to inspect, copy, and photograph any documents, computer-generated evidence as defined in Rule 2-504.3(a), recordings, photographs, or other tangible things that the defense intends to use at a hearing or at trial.

In *Thomas v. State*, 213 Md. App. 388, 402 (2013), this Court stated that, if the defense can "reasonably predict" that it will use "certain exhibits to impeach a State's witness," the evidence must be disclosed to the State during discovery. (quoting *Williams v. State*, 364 Md. 160, 172 (2001)).

Here, appellant did not dispute that he intended to use the videos to impeach C.B. Indeed, at oral argument, counsel stated that the defense did not disclose the videos for tactical reasons. Accordingly, appellant violated Md. Rule 4-273(e)(7) by failing to disclose them during discovery, and the exclusion of the videos was warranted on this

ground. *See State v. Funkhouser*, 140 Md. App. 696 (2001) (This Court may affirm where the trial court was right for the wrong reason.).

2.

Limits on cross-examination

"Generally speaking, the scope of examination of witnesses at trial is a matter left largely to the discretion of the trial judge and no error will be recognized unless there is clear abuse of such discretion." *Tetso v. State*, 205 Md. App. 334, 401 (quoting *Oken v. State*, 327 Md. 628, 669 (1992)), *cert. denied*, 428 Md. 545 (2012). Md. Rule 5-616(a)(1) and (2) provides that the "credibility of a witness may be attacked through questions asked of the witness, including questions that are directed at [p]roving under Rule 5-613 that the witness has made statements that are inconsistent with the witness's present testimony" or to prove "that the facts are not as testified to by the witness." Subsection (2) states that "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."

Here, appellant sought to contradict C.B.'s testimony that no urination occurred on December 20, 2016, and they had tried anal intercourse, but she stopped it. Appellant argued that the videos showing that these acts occurred on that date impeached these statements. After C.B. was permitted to view the videos privately, however, she agreed that her prior testimony was not correct, and these acts occurred. The impeachment, therefore, had already occurred. Moreover, the videos concerned a collateral matter

because C.B. had already testified that everything that occurred on December 20, 2016, was consensual, and the trial did not concern her encounters with appellant that day. Md. Rule 5-613(b)(2); *see Hardison v. State*, 118 Md. App. 225, 239 (1997) (A non-collateral fact is "a fact that is material to the issues in a case so as to be admissible irrespective of its use to counter contrary evidence[.]"). The trial court properly exercised its discretion in excluding the videos.

III.

Internet Search History

On October 19, 2017, the police executed a search warrant of appellant's mother's residence, where appellant was living. They seized two computers and appellant's cell phone. Eugene Curtis, a forensic expert in the State's Electronic Crimes Unit, testified regarding the data found on appellant's seized laptop computer.[12] The State introduced screenshots of appellant's call history with the victims, a screenshot of the Tinder application installed on his phone, and a list made by appellant of women with whom he had had sexual relations.

Detective Curtis testified that he looked up internet searches that appellant conducted on his laptop. He testified that he did a "keyword search" for the phrase "forced anal." A bench conference ensued, and appellant argued that the evidence was prejudicial and irrelevant. The State argued that the evidence was relevant because it showed

[12] Mr. Curtis was able to confirm the computer belonged to appellant because the laptop had a user account with appellant's name on it.

appellant's intent and his "predilection for forced anal," which was at "the heart of what happen[ed] in [E.M.'s] case and with [C.B.]"

The court ultimately admitted a list, State's Exhibit 21, showing 13 searches with the phrase "forced anal." The court determined that the evidence was admissible as "circumstantial evidence of [appellant's] state-of-mind and intent." Mr. Curtis testified that three of the searches were dated December 13, 2014, but the rest did not have dates. Some of the entries had been deleted, but he was still able to recover them.[13]

Appellant contends that the court abused its discretion in admitting this internet search history. He asserts that the searches had no bearing on his state of mind at the time of the alleged offense because they were predominantly undated, and those that were dated were from three years before he met E.M. Moreover, he asserts that the court failed to consider the "grossly prejudicial effect" the "grotesque" entries may have had on the jury.[14]

The State argues that the court properly exercised its discretion in admitting this evidence. It asserts that the evidence was relevant because the charges against appellant were based on allegations of "forced anal intercourse," and the searches for "forced anal" made it more likely that E.M.'s assertion of forced anal intercourse were true. With respect to prejudice, the State contends the prejudice arising from these search terms was minimal

[13] The State explained that many of the searches on the log showing searches using the phrase "forced anal" were not dated because they were found "in something called unallocated space," which is space that is not being used to store files. Browser history that has been deleted can be found in unallocated space, but the date of the search is deleted.

[14] On appeal, appellant proffers a list of search terms that included items not listed on State's Exhibit 21.

because appellant's "predilections for anal intercourse, handcuffs, and generally 'rough sex,' were already a central part of proving the essential underlying facts."

"We review a circuit court's decisions to admit or exclude evidence applying an abuse of discretion standard." *Paige v. State*, 226 Md. App. 93, 124 (2015) (quoting *Norwood v. State*, 222 Md. App. 620, 642 (2015)). As indicated, "[a]n abuse of discretion occurs where no reasonable person would take the view adopted by the circuit court." *Williams v. State*, 457 Md. 551, 563 (2018); *accord Jackson*, 216 Md. App. at 363–64 ("A ruling generally will not be deemed to be an abuse of discretion unless it is well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.") (cleaned up).

We agree with the State that the circuit court did not abuse its discretion in admitting this evidence. As discussed, *supra*, evidence of prior crimes is admissible if it has "special relevance" to a contested issue, i.e., "if it shows notice, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident." *Smith*, 218 Md. App. at 710 (quoting *Winn v. State*, 351 Md. 307, 316 (1998)); Rule 5-404(b). This same analysis applies to a "bad act," "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." *Klauenberg v. State*, 355 Md. 528, 546–49 (1999).

Appellant argues that the court erred in admitting the evidence as circumstantial evidence of intent because it is unclear what the searches meant regarding appellant's state of mind. The Court of Appeals, however, has stated:

> It is well settled in Maryland that where intent is at issue, proof of a defendant's prior conduct may be admissible to prove the defendant's intent. *See Harris* [*v. State*], 324 Md. [490,] 502–03, 597 A.2d [956,] 962–63 [(1991)]; *Harrison v. State*, 276 Md. 122, 155, 345 A.2d 830, 849 (1975); *Bryant v. State*, 207 Md. 565, 586, 115 A.2d 502, 511 (1955). *See also Huddleston v. United States*, 485 U.S. 681, 685, 108 S.Ct. 1496, 1499, 99 L.Ed.2d 771, 780 (1988) ("Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct."). Such evidence is admissible, even if not directly concurrent, when the subject acts "are committed within such time, or show such relation to the main charge, as to make connection obvious," *Bryant*, 207 Md. at 586, 115 A.2d at 511, that is to say, they are "so linked in point of time or circumstances as to show intent or motive." *Harrison*, 276 Md. at 155, 345 A.2d at 849.

Johnson v. State, 332 Md. 456, 470 (1993). *Accord Howard v. State*, 324 Md. 505, 514 (1991) ("Under some circumstances, where intent is legitimately an issue in the case, and where by reason of similarity of conduct or temporal proximity, or both, evidence of other bad acts may possess a probative value that outweighs the potential for unfair prejudice, the evidence may be admissible.").

Here, the prior "bad acts" had an obvious connection to the crime because the central issue at trial was whether E.M. consented to anal intercourse, and therefore, evidence of searches regarding appellant's sexual predilection for "forcing" another into these acts was highly probative of his intent with E.M. *See State v. Rowe*, 318 P.3d 57, 64–65 (Colo. App. 2012) (Images of child pornography on defendant's computer were "logically relevant" to sexual exploitation of a minor charge because it showed he "received sexual gratification from viewing" such material.), *cert. denied*, 2013 WL 4008636 (2013); *State v. Bridges*, 251 So.3d 661, 668–69 (La. Ct. App. 2018) (Detective testimony regarding defendant's

internet history including pornographic searches for "virgin" and "teen naïve" was admissible to show his interest in sex with young girls.). *See also United States v. Long*, 328 F.3d 655, 661 (D.C. Cir. 2003) (cleaned up) ("[T]he admissible bad acts evidence need not show incidents identical to the events charged, so long as they are closely related to the offense," and "show a pattern of operation that would suggest intent and that tends to undermine the defendant's innocent explanation.").

Appellant next contends that the "grossly prejudicial effect" of the evidence outweighed its probative value. In that regard, we note that the court was selective about which searches it allowed into evidence, narrowing the proffered list so that only references to "forced anal" were admitted.

Moreover, we cannot say that the prejudice outweighed the probative value given the extensive evidence of appellant's interest in anal intercourse, handcuffs, and rough sex. *See State v. Taylor*, 347 Md. 363, 372 (1997) ("[A]ny chance of prejudice by virtue of the admission of prior bad acts is less" when the issue at trial is the defendant's state of mind rather "than if the primary issue is identity of the perpetrator."). The circuit court did not abuse its discretion in admitting State's Exhibit 21.

IV.

Curative Instruction

At trial, appellant's counsel observed that the State had redacted E.M.'s medical records to eliminate references that she suffered from depression prior to the encounter with appellant. Counsel argued that they should be permitted to raise this issue on cross-

examination because it was relevant to E.M.'s mental state on the day of the encounter. The court ruled that the defense could not inquire about E.M.'s history of depression because it was not relevant without additional medical testimony.

E.M.'s friend, Ms. Callaway, subsequently testified for the State. On cross-examination, appellant's counsel elicited that E.M. was no longer Ms. Callaway's "best friend." When appellant's counsel asked why, the State objected. Outside the presence of the jury, the court asked Ms. Callaway why they were no longer best friends, and she replied: "After the attack, [E.M.] went through some bad depression, anxiety, suicidal thoughts. She became extremely agitated, would not get counseling, and lashed out at me most of the time. I had to remove myself for my own mental health." The State withdrew its objection, and appellant's counsel said that he was "not going to pursue it based on [the court's] previous rulings and the answer."

On redirect examination, the following occurred:

> [PROSECUTOR]: Ms. Callaway, [appellant's counsel] just asked you why you are no longer friends with [E.M.]. Can you explain to the ladies and gentlemen of the jury why you are no longer friends with her?
>
> [MS. CALLAWAY]: After the attack, things became extremely rough with her anxiety, depression, lashing out. She lost her job. After almost two years of being the person that she went to for everything and being the person that held the brunt of a lot of her emotions that she wasn't dealing with well, I chose to remove myself and my children from it until she got help.

On re-cross, appellant's counsel asked Ms. Callaway: "[Y]ou previously testified in response to a question by [the State] that, after this event, [E.M.] went back to being

depressed, correct?" Ms. Callaway replied, "She did." The court sustained the State's objection, and a bench conference ensued.

The court observed that the potential problem was that the jury might now be left with the impression that E.M. developed depression as a result of the encounter with appellant, when she had a history of depression, a fact that was already excluded. Appellant's counsel argued that, in light of the testimony the State elicited, the court should admit the redacted references in E.M.'s medical records regarding her prior depression or allow him to ask Ms. Calloway whether E.M. was experiencing depression when she went to appellant's apartment. The court stated that additional questions would just "compound what is now a relatively minor problem," and it determined that striking the testimony was the proper remedy. The court then instructed the jury, over defense objection, as follows:

> So the last couple questions and answers that we heard about from Ms. Callaway was on the issue of whether or not she and [E.M.] were still best friends. That's how we got into this topic. So at this point, I'm just going to indicate to you that whether or not they are still best friends is not a relevant point in this case. It's not relevant to what happened back in March of 2017.

The court stated that the questions and answers were stricken from the record and should not be considered by the jury. Appellant made a motion for a mistrial, which was denied.[15]

Appellant contends that the court abused its discretion by striking the testimony as opposed to allowing him to "cure" testimony of E.M.'s "post-event depression with evidence of her pre-event depression." He contends that the court's resolution of the issue

[15] Appellant does not challenge the denial of the mistrial on appeal.

left the jury with impression that E.M. became depressed only after her encounter with appellant and not before.

The State contends that the court properly exercised its discretion by striking Ms. Callaway's reference to E.M.'s depression after the assault, rather than permitting appellant to inquire about her preexisting mental history, because this fix sufficiently cured what the court recognized as a minor problem. It asserts that this solution actually benefitted appellant because it prevented the jury from learning that E.M.'s mental health had declined following her encounter with appellant, which was relevant to determining the truthfulness of her allegations.

As indicated, a court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Paige*, 226 Md. App. at 124. E.M.'s depression after the assault clearly was relevant in this case. *See Parker v. State*, 156 Md. App. 252, 271–73 (Evidence of victim's mood and actions after alleged assault was relevant to show that the victim did not engage in consensual sex.), *cert. denied*, 382 Md. 347 (2004).

It did, however, raise the question whether the defense should be able to introduce evidence of E.M.'s depression before the incident, which the court previously had excluded. The court's decision to resolve the issue by instructing the jury not to consider the reasons that E.M.'s friendship with Ms. Calloway ended, i.e., her anxiety and depression, was not an abuse of discretion.

V.

Time-Served Credits

Appellant contends that the court erred in denying his request for credit for time-served, based on the 613 days he was on pre-trial release subject to GPS monitoring. He argues that credit was warranted pursuant to Md. Code Ann., Criminal Procedure Article ("CP") § 6-218(b)(1) (2018).

The State contends that the court properly denied the request for time-served credit. It argues that such credit applies only to individuals who were in "custody," and GPS monitoring does not constitute custody.

CP § 6-218(b)(1) provides:

> A defendant who is convicted and sentenced shall receive credit against and a reduction of the term of a definite or life sentence, or the minimum and maximum terms of an indeterminate sentence, for all time spent in the **custody** of a correctional facility, hospital, facility for persons with mental disorders, or other unit because of:
>
> (i) the charge for which the sentence is imposed; or
>
> (ii) the conduct on which the charge is based.

(Emphasis added.)

"Section 6–218 was enacted 'to ensure that a defendant receive as much credit as possible for time spent in custody as is consistent with constitutional and practical considerations.'" *Johnson v. State*, 236 Md. App. 82, 89 (2018) (quoting *Fleeger v. State*, 301 Md. 155, 165 (1984)). We review *de novo* a trial court's denial of an appellant's request for time-served credit. *Id.* at 88.

Here, the record indicates that appellant was released on bail pending trial. The District Court document from his February 14, 2018, bail hearing on the present indictment states that he was not placed in the custody of any institution/service or confined to any one location, but rather, he was released on bail with certain restrictions.[16]

The issue before this Court is whether appellant's release on bail with GPS monitoring constitutes "custody" within the meaning of CP § 6-218(b)(1). The appellate courts have held that confinement to home detention can constitute custody. *See Dedo v. State*, 343 Md. 2, 13–14 (1996) (Defendant was entitled to time-served credits for time spent in home detention because his home "qualifies as an institution."); *Johnson*, 236 Md. App. at 93–94 (Defendant was in custody while placed in home detention following his conviction, and therefore, he was entitled to time-served credit.).

It is well-settled, however, that "mere supervision [is] insufficient to qualify as custody." *Dedo*, 343 Md. at 10; *accord Johnson*, 236 Md. at 90. A "key feature of custody . . . is the defendant's exposure to criminal prosecution for escape if he were to leave the site of his detention." *Id.* at 89.

In this case, appellant was not confined to a particular place. He was able to freely travel and work within a 50-mile radius of his home (and farther with leave of the court), with reasonable exceptions, such as prohibitions from entering school grounds or having contact with the victims, given the nature of the charges. As a result, appellant's

[16] The record reflects that these pre-trial conditions were identical to those from the first indictment.

circumstance can be accurately characterized as "mere supervision," and therefore, it was non-custodial. *See United States v. Insley*, 927 F.2d 185, 186 (4th Cir. 1991) (Restrictive conditions of defendant's bail did not constitute custody for time-served credit to be provided.).

Because appellant was not in any form of custody when he was out on bail, he was not subject to prosecution for escape. *See* Md. Code Ann., Criminal Law ("CR") § 9-405 (2012 Repl. Vol) ("A person who has been lawfully arrested may not knowingly **depart from custody**" by "violat[ing] any restriction on movement" or "tamper[ing] with a monitoring device required to be worn or carried by the person to track the person's location[.]" (emphasis added)).[17] The circuit court correctly denied appellant's request for time-served credit.

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

[17] This holding is further evidenced by the fact that, when appellant did violate the terms of his pre-trial release by failing to report to PTSU after his GPS monitor lost signal while on a court-approved out-of-state trip, he was not prosecuted for escape, but rather a petition to revoke his bond was filed.