Circuit Court for Talbot County
Case No. C-20-CR-21-000230

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1761

September Term, 2022

GERRY BERRY

V.

STATE OF MARYLAND

Reed,
Ripken,
Raker, Irma S.
(Senior Judge, Specially Assigned),

Opinion by Raker, J.

Filed: June 18, 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 Rule 1-104(a)(2)(B).

Appellant, Gerry Berry, was convicted in the Circuit Court for Talbot County of second-degree assault, reckless endangerment, false imprisonment, and commission of a crime of violence with a minor present. Appellant presents the following questions for our review:

> 1. "Did the trial court err as a matter of law and abuse its discretion in admitting irrelevant and prejudicial prior bad acts evidence?
>
> 2. Did the trial court abuse its discretion in denying Appellant's motion for a mistrial?"

Finding no error, we shall affirm.

I.

Appellant was charged by criminal information with first-degree assault, second-degree assault, two counts of reckless endangerment, false imprisonment, malicious destruction of property, and commission of a crime of violence with a minor present. He proceeded to a jury trial. The court entered a judgment of acquittal on one count of reckless endangerment, and the jury found appellant not guilty of first-degree assault and malicious destruction of property. The jury found appellant guilty of all other charges. For sentencing purposes, the court merged reckless endangerment and false imprisonment into second-degree assault. The court imposed a term of incarceration of three years, all but one suspended, for second-degree assault and a consecutive term of incarceration of one year, all but six months suspended, for commission of a crime of violence with a minor present, to be followed by three years of probation.

The charges stem from an altercation between appellant and C.S., the mother of appellant's five-year-old son, J. on September 17, 2021. C.S. received a number of calls that day which she believed to be from appellant, but she did not pick up the phone. She contacted her mother and asked to spend the night at her mother's residence. As she was packing to leave, appellant arrived at her apartment and J. let appellant inside. Appellant began to question C.S. about her personal life and asked to look through her phone. When she refused, appellant picked C.S. up by the throat and began to choke her, pinning her against the wall. When J. intervened and tried to pull his parents apart, C.S. fell to the floor and appellant began to stomp on her and kick her. C.S. gave appellant her phone to get him away from her and then ran to her neighbor's door to borrow a phone and call her mother. When C.S.'s mother arrived, they went to the police station and spoke to the police before going to the Commissioner's office to press charges.

The first piece of testimony at issue in the present appeal concerns several restraining orders C.S. took out against appellant. Immediately after the September 17 incident, C.S. took out a protective order against appellant. She rescinded that order in December because she believed that it was inhibiting appellant's ability to take care of J. C.S. also had a prior restraining order against appellant. The State elicited the following testimony about that prior restraining order, which appellant now contests on appeal.

> "[THE STATE:] And now why was visitation mostly at his, did you say his grandmother's house?
>
> [C.S.:] Yes. J.'s grandmother's house.
>
> [THE STATE:] Okay. Why was the visitation mostly there?

[DEFENSE COUNSEL:] Objection, relevance.

[THE COURT:] Basis?

[DEFENSE COUNSEL:] Relevance, Your Honor. I don't see how that is relevant to why we're here today.

[THE COURT:] I'll overrule it. It is simply stating where the visitation took place I believe. Correct?

[DEFENSE COUNSEL:] She asked why it took place at the grandmother's house.

[THE COURT:] Overruled you may proceed.

[C.S.:] We had a restraining order at one point.

[DEFENSE COUNSEL:] Objection.

[THE COURT:] Do you want to approach?

[DEFENSE COUNSEL:] Yes.

(Counsel approached the Bench and the following ensued.)

[THE COURT:] There were several restraining, domestic violence orders.

[DEFENSE COUNSEL:] There's at least two that I'm aware of that were not a part of the discovery and I think that saying that in front of the jury changed the client in a bad light before they even hear any evidence about what happened (inaudible).

[THE COURT:] But is it not relevant that she had taken out the domestic violence orders against him previously?

[DEFENSE COUNSEL:] Not as it relates to this case because at the time there was no restraining order.

[THE COURT:] Well that, the day of this event she took out a protective order on September the 7th on the same day.

[DEFENSE COUNSEL:] Afterwards.

> [THE COURT:] And I'm not telling you how to try your case but didn't she attempt to have that order rescinded?
>
> [DEFENSE COUNSEL:] She did.
>
> [THE COURT:] Don't you...
>
> [THE STATE:] Yeah, I understand.
>
> [THE COURT:] I'm going to overrule the objection. I think that it is relevant that she took the protective orders out. The timing of that will be certainly a matter for cross examination and the final results of those protective orders will be further grounds for cross examination but I'm going to permit it."

The second piece of testimony appellant contests on appeal concerns C.S.'s characterization of appellant's behavior in her texts with her mother.

> "[THE STATE:] And, Court's brief indulgence. Now when the Defendant, when the Defendant was calling you did you notify anyone?
>
> [C.S.:] Yes.
>
> [THE STATE:] Who did you notify?
>
> [C.S.:] So when he had started calling me that morning I text my mother and my aunt that he had been, that he had started calling me.
>
> [THE STATE:] And what did you say to them?
>
> [C.S.:] I said I guess my baby's dad is being crazy again.
>
> [DEFENSE COUNSEL:] Objection."

Finally, appellant draws our attention to a third instance in which the testimony suggested that appellant might have had ongoing issues with C.S. The State was

questioning C.S.'s mother about her communications with C.S. on the evening of September 17, 2021.

> "[THE STATE:] What is this?
>
> [WITNESS:] This is the screen shot that [C.S.] sent of calls. Multiple calls, no caller ID and her text saying guess my BD back to being crazy, shaking my head.
>
> [THE STATE:] And how do you know that was [C.S.] texting you?
>
> [WITNESS:] Because it as her number. I have her saved in my phone.
>
> [THE STATE:] And have you contacted her through that number before?
>
> [WITNESS:] Yes.
>
> [THE STATE:] And is there an emoji at the bottom?
>
> [WITNESS:] Yes.
>
> [THE STATE:] Who sent that emoji?
>
> [WITNESS:] I did.
>
> [THE STATE:] And what is the emoji of?
>
> [WITNESS:] It's the rolling eyes emoji.
>
> [THE STATE:] And why did you send that?
>
> [WITNESS:] I was basically saying here we go again.
>
> [DEFENSE COUNSEL:] Objection.
>
> [THE COURT:] Sustained."

Following this sustained objection, appellant moved for a mistrial. The court denied appellant's motion.

Appellant was found guilty and sentenced as described above. This timely appeal followed.

II.

Appellant argues that the trial court erred in overruling his objections to the testimony about C.S.'s prior restraining order and C.S.'s characterization of appellant as "acting crazy *again*." Appellant argues that the testimony about the restraining order suggested that appellant must have been abusive or violent in the past. The testimony about him being crazy "again" suggested that he had acted "crazy" in the past. Appellant argues that both pieces of evidence were probative only as prior bad acts evidence and were inadmissible under Md. Rule 5-404(b).

Appellant argues that C.S.'s mother's characterization of her text messages was also prejudicial bad acts evidence. Appellant argues that, while the court sustained his objection to this particular testimony, the cumulative prejudice of this testimony along with the previous two instances of prior bad acts evidence was so great that a mistrial was warranted. Appellant argues that this third instance of prior bad acts evidence was particularly egregious because it came from a third party and would corroborate C.S.'s account of appellant as a person who had been abusive in the past.

The State argues that appellant's prior bad acts argument regarding the restraining order is not preserved. The State notes that appellant never used the words "prior bad acts"

or analogous words at trial and, instead, asserted that the basis of his objection was relevance. Thus, the State argues, he cannot raise a prior bad acts objection now. In the alternative, the State argues that the testimony was admissible. The State argues that the evidence was limited to the fact that there was a restraining order and that, because witnesses did not describe the behavior giving rise to the order or even which party had taken out the order, there was no prior bad acts evidence. The State also argues that, even if there was evidence of a prior bad act, that evidence was relevant for non-propensity purposes, namely, to demonstrate motive by showing that the relationship was acrimonious and to explain some of C.S.'s actions in the lead-up to the incident.

The State argues that appellant's prior bad acts argument regarding the text messages in which C.S. stated that appellant was acting "crazy again" is not preserved because, while appellant objected when these texts were discussed on the direct examination of C.S., he did not object when the State elicited the same testimony from C.S.'s mother. In the alternative, the State argues that "being crazy again" does not necessarily suggest a prior bad act or any specific conduct. It could simply suggest that appellant had a history of doing things like repeatedly calling C.S. (as he did on this occasion), which would not impugn his character. Further, as with the restraining order, appellant argues that this evidence was relevant for the non-propensity purpose of explaining the state of appellant's relationship with C.S.

Finally, the State argues that the trial court did not abuse its discretion in declining to grant a mistrial. The State argues that C.S.'s mother's interpretation of her text messages was not particularly prejudicial given that the text messages themselves were already in the

record, the witness did not explicitly indicate that appellant had engaged in any specific prior bad acts, the witness was a non-principal witness, and appellant's credibility was not in issue. The State also argues that there was so much other evidence against appellant that this passing reference to prior issues in the relationship was unlikely to affect the outcome of the trial.

III.

We begin with appellant's argument that the court improperly admitted prior bad acts evidence. As a threshold matter, we must consider the State's assertion that neither issue is preserved. Ordinarily, we do not decide any issue unless it plainly appears, by the record, to have been raised in or decided by the trial court. Md. Rule 8-131(a). An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Md. Rule 4-323. Where a party states the basis for its objection, all bases for objection not stated are deemed waived. *Banks v. State*, 84 Md. App. 582, 588 (1990). In order to state a basis for an objection, it is sufficient that the basis of the objection is made known to the court. Md. Rule 4-323(c). No specific language must be used provided that counsel makes clear what exception he has to the testimony. *Newman v. State*, 156 Md. App. 20, 51 (2003).

A party opposing the admission of evidence must also object each time the evidence is offered. *Klauenberg v. State*, 355 Md. 528, 545 (1999). Any error is waived and not preserved for our review where there is no objection each time the evidence is offered. *DeLeon v. State*, 407 Md. 16, 31 (2008).

Here, appellant preserved his objection to the testimony about the restraining order, but not his objection to the testimony about C.S.'s statement that appellant was "acting crazy again." As for the restraining order, the initial basis for the objection was "relevance." But, in the subsequent argument, counsel then asserted "I think that saying that in front of the jury changed the client in a bad light before they even hear any evidence about what happened" and clarified that the restraining order under discussion was a past restraining order not in effect at the time of the September 17 incident. In short, counsel articulated the underlying concern of a "prior bad acts" objection: that the jury will prejudge the defendant based on his prior misconduct. The objection is preserved.

However, while appellant did object to some instances in which C.S.'s statement that appellant was "acting crazy again" were discussed, as quoted above, he did not object to all instances of the same or similar testimony. Appellant objected when C.S. first described the texts. He objected when C.S.'s call and text history was entered into evidence. He did not, however, object when the following exchange occurred on the direct examination of C.S.'s mother:

> "[THE STATE:] And how do you know the Defendant?
>
> [WITNESS:] He is J.'s father.
>
> [THE STATE:] And drawing your attention to September 17th of 2021 do you recall receiving a text message from [C.S.] that morning?
>
> [WITNESS:] Yes.
>
> [THE STATE:] And do you remember what the text message said?

> [WITNESS:] She said something to the effect of my baby dad is acting crazy again, or something to that effect."

Because appellant did not object to each instance in which the evidence was offered, the objection is not preserved. We shall only reach the merits on appellant's first contention regarding prior bad acts evidence.[1]

Md. Rule 5-404(b) provides that "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." We must first determine whether the testimony about the prior restraining order was "evidence of other crimes, wrongs, or other acts" at all, given that C.S. never directly asserted what actions or events gave rise to the restraining order.

The Maryland Supreme Court has made clear that there is a difference between testimony about the existence of a restraining order and its terms, on the one hand, and evidence of the conduct giving rise to the restraining order on the other. *Streater v. State*, 352 Md. 800, 813 (1999) ("[T]he restraining order by itself, *i.e.*, without the factual findings contained therein, was not unduly prejudicial since it does no more than establish that Mr. Streater had been warned not to contact or harass Ms. Streater."). We have held that it is appropriate to admit evidence of a restraining order without evidence of the conduct giving rise to that order. *Case v. State*, 118 Md. App. 279, 285 (1997). Such testimony is not evidence of prior bad acts. *Id.* ("[N]o prior crimes, wrongs, or acts are mentioned in that portion of the restraining order that was read to the jury.").

[1] Even assuming *arguendo* that the "crazy" reference was preserved, calling someone crazy is not bad acts evidence.

The testimony here was analogous to the testimony in *Streater* and *Case*. C.S. testified that there was a restraining order and that it affected the way she set up visitation between J. and appellant. She did not testify to any underlying behavior that was the basis of the restraining order. She did not assert that appellant had been abusive to her in the past. This was not prior bad acts evidence. The trial court did not err in overruling appellant's objection.

IV.

We turn next to appellant's argument that the court should have granted a mistrial. A request for a mistrial is addressed to the sound discretion of the trial court. *Basiliko v. State*, 212 Md. 248, 260-61 (1957). In recognition of the fact that the trial judge has a better vantage point from which to evaluate which remarks by witnesses may cause prejudice and, for those that do, the extent of the prejudice, we review a trial court's decision to deny a mistrial for abuse of discretion. *Wilhelm v. State*, 272 Md. 404, 429 (1974). The decision by the trial court to deny a mistrial will not be reversed on appeal unless it is clear that there has been prejudice to the defendant. *Id.*

A trial judge should declare a mistrial only where there is a manifest necessity for the act. *Cornish v. State*, 272 Md. 312, 317 (1974). "The power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes." *Lusby v. State*, 217 Md. 191, 197 (1958). A mistrial is "an extreme sanction that sometimes must be resorted to when such overwhelming prejudice has occurred that no other remedy will suffice to cure the prejudice." *Wright v. State*, 131 Md. App. 243, 253 (2000). Thus,

appellant must show significant, substantial prejudice to justify a reversal of the trial court's decision in this case. *Wagner v. State*, 213 Md. App. 419, 462-63 (2013).

In *Rainville v. State*, 328 Md. 398 (1992), the Supreme Court of Maryland addressed the factors a court should consider in determining whether a mistrial is warranted after the jury has heard inadmissible information:

> "[W]hether the reference to the inadmissible evidence 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; and whether a great deal of other evidence exists."

Id. at 408. No single factor is determinative, but the factors help to guide the court in a totality of the circumstances analysis. *McIntyre v. State*, 168 Md. App. 504, 524 (2006).

Here, neither party contests that C.S.'s mother's interpretation of her emoji meaning "here we go again" was inadmissible. But the prejudice from that statement was not great. The statement itself was vague. It was not clear what prior course of conduct the witness referred to when she said "again." The emoji came immediately after C.S. and her mother were discussing appellant's repeated phone calls, so the natural inference was that "here we go again" implied that appellant had repeatedly called C.S. in the past. The testimony came shortly after the same witness's prior testimony that appellant was acting crazy "again" to which appellant failed to preserve an objection. Thus, the evidence added very little that was not in the record.

The testimony occurred during the direct examination of an ancillary witness and simply summarized and interpreted text messages that were on the record. This testimony

was brief, not particularly central to the State's case, concerned a matter where credibility was not particularly in doubt (due to the documented text messages), and not particularly prejudicial. We do not see the kind of substantial prejudice that would compel a mistrial. The court did not abuse its discretion in denying the motion for a mistrial.

JUDGMENTS OF THE CIRCUIT COURT FOR TALBOT COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

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