UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 327

September Term, 2016

MARK ANDREW MATTHEWS

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Reed,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: April 10, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

FACTS[1] AND LEGAL PROCEEDINGS

M.H. consulted in late 2013 with Mark Andrew Matthews (Appellant), a tattoo artist at Damascus Tattoo Company. She wanted a tattoo of a phoenix covering her right hip, spanning to her inner thigh. After agreeing on a specific design, they scheduled an appointment to ink the tattoo, contemplated to be split over two days, beginning on 22 November 2015.

M.H. arrived with her boyfriend, Calvin, for the estimated initial four hour session. Calvin accompanied M.H. into the tattoo room, approximately measuring six feet by eight feet in area, and for which its door and window blinds were open. Matthews and M.H., who had removed her pants, but wore a bikini bottom, agreed to enlarge the stencil template for the tattoo after holding it up to her body for her final approval. Matthews began tattooing as Calvin sat on a chair nearby. The tattoo session took longer than anticipated, so Calvin left for work before the session's procedure was completed. After he departed, Matthews closed the door and the blinds. Before closing the door, he declaimed that the presence of people walking by the room and gesturing distracted him.

M.H. testified that, after the door and blinds were closed, the hand Matthews used to keep the skin taut at the shifting tattoo application sites encroached slowly, over twenty minutes, up her thigh, until he touched and penetrated her vagina for approximately five

[1] The facts related here come principally from the State's case-in-chief at trial, except as noted otherwise or by context.

minutes.[2] On redirect examination, she stated that, although she was unsure about the timeline, the entirety of the offensive conduct, including the encroachment and the penetration, lasted about 30 or 45 minutes. During the alleged inappropriate touching, she texted Calvin several times, saying "I just feel violated;" "I can't really tell what he's doing cuz I'm in pain but he has come kinda close to fingering me I just wanna leave;" "I think I'm gonna cry;" and finally, "He's done I'm leaving soon."

After about four-and-a-half hours of tattooing, the first day's session was complete. M.H. paid Matthews, adding a tip. She met her mother in the lobby. Once in her mother's car, M.H. cried and described what happened during the session. They went home and awaited Calvin's arrival, at which point they talked about what M.H. said occurred and then called the police. Matthews was charged in the Circuit Court for Montgomery County with sexual offense in the second degree and sexual offense in the fourth degree.

The State charged Matthews also for touching inappropriately three other female clients during tattoo sessions occurring between 7 August 2013 and 26 December 2013. Matthews moved to sever the charges for trial, arguing that the "counts listed in the indictment will involve mutually inadmissible 'other crimes' evidence, and therefore must be tried separately," both as a matter of law and to avoid provoking a "latent hostility" in the jury, which could be susceptible to "judg[ing] Mr. Matthews's level of guilt based on

[2] In December 2013, a month after the tattoo session, M.H. told police that the inappropriate touching lasted over an hour, and the penetration lasted for thirty minutes.

the sheer number and nature of the presented charges."[3] In its Opposition to Defendant's Motion to Sever, the State argued that at least four exceptions ("intent, opportunity, common scheme or plan, and absence of mistake") to the rule prohibiting the admission of prior bad acts evidence applied here, rendering proper the joinder of the charges for trial. The court granted severance.

On 3 September 2015, the State filed in M.H.'s case a Motion in Limine to Introduce Evidence of Other Crimes, Wrongs, or Acts in its Case-in-Chief, arguing for the admission of evidence regarding Matthews's other alleged sexual assaults based on the applicability of the four exceptions noted above, the clear and convincing nature of the evidence, and its probative value outweighing the risk of unfair prejudice. Responding with a Motion in Limine to Limit Testimony, Evidence[,] and Statements of Counsel, Matthews sought to bar the admission of "[a]ny and all references to events and/or allegations of charges related to" the other alleged sexual offenses because such evidence is "inherently prejudicial." After reviewing a recording of a police interview with one of the other victims (A.S.), the court decided, at a 9 October 2015 hearing, that A.S. related a probative, clear, and convincing recitation of an encounter with Matthews similar to that alleged by M.H. and, accordingly, A.S.'s testimony would be admissible at the jury trial of the charges brought because of Matthews's encounter with M.H.

[3] *See* Analysis section *infra* for the legal standards regarding prior bad acts evidence. Generally, evidence of prior bad acts is not admissible to prove that a defendant has a propensity to commit such acts and that, therefore, the defendant did so in the current case. The same evidence may be admitted, however, for other purposes. Md. Rule 5-404(b); *State v. Faulkner*, 314 Md. 630, 552 A.2d 896 (1989).

At trial on 15 October 2015, the State called A.S. to testify about her experience with Matthews. Defense counsel objected, stating "we wanted to still renew our motion that it's not probative and it's outweighed by the (unintelligible). So we want an outstanding objection to all those line of questioning for any witness that's not directly related to this case or the other crime. And so if you'll give us the continuous objection . . . ." The judge granted a continuing objection, but restated his prior finding that the testimony would be admissible as evidence of a common scheme or plan, motive, intent, opportunity, knowledge, absence of mistake, or accident.

A.S. testified that Matthews touched her vagina for twenty minutes during a tattoo session in which her boyfriend (Kyle) and his brother sat in the tattoo room next to her. Reportedly, people walked by intermittently and looked in through the open door. She first discussed equivocally that an inappropriate touching may have occurred when she got home with Kyle after the tattoo session. She told the police that she "can't say" whether penetration occurred. Matthews's counsel stated, regarding the purpose of calling Kyle to testify, that "[h]e would say, she's telling me she was so conflicted about whether or not it had happened because, you know, where he was and where the tattoo was located. She didn't want to accuse him of doing that. And then there is another quote that is, . . . the tattoo was in a spot . . . where she had thought that maybe he had just accidentally touched her." At Matthews's trial, however, A.S. testified that the touching "definitely happened," and answered affirmatively a question whether "[she was] 100 percent sure when [she] spoke with Kyle that the contact was intentional." The judge prevented Matthews's

counsel from attempting to impeach A.S. with her prior inconsistent statement to police, during her cross-examination and with a defense proffer to call Kyle as a witness to elicit the inconsistency through him.

The jury found Matthews guilty of a fourth degree sex offense against M.H. The State entered a *nolle prosequi* for the charges related to the three other women. Matthews was sentenced to imprisonment for 365 days. He noted a timely appeal, presenting the following questions for our consideration:

I. Did the trial court err when it allowed [a] government witness, [A.S.], the purported victim in an unrelated case, to testify to the alleged prior bad act of [] Matthews?

II. Did the trial court err when it did not allow defense counsel to use [A.S.]'s prior inconsistent statement to impeach her?

STANDARD OF REVIEW

> The standard of appellate review of an evidentiary ruling turns on whether the trial judge's ruling was based on a pure question of law, on a finding of fact, or on an evaluation of the admissibility of relevant evidence. Questions of law are reviewed without according the trial judge any special deference; findings of fact are assessed under a "clearly erroneous" standard; and an assessment of the admissibility of relevant evidence is reviewed under an abuse of discretion standard.

Brooks v. State, 439 Md. 698, 708, 98 A.3d 236, 241-42 (2014) (internal citations omitted).

On one hand, "[w]hen the trial judge's ruling involves a weighing [of both the probative value of a particular item of evidence, and of the danger of unfair prejudice that would result from the admission of that evidence], we apply the more deferential abuse of discretion standard [of review]." *Ruffin Hotel Corp. of Maryland v. Gasper*, 418 Md. 594, 620, 17 A.3d 676, 691 (2011) (quoting *J.L. Matthews, Inc. v. Maryland-Nat'l Capital Park*

& Planning Comm'n, 368 Md. 71, 92, 792 A.2d 288, 300 (2002)). On the other hand, when "the trial judge's ruling was based on a pure question of law," we review the decision without deference. *Brooks*, 439 Md. at 708, 98 A.3d at 242.

ANALYSIS

Matthews argues that: I) "[A.S.], the purported victim in an unrelated case, should not have been permitted to testify about [his] alleged prior bad act because the unfair prejudice of her testimony substan[ti]ally outweighed its probative value;" and, II) "the court erred in not allowing defense counsel to impeach [A.S.] using her prior inconsistent statements." (formatting changed to sentence-case). The State answers that: I) "to the extent preserved, the trial court properly exercised its discretion in admitting prior bad act evidence;" and, II) "the trial court properly declined to permit Matthews to impeach [A.S.] with her boyfriend's statement to police." (formatting changed to sentence-case). In his reply brief, Matthews retorts that: I) "as defense counsel's objection made clear, [A.S.], the purported victim in an unrelated case, should not have been permitted to testify both because her testimony was not probative and because it was unduly prejudicial;" and, II) "defense counsel was improperly prevented from impeaching [A.S.] with prior inconsistent statements she made to her boyfriend in which she expressed doubt about whether [] Matthews had done anything wrong." (formatting changed to sentence-case).

I. Matthews Preserved For Appellate Consideration Only the Third *Faulkner* Prong Regarding the Admissibility of Prior Bad Acts Evidence. The Trial Judge did not Abuse his Discretion by Finding that the Probative Value of A.S.'s Testimony Outweighed the Risk of Unfair Prejudice to Matthews.

A. Matthews Preserved Only the Probative Value vs. Risk of Prejudice Weighing Issue.

Maryland Rule 5-404(a)(1) states that "evidence of a person's character or character trait is not admissible to prove that the person acted in accordance with the character or trait on a particular occasion." Similarly, under subsection (b), "[e]vidence of other crimes, wrongs, or acts . . . is not admissible to prove the character of a person in order to show action in 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, or absence of mistake or accident."

> In *State v. Faulkner*, 314 Md. 630, 634–35, 552 A.2d 896, 898 (1989), [the Maryland Court of Appeals] set forth the three-step analysis a trial court must undertake to determine whether the admission of evidence of another crime is appropriate. [The Court] stated:
>
> > [The trial court] first determines whether the evidence fits within one or more of the *Ross* exceptions[, essentially the exceptions now found in Rule 5–404(b)]. That is a legal determination and does not involve any exercise of discretion.
> >
> > If one or more of the exceptions applies, the next step is to decide whether the accused's involvement in the other crimes is established by clear and convincing evidence. [The appellate court] will review this decision to determine whether the evidence was sufficient to support the trial judge's finding.
> >
> > If this requirement is met, the trial court proceeds to the final step. The necessity for and probative value of the "other crimes" evidence is to be carefully weighed against any undue prejudice likely to result from its admission. This segment of the analysis implicates the exercise of the trial court's discretion.
>
> *Id.* (citations omitted).

Wynn v. State, 351 Md. 307, 317–18, 718 A.2d 588, 593 (1998).

The State argues that Matthews objected at trial only to the third *Faulkner* factor with respect to A.S.'s testimony, the balancing of probative value against the risk of prejudice, rendering unpreserved the first two *Faulkner* inquiries. First, the State maintains that "when evidence has been contested in a motion in limine, an objection at the time the evidence is offered is generally still required." (citing *Boyd v. State*, 399 Md. 457, 924 A.2d 1112 (2007); Md. Rule 4-323(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."); *Reed v. State*, 353 Md. 628, 728 A.2d 195 (1999); and *Hickman v. State*, 76 Md. App. 111, 543 A.2d 870 (1988)). Second, the State recounts that "Matthews did not make a contemporaneous objection, but did seek a continuing objection," which "'is effective only as to questions clearly within its scope.'" (quoting MD. Rule 4-323(b)). The scope of Matthews's trial objection, that "we wanted to still renew our motion that it's not probative and it's outweighed by the [unintelligible]," preserved only the third *Faulkner* step.

In his reply brief, Matthews contends that the objection at trial encompassed two separate issues: "(1) that [A.S.]'s testimony should not be admitted because it was not probative; and (2) even if [A.S.]'s testimony could be considered to fit within one of the other crimes exceptions, the probative value of that testimony would be outweighed by its prejudicial effects. *Id.* (reflecting counsel's clear binary objection: 'it's not probative and it's outweighed.')."

We agree with the State that Matthews preserved for appellate consideration only step three of the *Faulkner* analysis. Certainly, step three requires the analysis of both probative value and the risk of unfair prejudice, but the fact that it is a balancing inquiry of two factors does not compel an inference that Matthews intended his objection to encompass also the first two *Faulkner* steps, whether the evidence fits an exception (such as intent, opportunity, common scheme or plan, or absence of mistake) and whether proof of the accused's involvement in the other crimes was clear and convincing.

B. The Trial Judge did not Abuse his Discretion in Determining the Probative Value of A.S.'s Testimony Outweighed its Risk of Unfair Prejudice to Matthews.

The trial judge determined, under the third *Faulkner* inquiry, that the probative value of A.S.'s testimony outweighed its risk of unfair prejudice to Matthews:

> The issue of prejudice is clear from the defense perspective, but it is the probative necessity of having that testimony come in, given the circumstances, given the similarities, given the clear absence of mistake, knowledge, motive, intent, opportunity, the circumstances surrounding the allegations between, they are so similar between [M.H.] and [A.S.], clearly support the evidence of [A.S.] being received in the trial involving [M.H.].

Our review of the trial judge's weighing of probative value versus the risk of prejudice is governed by the abuse of discretion standard. We hold that the judge did not abuse his discretion in determining that, given the similarity between the alleged experiences of A.S. and M.H., the testimony had more probative value than risk of unfair prejudice to Matthews's defense.

II. The Trial Judge Sustained Erroneously, however, the State's Objections to Defense Counsel's Attempts to Impeach the Credibility of A.S.'s Trial Testimony.

Shortly after her tattoo session with Matthews, A.S. told her boyfriend, Kyle, that she was unsure whether Matthews touched her inappropriately. At M.H.'s trial, however, she asserted that it "definitely happened." Defense counsel sought to impeach her trial testimony with her prior inconsistent statement:

> Counsel: It's only after you got home and you were home with him that you told him what you believed had happened right?
> A.S.: Yes, ma'am.
> Counsel: And when you talked to Kyle you were conflicted about what had happened, correct?
> A.S.: Correct.
> Counsel: And you were not sure whether the contact that you described to the jury today, you were not sure the contact was an intentional contact, correct?
> State: Objection.
> Court: Overruled.
> A.S.: I was sure that the contact definitely happened.
> Counsel: Correct, that's not my question.
> A.S.: Yes.
> Counsel: The question is, when you spoke to Kyle you told Kyle that you were not sure the contact was intentional, correct?
> A.S.: Not true, no.
> Counsel: Okay, so you were one hundred percent sure when you spoke with Kyle that the contact was intentional?
> A.S.: Yes, ma'am.
>
> * * *
>
> Counsel: Now I just want to make sure that you never said any of the following words I'm going to read to you to Kyle, okay?
> A.S.: Okay.
> State: Objection.
> Court: Sustained.
> Counsel: You never told Kyle –
> State: Objection.
> Court: Sustained.
> Counsel: Well your testimony today was that you never told Kyle that considering the location of where your tattoo was –
> State: Objection
> Court: Sustained.
> Counsel: You never used the word "accident?"

State: Objection.
Court: Sustained.
Counsel: Did you use to him the word –
State: Objection
Court: Sustained.

In his defense case, Matthews sought to call Kyle as a witness to elicit A.S.'s prior statements. Matthews's counsel proffered, regarding the purpose of calling Kyle to testify, that "[h]e would say, she's telling me she was so conflicted about whether or not it had happened because, you know, where he was and where the tattoo was located. She didn't want to accuse him of doing that. And then there is another quote that is, . . . the tattoo was in a spot . . . where she had thought that maybe he had just accidentally touched her." The judge prevented Kyle from testifying about these statements, however, reasoning that his testimony would elicit only his subjective interpretation of A.S.'s prior statements, not their objective nature.

Matthews argues that Kyle's earlier statement, however, demonstrated what A.S. said and thought at that time, not what Kyle felt or thought about her account to him of the event. The State counters that the trial judge denied properly the introduction of the prior inconsistent statements because the statements to be introduced were those of Kyle, not A.S.

Md. Rule 5-616, "Impeachment and Rehabilitation—Generally," states, "(a) Impeachment by Inquiry of the Witness. The credibility of a witness may be attacked through questions asked of the witness, including questions that are directed at: (1) Proving under Rule 5-613 that the witness has made statements that are inconsistent with the

witness's present testimony." Md. Rule 5-613, "Prior Statements of Witnesses," in turn, states:

> **(a) Examining Witness Concerning Prior Statement.** A party examining a witness about a prior written or oral statement made by the witness need not show it to the witness or disclose its contents at that time, provided that before the end of the examination (1) the statement, if written, is disclosed to the witness and the parties, or if the statement is oral, the contents of the statement and the circumstances under which it was made, including the persons to whom it was made, are disclosed to the witness and (2) the witness is given an opportunity to explain or deny it.
>
> **(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness.** Unless the interests of justice otherwise require, extrinsic evidence of a prior inconsistent statement by a witness is not admissible under this Rule (1) until the requirements of section (a) have been met and the witness has failed to admit having made the statement and (2) unless the statement concerns a non-collateral matter.

Md. Rule 5-613(a), therefore, conditions the admissibility of a witness's allegedly inconsistent prior statement on two requirements: first, counsel must present the witness with the statement during examination, and second, counsel must give the witness an opportunity to explain or deny it. Under subsection (b), two more elements, in addition to the two presented under subsection (a), must be satisfied to introduce extrinsic evidence of a prior inconsistent statement. These requirements are that the witness failed to admit having made the statement and the statement must concern non-collateral matters. The Court of Appeals, in *Brooks v. State*, 439 Md. 698, 716–17, 727, 98 A.3d 236, 246–47, 252 (2014), explained these rules as a four-part "checklist," and added that "a witness may not be impeached with extrinsic written evidence of a prior allegedly inconsistent oral

statement, unless the written evidence is a substantially verbatim version of the oral statement or was previously acknowledged by the witness as an accurate version."

Based on the trial transcript sections quoted earlier, we perceive that the trial judge thwarted Matthews's counsel's attempts to establish adherence to the requirements of Md. Rule 5-613(a). Assuming that A.S.'s testimony was inconsistent with her prior statement to Kyle, the judge prevented defense counsel from pursuing "the contents of the statement and the circumstances under which it was made." Had the judge permitted the line of inquiry initiated by Matthews's counsel, A.S. could have explained or denied more fully the prior statement. The decision whether to admit evidence under Md. Rule 5-613(a) is purely a question of law, involving no comparative, discretionary analysis of probative value versus the risk of prejudice, and only a two-part checklist with which Matthews's counsel attempted to engage. We review the trial judge's decision, therefore, without deference, and hold that he erred in preventing the examination of A.S. regarding her prior potentially inconsistent statement.

The judge erred similarly in preventing Kyle's proffered testimony about A.S.'s prior inconsistent statement. A.S. "failed to admit having made the statement" when she said, "No, not true," in response to defense counsel's inquiry about her prior statement to Kyle that she was not sure whether the alleged contact was intentional. The prior statement was not collateral to the issues because it addressed directly the likelihood of the key question at trial—whether Matthews assaulted similarly M.H. In contrast to the trial judge's determination during cross-examination of A.S., Kyle's testimony would not have

pertained merely to his interpretation of A.S.'s prior statement to him. Defense counsel sought Kyle's account of what A.S. told him. Kyle used language in his interview with the police that attributed the statements to A.S., such as, "she's telling me . . . ," that indicated he was reporting what A.S. told him, not merely his subjective interpretation of A.S.'s statements or thinking. We hold that the trial judge erred as a matter of law in barring Kyle's testimony about A.S.'s prior potentially inconsistent statement.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED; CASE REMANDED FOR A NEW TRIAL. COSTS TO BE PAID BY MONTGOMERY COUNTY.