

Circuit Court for Wicomico County
Case No. C-22-CR-23-000147

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2231

September Term, 2023

ROBERT SHERRILL HILL, JR.

v.

STATE OF MARYLAND

Reed,
Zic,
Albright,

JJ.

Opinion by Reed, J.

Filed: September 5, 2025

* 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).

In March 2023, the State of Maryland filed a thirty-five-count indictment against Robert Sherrill Hill, Jr., the Appellant, in the Circuit Court for Wicomico County, for charges of sexual abuse of a minor and related offenses based on his alleged assault of his granddaughter. The circuit court held hearings and granted the State’s motion in part to enter sexual propensity evidence under Courts & Judicial Proceedings Article § 10-923. The case was heard by a jury on October 4 and 5, 2023, and at the end of the trial, the jury convicted the Appellant of one count of sexual abuse of a minor (by a family member), one count of sexual abuse of a minor (temporary responsibility), two counts of second-degree rape, three counts of third-degree sex offense, three counts of fourth-degree sex offense, and four counts of second-degree assault. On December 21, 2023, and the court sentenced the Appellant to an aggregate sentence of 75 years of incarceration. On January 19, 2024, the Appellant timely appealed his case.

In bringing his appeal, Appellant presents three questions for appellate review:

- I. Did the motions court err by admitting sexual propensity evidence under Courts & Judicial Proceedings Article § 10-923?
- II. Did the trial court err by permitting J.M. to testify about the effect the assault has had on her life, where this is not “evidence of . . . sexually assaultive behavior” under § 10-923?
- III. Did the motions court abuse its discretion by granting the State’s postponement request where the reason for the request was to circumvent the deadline provision of § 10-923?

For the following reasons, we reverse and remand the judgment of the Circuit Court for Wicomico County.

FACTUAL & PROCEDURAL BACKGROUND

The allegations of sexual abuse in the case came from A.A., the Appellant's granddaughter. At the time of trial, A.A. was twelve years old. During the relevant years, A.A. lived in Delmar, Maryland with her mother, A.W., her stepfather and, sometimes, her stepsiblings. A.A. testified that the Appellant would visit her house every two or three months and stay for a night or a weekend. During some of these visits, the Appellant would occasionally babysit A.A. The Appellant would be with his girlfriend or one of A.A.'s sisters as well.

A.A. testified that the Appellant began touching her when she was eight years old. She testified the touching happened every time the Appellant visited her, which she estimated to be about ten times between when she was eight and ten years old. When asked where she was touched, A.A. circled the vagina on a diagram of the human body. Usually, the incidents happened in her bedroom.

During the first incident, A.A. was in her bedroom when the Appellant walked in. A.A. was on her bed and the Appellant approached her bed and then touched her vagina with his hand beneath A.A.'s clothes. Within ten minutes, the Appellant then stopped and left the bedroom. There was another incident testified to in which A.A. was nine and she was in the living room of her house. She was sitting on the couch and was under a blanket sitting next to the Appellant, when the Appellant touched her again in the same area. A.A. testified that the final incident occurred on Christmas Day in 2021 when A.A. was in her bedroom. The Appellant entered the bedroom again and tried to touch her when she pushed the Appellant off of her. The Appellant then got up and walked away.

In mid-February 2023, A.A. told her friends about what happened to her. After that, the police and Child Protective Services began investigating the case. A.A. met with Amanda Mumma, a social worker for the Wicomico County Child Advocacy Center. Mumma interviewed A.A. on March 10, 2023. Detective Matthew Rockwell of the Salisbury Police Department then interviewed A.W. Detective Rockwell then asked A.W. to conduct a phone sting against the Appellant, where the police would record the phone call between the two. When A.W. asked the Appellant about what A.A. might have been talking about, the Appellant said, “I don’t know, it was messed up . . . I put my hand down in the wrong spot. . . . It was—it was an accident. I didn’t mean to do it.” When Detective Rockwell then interviewed the Appellant, he said that he did not do anything to A.A. “but we were wrestling around and one time I touched her thing and it wasn’t on purpose” He said that the touching only occurred one time, but even then, he did not touch A.A.’s vagina or under her clothes.

On March 24, 2023, the Appellant was charged in the Circuit Court for Wicomico County with a thirty-five-count indictment. The Appellant was charged with two counts of sex abuse of a minor who is a family member, one count of sex abuse of a minor, two counts of rape in the second degree, ten counts of a sexual offense in the third degree, ten counts of a sexual offense in the fourth degree, and ten counts of assault in the second degree.

On June 5, 2023, the State made a motion of intent to introduce evidence of the Appellant’s prior sexually assaultive behavior pursuant to Maryland Code, Courts and Judicial Proceedings § 10-923. The State intended to offer two pieces of prior behavior:

(1) the testimony of A.W., A.A.’s mother, about an incident from her childhood in which the Appellant touched her inappropriately, and (2) the testimony of J.M., a childhood friend of A.W., regarding an assault that occurred while J.M. was staying at the Appellant’s trailer.

The Circuit Court held a motions hearing on the issue on July 28, 2023. At the start of the hearing, the State noted that § 10-923 has a 90-day notice requirement and requested that the trial date be moved back in order to comply with that date. Trial was originally set for August 1 and 2, 2023. The State noted that Appellant’s counsel said he would not object to postponing the trial date to comply with the 90-day requirement. Appellant’s counsel pointed out his client’s right to a speedy trial and the court’s need to comply with the *Hicks* deadline, which was October 8, 2023. Appellant’s counsel noted that “to the extent that the [trial c]ourt obligate[s] the [Appellant] to proceed to trial with the State using that evidence [under § 10-923], we would be objecting on timeliness grounds.” The Court granted the postponement request. The State proposed the new trial date of October 4 and 5, 2023, which the parties and the court accepted. At the hearing, J.M. and A.W. testified to their assaults by the Appellant.

On August 18, 2023, the parties made arguments as to the admissibility of the evidence under § 10-923. The Appellant, pointing to the recently decided *Woodlin v. State*, 484 Md. 253 (2023), opinion argued that J.M.’s assault was not proven by clear and convincing evidence and was not sufficiently similar to the current case for the evidence to be probative. The motions court found that J.M.’s testimony was being offered to rebut an expressed or implied allegation that A.A. fabricated the sexual offense and that the

Appellant had an opportunity to confront and cross-examine J.M. and A.W., who corroborated J.M.’s testimony. The court found that J.M. was a credible witness who had enough recollection about the specific facts. By contrast, the motions court determined that A.W.’s testimony about her own assault did not have sufficient evidence of “credible facts that are distinctly remembered and remembered in due order.” As a result, A.W.’s testimony on her assault was excluded from evidence. The motions court concluded that J.M.’s assault was proven by clear and convincing evidence. The court concluded by stating: “in this case that the probative value of that evidence is not substantially outweighed by the danger of unfair prejudice, and the Court would find that the testimony as it relates to the incident involving [J.M.] would be admissible at trial under 10-923.” Neither party objected to this ruling and the hearing concluded.

The case was heard by a jury on October 4 and 5, 2023. At the trial, A.A. testified to the alleged abuse she suffered, described above. J.M. took the stand to describe the Appellant’s assault. She testified that she was childhood friends with A.W. When she was twelve, she stayed over at the Appellant’s trailer for a weekend with A.W. On Saturday night, J.M. and A.W. were smoking and drinking and the Appellant was giving the girls shots of tequila. J.M. recalled them both having seven shots of tequila. J.M. said she fell asleep on the recliner and then woke up being carried by the Appellant over his shoulder into the back bedroom of the trailer. During A.W.’s testimony, she recalled that J.M. and the Appellant disappeared together towards the end of the night. J.M. described the Appellant being on top of her without her shirt on as he kissed or licked her breasts and stomach area. She tried to push him off and told him to stop, but she felt like she could not

control her arms. J.M. remembered his head being close to her pelvic area but she could not be sure whether she was wearing pants. She recalled the Appellant telling her, “Please don’t tell on me.” The next morning, she woke up wearing someone else’s bra and her nipples had blood on them.

Later in the direct, the State asked J.M. whether the assault affected her over the years. J.M. responded that she had been diagnosed with PTSD and hooked on hard drugs to try and stop the flashbacks. When the State asked a follow-up question, the Appellant objected and argued that the line of questioning was not relevant. The State argued that the line of questions went to the credibility of the witness. The trial court overruled the objection, and the State asked whether the incident affected J.M.’s personal life. J.M. answered a follow-up question that sex has become weird for her and a struggle, even with her fiancé.

Lastly, the Appellant testified in his own defense. He denied touching A.A. inappropriately. He admitted to one incident in the living room in 2020 where he accidentally touched A.A.’s private parts over her clothes while they were “playing around and tickling.” The Appellant denied any other instances of touching A.A.’s vagina. The Appellant also recalled J.M. staying at his trailer, but he denied providing J.M. and A.W. alcohol and denied touching J.M. in his bedroom.

At the end of the trial, the jury convicted the Appellant of one count of sexual abuse of a minor (by a family member), one count of sexual abuse of a minor (temporary responsibility), two counts of second-degree rape, three counts of third-degree sex offense,

three counts of fourth-degree sex offense, and four counts of second-degree assault.¹ Sentencing was held on December 21, 2023, and the court sentenced the Appellant to an aggregate sentence of 75 years of incarceration. On January 19, 2024, the Appellant timely appealed his case.

DISCUSSION

Admission of Sexual Propensity Evidence

A. Parties' Contentions

The Appellant argues that the circuit court erred when it admitted testimony from J.M. detailing prior sexually assaultive behavior by the Appellant. The Appellant argues that the probative value of J.M.'s testimony was substantially outweighed by the danger of unfair prejudice because J.M.'s assault was not similar to A.A.'s assault, close in time to the current case, or frequent. The Appellant further contends that the circuit court failed to exercise its discretion in determining whether the testimony was admissible after the court determined that the statutory criteria were met.

The State first argues that this issue is partially unpreserved because the Appellant did not alert the circuit court to the need to make a second explicit determination on the probative versus prejudicial balancing test. The State then argues that if the issue is preserved, the trial court properly exercised its discretion. The State explains that there were sufficient similarities between the two cases and as a result J.M.'s assault was highly

¹ The trial court granted motions for judgment of acquittal after the State rested its case as to the counts of sex abuse of a minor by a household member, seven counts of third-degree sex offense, seven counts of fourth-degree sex offense, and six counts of second-degree assault.

probative for the current case.

B. Standard of Review

The statute controlling the admission of prior sexually assaultive behavior uses the balancing test to exclude evidence if its probative value is substantially outweighed by a danger of unfair prejudice. *See Woodlin v. State*, 484 Md. 253, 268 (2023) (citing Md. Code, Cts. & Jud. Proc. § 10-923(e)(4)). We review the circuit court’s determination under that balancing test using the abuse of discretion standard. *Id.* (citing *Dejarnette v. State*, 478 Md. 148, 175 (2022)). Under this standard, “the trial court’s decision must be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable” to warrant a reversal. *Id.* at 277 (quoting *State v. Matthews*, 479 Md. 278, 305 (2022)). An abuse of discretion will occur when “no reasonable person would take the view adopted by the circuit court.” *Id.* (quoting *Williams v. State*, 457 Md. 551, 563 (2018)).

C. Analysis

Generally, the Rules of Evidence and common law in Maryland prohibit the use of character evidence “to show a person’s propensity to act in accordance with their character traits or prior bad acts.” *Woodlin*, 484 Md. at 261. This rule attempts to prevent the admission of evidence that could allow the jury to believe “that the defendant is a bad person ‘who should be punished regardless of [their] guilt of the charged crime, or to infer that [they] committed the charged crime due to a criminal disposition.’” *Id.* at 265 (quoting *Thompson v. State*, 412 Md. 497, 503 (2010)).

One exception to the general rule against the admission of character evidence is

evidence of similar sexual acts in the prosecution of sex crimes. *Id.* at 266–67. In *Vogel v. State*, the Supreme Court of Maryland held that there was a “‘sexual propensity’ exception to the rule excluding evidence of other crimes.” 315 Md. 458, 462 (1989). In a later case, the Supreme Court declined to extend *Vogel*’s ruling to similar sexual acts committed against someone other than the victim in the particular prosecution, stating that the extension required the General Assembly to act or a change in the rules of evidence. *Woodlin*, 484 Md. at 266 (citing *Hurst v. State*, 400 Md. 397, 415 (2007)). The General Assembly then extended *Vogel*’s holding through a new statute governing the admissibility of similar sexually assaultive behavior. *Id.* at 267 (citing Md. Code, Cts. & Jud. Proc. § 10-923).

The Maryland Rules of Evidence state that in prosecutions for sexually assaultive behavior, “evidence of other sexually assaultive behavior by the defendant occurring before or after the offense for which the defendant is on trial may be admitted in accordance with [Md. Code, Cts. & Jud. Proc.] § 10-923.” Md. Rule 5-413. Courts and Judicial Procedure section 10-923 defines “sexually assaultive behavior” as acts that constitute any of a list of sexual crimes, including sexual abuse of a minor. Md. Code, Cts. & Jud. Proc. § 10-923(a)(2). The statute directs circuit courts to hold a hearing to determine whether evidence of sexually assaultive behavior is admissible. *Id.* at § 10-923(d). To admit that evidence, the court must find and state 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.

Id. at § 10-923(e)(1)–(4). All four of these criteria must be satisfied before the court may admit the evidence. *Woodlin*, 484 Md. at 268. However, even if these four criteria are satisfied, the circuit court still has discretion on whether to admit the evidence, as the evidence may be inadmissible for other reasons. *Id.* at 268–69. As the *Woodlin* court said, the circuit court “will always exercise discretion at least once (in determining whether the State can satisfy subsection (e)(4)) and potentially twice (in determining whether to admit the evidence after it finds that the State has satisfied, if indeed it has, subsections (e)(1)–(4)).” *Id.* at 269.

The balancing test in subsection (e)(4) is the same as the balancing test set out Maryland Rule 5-403, which excludes evidence if the danger of unfair prejudice substantially outweighs its probative value. Md. Rule 5-403. This standard does not mean that prejudicial evidence is excluded just because it harms one party’s case. *Montague v. State*, 471 Md. 657, 674 (2020) (citing *Burris v. State*, 435 Md. 370, 392 (2013)). A piece of evidence will fail the balancing test if its prejudicial value “tends to have some adverse effect . . . beyond tending to prove the fact or issue that justified its admission.” *Woodlin*, 484 Md. at 265 (quoting *Montague*, 471 Md. at 674).

In making the determination of whether evidence is admissible under subsection (e)(4), the *Woodlin* court suggested various factors that circuit courts may consider. *Id.* The Court in *Woodlin* began its analysis of these factors by noting that “it generally is

incumbent upon the parties to argue any factor they deem relevant or applicable” and in order to argue on appeal that a factor was weighed or considered, the party must have brought that particular factor to the circuit court’s attention. *Id.* at 283. Factors for the probative value of the evidence include the similarity or dissimilarity of the acts, temporal proximity and intervening circumstances, and the frequency of sexually assaultive behavior. *Id.* at 284–87. Factors for the prejudicial value of the evidence included whether the new evidence would overshadow the crime charged and the jury’s knowledge that a defendant was or was not punished for the act. *Id.* at 287–89. Finally, if the State has satisfied § 10-923(e)(1)–(4), to determine whether the evidence is admissible the *Woodlin* Court said a circuit court could also consider the parties’ need for the evidence, the clarity with which the State can prove the other behavior, and the means by which the State will prove the other behavior. *Id.* at 289–91. None of these factors are mandatory and *Woodlin* said that courts will be better served in analyzing subsection (e)(4) if they have “the very same latitude and discretion they have in making similar determinations under Maryland Rule 5-403’s balancing test.” *Id.* at 282.

Turning to this case, the Appellant was accused of sexual abuse of a minor, so this case involved a prosecution falling under § 10-923. The circuit court held a hearing on June 5 and August 18, 2023, to determine the admissibility of the State’s evidence of the Appellant’s alleged prior sexually assaultive behavior under § 10-923(d). At the hearing, the court analyzed each of the subsections of § 10-923(e) and found each prong was met by J.M.’s testimony. The court found that J.M.’s testimony was being offered to rebut an expressed or implied allegation that A.A. fabricated the sexual offense and that the

Appellant had an opportunity to confront and cross-examine J.M. The court found that J.M. was a credible witness and that J.M.’s assault was proven by clear and convincing evidence through her testimony and the corroborating evidence from A.W.’s testimony. The court concluded by stating: “in this case that the probative value of that evidence is not substantially outweighed by the danger of unfair prejudice, and the Court would find that the testimony as it relates to the incident involving [J.M.] would be admissible at trial under 10-923.” The court made a finding on the record of each of the requirements of subsection 10-923(e) and then determined that J.M.’s testimony would be admitted.

The Appellant argues that J.M.’s testimony was admitted in error because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. At the motions hearing, the Appellant argued there were differences between J.M.’s alleged assault and A.A.’s alleged assault. This included that the victims were disparate ages, with J.M. being 12, which was older than A.A. during the entire relevant time period. Additionally, the Appellant argued the conduct in both assaults differed as A.A. alleged that the Appellant touched her vagina with his hand while J.M. alleged that the Appellant was touching her breasts, but she was not as confident whether he touched her vagina. The Appellant pointed out that the assault was remote in time and distinct in character compared to the current allegations since it was a single event that occurred over two decades prior to A.A.’s alleged assaults. The Appellant also pointed out the difference in the frequency of the events, as J.M.’s assault was a single event, unlike the multiple events alleged by A.A. Lastly, the Appellant said that the allegations would “tend to overwhelm the evidence for which [the Appellant] will actually be put on trial.” The

Appellant’s brief expanded on this argument to say that J.M., as an adult witness, could be more compelling in describing her assault and in articulating the effect the assault had on her life, which is discussed below in the next issue. Based on these factors, the Appellant argues that J.M.’s testimony should not have been admitted as being substantially more prejudicial than it was probative.

In *Woodlin*, the Supreme Court of Maryland dealt with the same question as to whether the circuit court abused its discretion in admitting prior sexually assaultive behavior. The defendant was accused of performing fellatio on his grandson while staying over at his daughter’s house and touching his grandson’s butt. *Woodlin*, 484 Md. at 270. The State wanted to introduce evidence of a conviction from 2010 in which the defendant inserted a broomstick and vacuum hose into an unconscious male adult’s rectum. *Id.* at 271–72. The defendant highlighted differences between the two cases including the type of sexual act, the use of foreign objects, the age and relationship of the victim, and the consciousness of the victim. *Id.* at 292. The Supreme Court of Maryland held that they could not say the motions court abused its discretion when the court concluded that the events were “consistent enough” after focusing on the lack of consent in both cases. *Id.* at 293. Given the high bar of the standard of abuse of discretion, the Court ruled that it could not “say that no reasonable person would have concluded as the motions judge did” and the prior conviction was properly admitted into evidence. *Id.* (citing *Williams*, 457 Md. at 563).

The assaults alleged in this case were more similar than those in *Woodlin*. In *Woodlin*, the assault at issue involved a minor and the prior conviction involved an adult,

while in this case, even though the ages of the victims differed, both were minors. The assaults in *Woodlin* differed because one involved foreign objects while the other involved fellatio. Here, both assaults involved the Appellant touching intimate parts of the victims' bodies, with J.M. alleging her breast area being touched and A.A. alleging her vagina being touched. Beyond the acts themselves, there were greater similarities in how the Appellant used the relationship with his daughter to access both victims, where one was a friend of his daughter and the other was his granddaughter. These similarities in the Appellant's actions meant J.M.'s testimony had a higher probative value. *Woodlin* is similar to this case in terms of the frequency of the assaults as the prior sexually assaultive behavior in both cases only occurred once. A greater frequency can make a defendant's behavior more probative, *Woodlin*, 484 Md. at 287, but that does not mean that a single event is without any probative value. The prior assault in *Woodlin* was closer in time to the proceedings there with a nine-year gap versus the approximately two decades gap in this case.

The Supreme Court of Maryland found that the two assaults in *Woodlin* were “consistent enough” to find the danger of unfair prejudice did not substantially outweigh the probative value of the prior behavior. Here, the cases are more consistent than they were in *Woodlin*, even if they were more remote in time, which means the prior sexually assaultive behavior is more probative in this case than it was in *Woodlin*. As it relates to the danger of overwhelming the evidence, that factor concerns the “inflammatory character of the evidence.” *Id.* at 288. Here, we cannot conclude that J.M.'s assault was significantly more heinous than the current case, especially given the similarities between the assaults discussed above. While the additional assault is certainly prejudicial against the Appellant,

it does not have sufficient “inflammatory character” to make it *unfairly* prejudicial in a manner that warrants exclusion. Both alleged assaults having minor victims, victims who did not consent to being touched, victims who the Appellant touched in their intimate areas, and the Appellant using his daughter to access the victims in both cases. As a result, we hold that the trial court did not abuse its discretion in determining that the danger of unfair prejudice did not substantially outweigh the probative value of J.M.’s prior assault.

The Appellant’s final argument on this issue is that the circuit court failed to exercise its discretion in determining whether J.M.’s testimony was admissible beyond its compliance with the criteria set out in (e)(1)–(e)(4). This relates to the additional admissibility factors discussed above such as the need for the testimony and the clarity and manner of proof. The State argues that at the motions hearing, the Appellant never argued that the probative value of J.M.’s testimony was substantially outweighed by the danger of unfair prejudice. “[I]t generally is incumbent upon the parties to argue any factor they deem relevant or applicable” at the motions stage to preserve an argument on any particular factor, and here the additional factors related to admissibility like the need for the testimony were not argued before the motions court. *Woodlin*, 484 Md. at 283. As a result, the trial court had no burden to explicitly discuss the factors.

Further, the motions court does not need to explain “every thought and step of logic in weighing its considerations.” *Green v. State*, 259 Md. App. 341, 361 n.11 (2023) (quoting *Ridgeway v. State*, 140 Md. App. 49, 69 (2001)). “[A]bsent a misstatement of law or conduct inconsistent with the law, a trial judge is presumed to know the law and apply it properly.” *Id.* (quoting *Medley v. State*, 386 Md. 3, 7 (2005)) (internal quotations

omitted). Here, we presume that the motions court properly weighed the considerations under § 10-923 and there is no evidence on the record to show conduct inconsistent with the statute or *Woodlin*. As a result, we presume that the motions court properly weighed whether the evidence was generally admissible after analyzing the subfactors in § 10-923(e).

The motions court did not abuse its discretion in admitting the testimony of J.M. to discuss the Appellant's prior sexually assaultive behavior. The motions court made findings on the record as to the statutorily required factors in subsection § 10-923(e). While the Appellant has brought up differences between J.M.'s assault and the allegations from A.A., given the similarities in the manner of the assaults, we do not hold that the differences were controlling or rendered J.M.'s testimony substantially more prejudicial than probative.

Testimony on Effect of Assault

A. Parties' Contentions

The Appellant argues that the trial court erred in admitting J.M.'s testimony about the effect the Appellant's assault had on her life. The Appellant says that the testimony does not fall under § 10-923 since the impact of sexual abuse is not included in the statute. Further, the Appellant argues the testimony was unfairly prejudicial because it would have allowed the jury to feel sympathy for J.M. that was not a proper consideration in the case.

The State argues that the trial court properly exercised its discretion in admitting J.M.'s testimony about the assault's effect on her. The State argues that the evidence was relevant to support J.M.'s credibility and was not unfairly prejudicial. The State argues

that if the admission of the evidence was in error, that error was harmless for some of the offenses based on the Appellant’s testimony and other admissions.

B. Standard of Review

Whether evidence is relevant is a legal determination subject to *de novo* review. *DeLeon v. State*, 407 Md. 16, 20–21 (2008). “When evidence is relevant, this Court gives wide latitude to judges’ decisions on its admissibility.” *Id.* at 21. Whether evidence violates the balancing test under Rule 5-403, as stated above, is reviewed for abuse of discretion. *Woodlin*, 484 Md. at 277. Under that standard, “[r]eversal should be reserved for those rare and bizarre exercises of discretion that are, in the judgment of the appellate court, not only wrong but flagrantly and outrageously so.” *Thomas v. State*, 213 Md. App. 388, 413 (2013) (quoting *Oesby v. State*, 142 Md. App. 144, 167–68 (2002), *cert. denied*, 369 Md. 181 (2002)).

C. Analysis

The only reported opinion currently addressing the scope of evidence that may be admitted under § 10-923 is this Court’s decision in *Woodlin v. State*, 254 Md. App. 691 (2022), *aff’d* 484 Md. 253 (2023). After concluding the issue was not preserved,² this Court

² Since the argument was unpreserved, this Court’s statements on the matter constitute judicial *dicta*. “Judicial *dictum* is generally defined as an opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision.” *State v. Baby*, 404 Md. 220, 278 (2008) (Raker, J., concurring and dissenting in part) (quoting David Coale & Wendy Couture, *Loud Rules*, 34 Pepp. L. Rev. 715, 727–28 (2007)) (internal quotations removed). “Unlike ordinary *dicta*, judicial *dicta* [are], by definition, well-reasoned and stated only after the court has investigated an issue with care. Accordingly, courts afford judicial *dicta* greater

attempted to determine the scope of admissibility under § 10-923. *Id.* at 713. We looked to analogies in the federal sexual propensity exceptions and the Maryland exceptions to prior crime evidence under Rule 5-404(b). *Id.* This Court concluded that:

[F]or the jurors to be able to determine how probative [defendant's] 2010 conviction was of the likelihood that he sexually abused [the victim] in 2019, they had to know something about the similarity or dissimilarity between the offenses. Some degree of detail was, therefore, necessary to establish a factual basis on which the jury could compare and contrast the current allegations with the prior sexually assaultive behavior. Moreover, were we to omit the potentially prejudicial details that establish the relevance of prior sexually assaultive behavior, we might, in fact invite the jury to assume the worst. Without details, jurors would be left to speculate as to the nature and circumstances of the offense and could draw all manner of conclusions.

Id. at 714. Based on this reasoning, this Court said the trial court did not abuse its discretion in admitting details of the prior sexually assaultive behavior. *Id.*

The *Woodlin* court cited to two supportive cases where details of a prior sexual assault were admitted. *Id.* at 713–714. In the first, *Cousar v. State*, 198 Md. App. 486 (2011), details that the victim in an unrelated incident “encountered appellant through Craigslist, appellant requested oral sex without a condom, he produced a gun, and that money had been exchanged” were admitted under the intent or absence of mistake exception of Maryland Rule 5–404(b). *Id.* at 495; 510–11. The Court agreed that additional

deference than ordinary *dicta*, treating judicial *dicta* almost like holdings.” *Id.* at 279 (quoting Coale & Couture, *supra*, at 727–28).

The issue of the scope of § 10-923 and whether “salacious” details were admitted were argued before this Court in *Woodlin*, and this Court then came to a conclusion on the scope. *Woodlin*, 254 Md. App. at 712–13. The Supreme Court of Maryland agreed that the issue was not preserved for appellate review. *Woodlin*, 484 Md. at 293–94. The Supreme Court of Maryland did not address this Court’s statements on the scope of the admission of evidence. *Id.* As a result, we are left with the judicial *dicta* of this Court to guide us on this issue.

details were needed “[t]o demonstrate the non-accidental nature of the act.” *Id.* at 514. The second case, *United States v. LeMay*, 260 F.3d 1018 (9th Cir. 2001), reversed the district court limiting the prosecution to just proving the fact of a prior conviction for rape because “[t]he relevance of the prior act evidence was in the details.” *Id.* at 1029. The prior conviction for the defendant “sexually abusing his young relatives, by forced oral copulation, while they were in his care” required the jury hearing the details in order to show the similarities to the current case. *Id.* at 1029–30.

The additional details offered by J.M. in this case differ from these prior cases. In these prior cases, the additional details were necessary to prove the relevance of the prior events under the exception to character evidence. In *Cousar*, the details were needed to show the absence of a mistake and in *LeMay* the details were needed to show the similarities of the prior abuse. Here, the additional details about the effects of the assault did not contribute to the “similarity or dissimilarity between the offenses” as they did in *Woodlin*. 254 Md. App. at 714. Whether or not J.M. had lingering traumatic effects from her assault did not aid the jury in comparing her assault to the present case. The comparison came from J.M. detailing the facts of the assault itself, which we analyzed above.

Even though this case differs in the kind of details being offered, in sexual offense trials, the victim’s conduct after the alleged sexual assault has been held to be relevant. *Parker v. State*, 156 Md. App. 252, 273 (2004). In *Parker v. State*, the State offered evidence about how the victim’s behavior changed following an alleged rape, including needing to sleep in her grandmother’s bed, being taken out of school out of fear of her alleged rapist, and eventually moving to another state. *Id.* at 257–58. The appellant in

Parker argued that the evidence was too ambiguous to be relevant. *Id.* at 267. This Court compared the case to using post-crime behavior against a defendant because it may “tend[] to show [the defendant’s] consciousness of guilt.” *Id.* at 271 (quoting *Snyder v. State*, 361 Md. 580, 593 (2000)). As the Court wrote, “[i]f the commission of a crime can be expected to leave some mental traces on the criminal perpetrator, surely it must also leave its mark on the victim.” *Id.* The Court supported its reasoning with cases from states around the country that had similarly concluded that changes to the victim’s behavior after an alleged assault were circumstantial evidence of rape or a lack of consent. *Id.* at 271–73 (collecting cases). The Court concluded that the victim’s change in behavior was circumstantially relevant to rebutting the appellant’s argument that he had consensual sex with the victim. *Id.* at 273. As the Supreme Court of South Carolina phrased it when facing a similar issue: “mental trauma is relevant to prove the elements of criminal sexual conduct, including the lack of consent. Evidence of behavioral and personality changes tends to establish or make more or less probable that the offense occurred.” *State v. Alexander*, 401 S.E.2d 146, 149 (S.C. 1991).

Parker and the cases it cites differs from this case because the evidence in *Parker* concerned a change in behavior in the victim of the crimes charged in the case, while this case involves a change in behavior from a third-party to the current prosecution. However, the purpose of the evidence remains the same. J.M.’s testimony of the effect of the Appellant’s assault is circumstantially relevant to the argument that she did not fabricate the Appellant’s sexual offense.

Putting these two lines of cases together, the evidence of post-assault behavior by a

third-party is not necessarily admissible as an additional detail under § 10-923 because the evidence does not directly prove the sexually assaultive behavior that is covered by that rule, however the evidence could tend to support that the third party's sexual assault was not consensual or fabricated, which in turn rebuts an allegation that the central victim in a case's sexual assault was not consensual or fabricated. As a result, a third-party's post-assault change in behavior may be relevant if properly offered within the confines of § 10-923.

Under § 10-923(e), the evidence must be offered to “[p]rove lack of consent” or “[r]ebut an express or implied allegation that a minor victim fabricated the sexual offense.” Md. Code, Cts. & Jud. Proc. § 10-923(e)(1). J.M. was a minor victim in this case, as the assault she alleged by the Appellant occurred when she was twelve, and therefore she could not consent to sexual contact. *See* Md. Code, Crim. Law § 3-307(a)(3) (barring someone from “engag[ing]in sexual contact with another if the victim is under the age of 14 years, and the person performing the sexual contact is at least 4 years older than the victim.”). Therefore, J.M.’s testimony could only go towards rebutting an allegation that a minor victim fabricated the sexual offense.

By rebutting an allegation that J.M. fabricated a sexual offense and therefore that A.A. fabricated the sexual offense, the prior details would be relevant for the purpose of establishing J.M.’s credibility before the jury. “[A] witness’ credibility is **always** relevant.” *Devincentz v. State*, 460 Md. 518, 551 (2018) (citing *Smith v. State*, 273 Md. 152, 157 (1974)) (emphasis in original). At trial, the Appellant attacked the credibility of J.M. and her testimony. In opening statements, the Appellant previewed J.M.’s testimony and

mentioned how “[n]o charges were ever filed” and there was “[n]o investigation to ferret out what was real or not.” The Appellant said “[t]here is no independent way to verify anything about this event other than J.M.” On J.M.’s cross-examination, the Appellant impeached J.M. with her prior convictions for distribution of marijuana and felony theft. Therefore, J.M.’s testimony about her behavioral changes is probative of the fact that the alleged sexual offense by the Appellant did in fact occur and rebuts the Appellant’s comments that J.M. fabricated her assault by the Appellant, though the issue of whether or not J.M.’s assault occurred is not central to the case.

Finding that this evidence of J.M.’s subsequent actions was minimally probative, we turn to the Appellant’s argument that the trial court erred in admitting this evidence because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. The Appellant argues that the prejudicial effect of this testimony was to create sympathy for J.M. and a desire to punish the Appellant for what happened to J.M. As the *Woodlin* court acknowledged, a jury being told that prior sexually assaultive behavior resulted in a conviction makes “it is less likely to be swayed by the notion that the defendant previously escaped punishment.” 484 Md. at 288. Just because the prior behavior did not result in a conviction does not “automatically . . . weigh[] in favor of excluding evidence of the other sexually assaultive behavior.” *Id.* at 289. Here, there was no conviction or prosecution of the Appellant for J.M.’s alleged assault. As a result, the evidence of a prior unpunished assault increased the risk that “the defendant escaped punishment in the past” and increased the likelihood that the jury will “convict merely to punish the defendant for past criminal acts[.]” *Id.* at 288.

The State argues that this risk of sympathy was harmless because the trial court provided instructions to the jury that the jury “should not be swayed by sympathy, prejudice, or public opinion.” It is true that “[w]e assume that jurors follow a judge’s instructions.” *State v. Stringfellow*, 425 Md. 461, 475 (2012) (citing *Alston v. State*, 414 Md. 92, 108 (2010)). However, “general jury instructions . . . tend to have [a] relatively attenuated curative effect.” *Id.* The general curative instruction would have had a relatively attenuated curative effect that does not resolve the risk of prejudice.

Given the minimal probative value of J.M.’s testimony and the clear risk of unfair prejudice based on the jury sympathizing with J.M. against the Appellant, we hold that the trial court erred in admitting J.M.’s post-assault testimony.

Because we find that the trial court erred in admitting the post-assault testimony of J.M., we must determine whether that error was harmless. “[U]nless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed ‘harmless’ and a reversal is mandated.” *Dionas v. State*, 436 Md. 97, 108 (2013) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)). This Court must “be satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.” *Id.* (quoting *Dorsey*, 276 Md. at 659). “To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record.” *Bellamy v. State*, 403 Md. 308, 332 (2008) (quoting *United States v. O’Keefe*, 128 F.3d 885, 894 (5th Cir. 1997)). “[T]he burden is on

the State to show that the error was harmless beyond a reasonable doubt and did not influence the outcome of the case.” *Gonzalez v. State*, 487 Md. 136, 184 (2024) (quoting *Perez v. State*, 420 Md. 57, 66 (2011)).

In this case the error went towards bolstering the credibility of J.M. By allowing J.M. to describe how the assault has affected her life it both lent credibility to her not fabricating her own assault and created a danger of the jury sympathizing with J.M. and against the Appellant. “[W]here credibility is an issue and, thus, the jury’s assessment of who is telling the truth is critical, an error affecting the jury’s ability to assess a witness’ credibility is not harmless error.” *Dionas*, 436 Md. at 110. This would allow a jury to decide the case not on the facts presented related to the assault of A.A. but on a desire to punish the Appellant based on his conduct towards J.M. in the past, which is improper. The admission of J.M.’s post-assault behavior may have influenced the verdict and cannot be considered harmless.

Applying the harmless error standard, we cannot conclude beyond a reasonable doubt that J.M.’s testimony did not influence the jury’s verdict. As a result, we must reverse the judgment entered by the circuit court and remand the case for a new trial.

Postponement Request

A. Parties’ Contentions

The Appellant argues that when the motions court granted the postponement request it failed to require the State to argue why there was good cause for the postponement. The Appellant claims that the motions court failed to exercise its discretion in determining whether there was good cause, which constituted an abuse of discretion that necessitates

reversal.

The State argues that this issue was waived because the Appellant consented to the postponement and did not raise this issue before the motions court. If preserved, the State argues that the trial court had broad discretion to grant the postponement request and properly exercised that discretion to balance the Appellant's right to a speedy trial and notice requirements under § 10-923.

B. Standard of Review

We review a circuit court's ruling on a motion to postpone for abuse of discretion. *Howard v. State*, 440 Md. 427, 441 (2014) (citing *Ware v. State*, 360 Md. 650, 706 (2000), *cert. denied*, 531 U.S. 1115 (2001)).

C. Analysis

Courts and Judicial Proceedings § 10-923 contains a notice requirement. Under the statute, “[t]he 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.” Md. Code, Cts. & Jud. Proc. § 10-923(c)(1). Notice may be needed for evidence “so that the parties and the court have adequate opportunity to assess the evidence, the purpose for which it is offered, and whether the requirements of [other rules] have been satisfied.” Fed. R. Evid. 404 (Committee Notes on Rules–2011 Amendment).

Here, the State's indictment was transmitted to the circuit court on April 6, 2023. Then, Appellant's counsel entered his appearance on April 11, 2023. Trial was initially scheduled for August 1, 2023. On June 5, 2023, the State filed its motion to introduce evidence under § 10-923. This was less than 90 days before the scheduled trial date.

When the parties appeared for the hearing on the State’s motion on June 28, 2023, the State requested a postponement from the trial court. Appellant’s counsel noted his client’s right to a speedy trial and a trial compliant with the *Hicks* timeline. Appellant’s counsel then said that “to the extent that” the circuit court “obligated the [Appellant] to proceed to trial with the State using” the evidence of prior sexually assaultive behavior in violation of the 90-day notice provision, “we would be objecting on timeliness grounds.” The circuit court granted the postponement request and set trial for October 4, 2023, which was four days before the *Hicks* deadline.

“Ordinarily, an appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court” Md. Rule 8-131(a). In the hearing, the State claims the Appellant did not object to the postponement and thus this issue was not preserved. The Appellant’s objection appears to this Court to be that if a postponement was not granted and the case proceeded to trial without compliance with the 90-day notice, there would be an objection to the timeliness of the evidence. Additionally, the State indicated that Appellant’s counsel “wouldn’t object to postponing the trial date to comply with” § 10-923’s 90-day notice requirement and the Appellant did not dispute that statement.

The Supreme Court of Maryland has previously stated that defendants “will ordinarily not be permitted to ‘sandbag’ trial judges by expressly, or even tacitly, agreeing to a proposed procedure and then seeking reversal when the judge employs that procedure; nor will they freely be allowed to assert one position at trial and another, inconsistent position on appeal.” *Miles v. State*, 365 Md. 488, 554 (2001) (quoting *Burch v. State*, 346

Md. 253, 289 (1997), *cert. denied*, 522 U.S. 1001 (1997)) (applying this principle in the context of sentencing instructions). The Appellant’s specific issue on this appeal was the circuit court failing to make a finding of good cause for the extension, but at no point did the Appellant request the circuit court make that finding. The Appellant then consented to the postponement in the absence of a finding of good cause and never brought it up during the motions hearing or prior to the trial. As a result, we hold that the Appellant did not properly preserve the issue of a finding of good cause.

The statute requires the motion to be filed 90 days before trial “or at a later time if authorized by the court for good cause.” Md. Code, Cts. & Jud. Proc. § 10-923(c)(1). The Appellant points to the final clause as requiring a finding by the circuit court of good cause in order to file the motion within 90 days of trial. The circuit court circumvented that requirement by instead postponing the trial so the motion filing complied with the statute. However, the statute did not explicitly bar this practice of allowing a postponement in order to comply with the notice requirement. In fact, other criminal statutes provide similar explicit allowances for a postponement to comply with notice requirements. *See* Md. Rule 4-245(c) (stating that for the required notice of prior convictions “[i]f the State’s Attorney fails to give timely notice, the court shall postpone sentencing at least 15 days unless the defendant waives the notice requirement”); Md. Code, Cts. & Jud. Proc. § 10-915(d) (regarding the admissibility of DNA profile evidence if a party does not provide the evidence “at least 30 days prior to the criminal proceedings, the court may grant a continuance to permit such timely disclosures”).

In this case, the circuit court was permitted to grant a postponement to comply with

the notice requirements of § 10-923 since it did not interfere with the Appellant other rights. The postponement allowed the Appellant to have the benefit of the 90 days of notice he had a right to under § 10-923 and the trial date was still in compliance with *Hicks* deadline for trial. As a result, the postponement did not prejudice the Appellant. We will not hold that this decision to grant the postponement was an abuse of discretion under these circumstances.

CONCLUSION

Accordingly, we reverse and remand the judgment of the Circuit Court for Wicomico County.

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