Circuit Court for Prince George's County
Case No. C-16-CR-22-000633

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND

No. 2321

September Term, 2023

ULISES ESCOBAR-GARCIA

v.

STATE OF MARYLAND

Reed,
Shaw,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: March 17, 2026

A jury in the Circuit Court for Prince George's County found appellant, Ulises Escobar-Garcia, guilty of possession of a regulated firearm by a disqualified person, reckless endangerment, carrying a handgun, and carrying a loaded handgun. The court imposed sentences totaling ten years of incarceration. Appellant appeals those judgments and presents two questions for our review:

> 1. Did the trial court err in denying Appellant's motion to exclude evidence of prior bad acts?
>
> 2. Did the trial court err in denying Appellant's motion for mistrial?

Perceiving neither error nor abuse of discretion, we affirm.

BACKGROUND

On October 28, 2022, Santos Alcides-Alberto was playing soccer with friends at Colmar Manor Park in Prince George's County.[1] According to Mr. Alberto, there were "around 15 people" playing, along with two children, one of whom was his then-thirteen-year-old daughter, S. He noticed four men along the sideline, who were not

[1] Mr. Alberto testified that the incident at issue occurred "[a]round 6:30 in the afternoon," which would have been after sunset (6:11 p.m. EST) but during civil twilight (which lasted until 6:39 p.m. EST) on October 28, 2022. *See* Colmar Manor, Maryland, USA — Sunrise, Sunset, and Daylength, October 2022, *timeanddate*, https://www.timeanddate.com/sun/@4352015?month=10&year=2022 (last visited March 2, 2026). During civil twilight, the Sun "is just below the horizon, so there is generally enough natural light to carry out most outdoor activities." Konstantin Bikos, Civil Twilight — Civil Dawn & Dusk, *timeanddate*, https://www.timeanddate.com/astronomy/civil-twilight.html (last visited March 2, 2026).

playing in the match. He recognized one of them as Appellant but did not recognize any of the others.[2]

Mr. Alberto "continued playing." Eventually, Appellant approached, told Mr. Alberto that "he was there to kill" him, "pulled his gun out of his waist," pointed it at Mr. Alberto's head, then towards his chest, and finally fired one shot towards Mr. Alberto's feet.

Mr. Alberto said that he was "not afraid" and asked Appellant what he was waiting for, saying he should kill him then and there. Appellant replied that "if [Mr. Alberto] called the police, whenever he was released or the police released him that he was going to kill" him. Appellant then approached S. and told her to come with him, but she refused. Appellant then "walk[ed] away."

Meanwhile, Mr. Alberto resumed playing in the soccer match, waiting for Appellant to leave. After Appellant left, Mr. Alberto called 911, and police officers responded to the scene.

A bullet and a spent casing were found on the soccer field where Mr. Alberto had been playing.[3] During a field interview, S. told police officers that appellant had fired the

[2] Appellant was wearing a mask that evening. Mr. Alberto insisted he nonetheless recognized the masked shooter as appellant from the clothing he wore, which was "the only way he [ever] dressed," and because he had no "other enemies" except for appellant. When asked why appellant was his enemy, Mr. Alberto replied that appellant previously had threatened to kill him.

[3] Anticipating that it would assist police in their investigation, Mr. Alberto had marked the spot on the field where appellant had discharged his handgun.

shot towards her father's feet. Mr. Alberto corroborated S.'s statement, telling police that "he knew who did it[.]" Officers transported Mr. Alberto and S. to a nearby police station, where S. eventually gave a statement, inculpating appellant in the shooting.

Appellant was charged in a seven-count indictment with: (1) assault in the first degree; (2) assault in the second degree; (3) possession of a regulated firearm while under the age of 21; (4) use of a firearm in the commission of a crime of violence; (5) reckless endangerment; (6) wearing, carrying, and transporting a loaded handgun upon his person; and (7) wearing, carrying, and transporting a handgun upon his person.

A jury trial was held in the Circuit Court for Prince George's County. The State called six witnesses: Mr. Alberto; his daughter, S.; and four officers from the Maryland-National Capital Park Police—Detective Sergeant Andrew Conto, Officer Daniel Mosier, Detective Archie Ferguson, and Officer Antonio Hidalgo. Appellant exercised his constitutional right not to testify.

After the close of the State's case, the trial court granted the defense's motion for judgment of acquittal as to assault in the first degree, the lesser included offense of assault in the second degree, and the derivative crime of use of a firearm in the commission of a crime of violence (because there was no longer a crime of violence to be decided by the jury).[4] After deliberating for an hour, the jury returned its verdict, finding appellant guilty

[4] The trial court relied upon the pattern jury instruction, which requires that, to prove intent-to-frighten assault, the State must show that the victim "reasonably feared immediate physical harm[.]" Md. Crim. Pattern Jury Instr. 4:01 (SECOND DEGREE ASSAULT) (MSBA 3d ed. 2024). The court reasoned that because the victim testified he was "not afraid," and the surrounding circumstances confirmed he was not afraid (*e.g.*, Mr. Alberto (continued)

of all remaining charges: possession of a regulated firearm while under the age of 21; reckless endangerment; wearing, carrying, and transporting a loaded handgun upon his person; and wearing, carrying, and transporting a handgun upon his person.

The trial court sentenced appellant to consecutive five-year terms of imprisonment for possession of a regulated firearm while under the age of 21 and reckless endangerment, and a concurrent term of three years for wearing, carrying, and transporting a loaded handgun upon his person, merging the other handgun offense. This timely appeal followed.

Additional facts are included where pertinent to the discussion of the issues.

DISCUSSION

I.

Parties' Contentions

Appellant contends that the trial court erred in denying his motion in limine, which sought to exclude other acts evidence—in this case, evidence that previously he had a sexual relationship with S. and that the victim, Mr. Alberto,[5] upon learning of that relationship, intervened to end it (by seeking a protective order on her behalf), and therefore, Appellant had motive to commit the flagship charge of assault in the first degree. According to Appellant, the other acts evidence admitted in this case had probative value

resumed his soccer match until the police arrived, the State could not prove this element. The trial court further denied the State's motion to reconsider based upon an alternative theory of attempted battery.

[5] Appellant is the nephew of Mr. Alberto's ex-wife. S. is Mr. Alberto's daughter and was thirteen years old at the time of the offenses.

that was substantially outweighed by its unfairly prejudicial effect, and thus, its admission into evidence violated Maryland Rule 5-404(b).

Appellant asserts two reasons why the trial court abused its discretion in admitting evidence of his prior sexual relationship with S.: first, that the State already had been allowed to introduce other evidence of motive—that previously he had threatened to kill Mr. Alberto—obviating the necessity of admitting the additional, highly prejudicial evidence at issue; and second, that by allowing evidence of a prior sexual relationship between him and S., the jury was led ineluctably to conclude that he had committed the uncharged offense of rape in the second degree, and he therefore was unfairly prejudiced.[6]

The State counters that the trial court did not abuse its discretion in admitting the other bad acts evidence at issue because it tended to establish motive. The State observes that Appellant does not contest the trial court's ruling that the disputed evidence was relevant to establishing motive, or its finding that there was clear and convincing evidence of the prior sexual relationship, instead challenging only the trial court's discretionary weighing of the evidence.

Relying upon *State v. Faulkner*, 314 Md. 630, 642 (1989), the State contends that the Supreme Court of Maryland has disapproved of appellant's lack-of-necessity theory. Furthermore, the State maintains, Appellant ascribes too much legal knowledge to the jurors, who never were told expressly that he had committed (statutory) rape and should

[6] Appellant further contends that the purported error that resulted from the improper admission of other acts evidence was not harmless. Because we find neither error nor abuse of discretion, we do not address this contention.

not be presumed to have understood that the other acts evidence was tantamount to evidence of that offense. Thus, according to the State, the trial court properly exercised its discretion in admitting the other acts evidence at issue—"testimony about Appellant's sexual relationship with the victim's 13-year-old daughter," but without express reference to the word "rape."

Additional Facts Pertaining to the Claim

On the first day of trial, after jury selection had been completed, the court dismissed the jurors for the rest of the day and turned its attention to preliminary motions. Defense counsel then moved to preclude any mention by the prosecutor of the allegations of rape and kidnapping that had been made in an application for a protective order against appellant, previously filed in the District Court in September 2022.[7]

The State called Mr. Alberto to testify about an encounter with Appellant on August 18, 2022, several weeks before he filed the application for a protective order. According to Mr. Alberto, he called police to "rescue" his daughter, S., who was staying with Appellant at his residence in Fairfax County, Virginia, and did not wish to return home. According to Mr. Alberto, appellant told him, "you must feel like a man 'cause the police

[7] Defense counsel also claimed that the prosecutor had failed to provide proper written notice of its intent to introduce other acts evidence. In that respect, it appears defense counsel mistakenly believed that Maryland law requires written notice of the State's intent to introduce other acts evidence prior to trial. Although Federal Rule of Evidence 404(b)(3)(C) does require such notice, Maryland Rule 5-404(b) does not. Nonetheless, Maryland Rule 4-263(d)(4) requires the prosecutor to provide to the defense all such evidence "that the State's Attorney intends to offer at a hearing or at trial pursuant to Rule 5-404 (b)[.]" In this case, the trial court ascertained that the State complied with its obligations under Rule 4-263(d)(4).

are here." The prosecutor then asked whether Appellant said anything else to him, and Mr. Alberto replied, "He told me when he saw me alone he would kill me."

After hearing Mr. Alberto's testimony and argument of the parties, the court performed the three-part analysis required under Maryland Rule 5-404(b) to determine whether the other acts evidence was admissible. The court concluded the death threat was "specially and particularly relevant" to prove motive and absence of mistake; found by clear and convincing evidence that Mr. Alberto testified truthfully; and determined the probative value of the death threat outweighed any undue prejudice. Accordingly, the court denied the defense motion to preclude testimony about Appellant's prior death threat against Mr. Alberto while reiterating that the State would not be permitted to "bring out any testimony about prior possession of a gun or any allegations of rape or kidnap," which had been in the application for a protective order.

The following morning, when trial reconvened, the prosecutor moved in limine to be permitted to introduce additional other acts evidence, namely, testimony that Appellant had been in a sexual relationship with S. Defense counsel objected that "that would be a statutory rape, and that would bring in what the Court has already ordered should be out, the stuff about the kidnapping and allegations of rape."

After ascertaining that the defense had been provided the necessary discovery relating to the other acts evidence, the court overruled the defense objection and conducted a brief hearing, out of the jury's presence, to afford the State an opportunity to present additional other acts evidence. The State called S. to the stand. S., who was fourteen years old at the time of trial, testified that she and the twenty-year-old Appellant had been

"dating" since May 2022. According to S., she and Appellant had sex "[o]ne time" at the home of Appellant's mother when she and Appellant were alone there.

The court then heard argument of counsel. Defense counsel insisted that evidence of the prior sexual relationship between Appellant and S. was merely propensity evidence that had minimal probative value but was "extremely prejudicial" to Appellant. Counsel declared: "I don't think really there is any benefit or probative value to her [i.e., S.] getting up there and testifying about a rape." Counsel further asserted that the State already had established a motive for the alleged first-degree assault and that the additional other acts evidence was not probative of motive.

The prosecutor countered that "the crux of this case is the motive" for the alleged assault, which, she asserted, was that the victim stood as an "obstacle in the relationship between" S. and Appellant. The prosecutor further asserted that "clearly," S. and Appellant "had a sexual relationship"; S. was thirteen at the time and Appellant was nineteen; and Mr. Alberto intervened to end the relationship, which angered Appellant so much that "he went to the park and shot at" Mr. Alberto's foot. By allowing the jury to hear evidence of the sexual relationship between S. and Appellant, the jury would understand that the alleged assault was not "a random act." Nor was evidence of the sexual relationship unfairly prejudicial, contended the prosecutor, because it did not suggest a propensity for violence.

The court once again applied the *Faulkner* analysis and determined, initially, that "the proposed evidence would show proof of motive, absence of mistake, or accident, at a minimum." As for the second step, the court found by clear and convincing evidence that

S. "was credible in describing that there was a sexual interaction of some sort" between her and Appellant, "who she identified as her cousin."

The court then addressed the third stage of the analysis, weighing probative value against unfair prejudice:

> I will say that to discuss a sexual relationship certainly again in light of the motive that the State's theory is of this case is probative.
>
> It would be undue prejudice I think if we describe it as a rape. Again, we all in this room know that by law, because [S.] was of a certain age, if in fact it occurred, we know legally that would be potentially defined as a rape. However, that word does connote something significantly different than what it appears we had here today. It appears that but for not being legally of an age to have the ability to consent, it sounds like it was otherwise consensual. It does not sound like it was a forcible act. It does not sound like it was done by threat.
>
> So I will say that I find that the probative value of the sexual relationship outweighs the prejudice of the testimony of a sexual relationship. However, I will find also that referencing it as a "rape," using that word in any way, shape or form shifts that to undue prejudice because again that connotes something that I do not feel is present in the facts of this case or specifically in the facts of the alleged prior bad act.

Accordingly, the court denied the defense motion to exclude testimony about the sexual relationship between S. and Appellant. The prosecutor reiterated that she would "make sure that the witnesses are aware that we are not to use that word [i.e., "rape"] throughout the trial."

Subsequently, Mr. Alberto testified without objection that S. and Appellant were "boyfriend and girlfriend" and that they were in "a physical relationship[.]".[8] Thereafter, S. testified in part as follows[9]:

> [PROSECUTOR]: [S.], did there ever come a time when you and the Defendant were boyfriend and girlfriend?
>
> [S.]: No.
>
> [PROSECUTOR]: Did there ever come a time where you and the Defendant had a sexual relationship?
>
> [S.]: No.
>
> [PROSECUTOR]: Did there come a time where you and the Defendant had an intimate relationship?

[8] The failure to object to Mr. Alberto's testimony may have created a preservation problem. *See Huggins v. State*, 479 Md. 433, 447 n.7 (2022) (explaining that where a trial court denies a "motion in limine to exclude evidence, the party seeking its exclusion must still object when the evidence is offered for admission at trial"). Defense counsel did, however, object to S.'s grudging admission that she and appellant had a sexual relationship and contends that this was "by far the most prejudicial" testimony. Although there is authority stating that a claim that a trial court erred in admitting evidence is waived where the same evidence is admitted without objection at another point in the trial, *see*, *e.g.*, *Klauenberg v. State*, 355 Md. 528, 545 (1999) ("it is fundamental that a party opposing the admission of evidence must object at the time that evidence is offered[,]" and "[t]his also requires the party opposing the admission of evidence to object each time the evidence is offered by its proponent"), the State does not contend that this claim is not preserved (although the State does raise a related non-preservation argument concerning appellant's second claim, which we discuss *infra*). To avoid an inevitable postconviction claim, we will exercise our discretion to address the claim on its merits. Md. Rule 8-131(a).

[9] Before the prosecutor asked S. expressly whether she and Appellant ever had a sexual relationship, defense counsel asked the court for a continuing objection to that line of questioning. Parts of the court's response are transcribed as "[i]ndiscernible." Immediately thereafter, defense counsel thanked the court, and the court replied in kind, thanking defense counsel. We think the most reasonable interpretation of that exchange is that the court granted the request for a continuing objection.

[S.]: No, we were only cousins. We only grew up together, like.

The prosecutor then refreshed S.'s memory with a video recording taken the evening of the alleged assault, depicting her and her father in a field interview with police officers from the Maryland National Capitol Park Police, who had responded to the crime scene. Ultimately, the following exchange occurred:

[PROSECUTOR]: **What did you say to the officers that day?**

[S.]: **That he was my cousin and he is my boyfriend.**

[PROSECUTOR]: Okay. And I know -- I know it's hard for you, but can you say it loud enough for the jury to hear you.

[S.]: **He's my cousin and he's my boyfriend.**

[PROSECUTOR]: Okay. **So is [Appellant] your boyfriend today?**

[S.]: **Yes.**

[PROSECUTOR]: And how long have you and [Appellant] been in a boyfriend-girlfriend relationship?

[S.]: I don't remember.

[PROSECUTOR]: Okay. **Do you remember telling the officers when it started?**

[S.]: **Yes, last year.**

[PROSECUTOR]: Last year. Around what month last year?

[S.]: I don't remember that.

* * *

[PROSECUTOR]: Okay. And do you remember telling us[10] when your relationship started?

[S.]: On May [3, 2022[11]].

(emphasis added).

The prosecutor further pressed the point:

[PROSECUTOR]: Okay. And did there come a time where you and [Appellant] had a sexual relationship?

[DEFENSE COUNSEL]: Objection. May we approach?

THE COURT: Overruled. I mean, is it different than what we discussed?

[DEFENSE COUNSEL]: Well, no.

THE COURT: Overruled.

* * *

[10] The prosecutor's reference to a pretrial interview of S. by the prosecutors elicited a prompt intervention by the trial court. The court convened a sidebar, declaring to the prosecutor, "You just made you both [i.e., both prosecutors] witnesses." The prosecutor attempted to cure the problem by invoking the presence, during the out-of-court conversation with S., of additional investigators who also were present during the conversation at issue and were present in court and available to be called as witnesses. At the beginning of proceedings the following day, the trial court ruled that the State would not be permitted to call as witnesses any of the other participants in the pretrial interview.

In his brief, Appellant suggests that this compounded the prejudice he suffered from the trial court's ruling to permit testimony about S.'s sexual relationship with him. Appellant does not, however, further explain why this exchange caused additional prejudice as to the admissibility of other acts evidence. We shall not further address this undeveloped claim. Md. Rule 8-504(a)(6); *Klauenberg*, 355 Md. at 552. Appellant further claims that the prosecutor's reference to an out-of-court conversation with S. should have resulted in a mistrial, a claim that we address *infra* in Part II.

[11] S. subsequently was asked more precisely when the relationship started, and she replied that it began May 3, 2022.

[PROSECUTOR]: Did there come a time where you and [Appellant] had a sexual relationship?

[S.]: No.

* * *

[PROSECUTOR]: You say you don't remember?

But finally, after the prosecutor repeatedly tried to impeach S. with prior statements, in which she had admitted there was a sexual relationship between her and Appellant, the following exchange occurred:

[PROSECUTOR]: About your sexual relationship with [appellant]?

[S.]: Yes.

[PROSECUTOR]: And what did you tell the officers?

[S.]: That he was my cousin.

[PROSECUTOR]: And what else?

[S.]: And my boyfriend.

[PROSECUTOR]: And then what about the sexual relationship?

[S.]: What do you mean by that?

[PROSECUTOR]: **What did you tell the officers about your sexual relationship between you and [Appellant]?**

[S.]: **That there was only one time we had like sexual.**

[PROSECUTOR]: Okay. **So you only had sex with [Appellant] one time?**

[S.]: (No audible response.)

[PROSECUTOR]: Okay. And you started dating on May 3rd of 2022. Is that what you said?

[S.]: Um-hum.

[PROSECUTOR]: Okay. And about how long after May 3rd of 2022 did you have that sexual -- did you have sex with [Appellant]?

[S.]: Never.

[PROSECUTOR]: **But you just said you had sex with --**

[S.]: **Yeah, only one time and no more.**

[PROSECUTOR]: Right, but that one time, when --

[S.]: Yes.

[PROSECUTOR]: When did that happen?

[S.]: I don't know. I don't remember.

[PROSECUTOR]: Was it after you started dating or before you started dating?

[S.]: After we were dating and then, you know.

[PROSECUTOR]: Okay. And did you tell anybody about --

[S.]: No.

[PROSECUTOR]: -- this relationship -- let me finish asking my question. Did you tell anybody about this relationship with -- between you and [appellant]?

[S.]: No.

[PROSECUTOR]: Did anybody find out about your relationship?

[S.]: Yes.

[PROSECUTOR]: Who found out?

[S.]: My cousin.

[PROSECUTOR]: What is your cousin's name?

[S.]: [C.]

[PROSECUTOR]: And who is [C.] to [Appellant]?

[S.]: His sister.

(emphasis added).

The following day, the State introduced into evidence a redacted copy of Officer Hidalgo's body-worn camera video recorded at the time of the offenses. In that recording, which was played before the jury, S. admitted that she and Appellant were in a "romantic" relationship.

Analysis

Maryland Rule 5-404(b) concerns the admissibility of other acts evidence[12] and states in relevant part:

> Evidence 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.

Maryland courts employ a three-part test, which predates the adoption of Title 5 of the Rules, in determining whether to admit other acts evidence. *First*, such evidence must be

[12] "Many courts refer to the acts in" Rule 5-404(b) "as 'prior bad acts.'" *Klauenberg*, 355 Md. at 547 n.3. "This nomenclature is not precise, however, as the acts contemplated by the rule need not be 'prior'; they can be acts subsequent to the event that is the subject of the lawsuit." *Id.* "What is more, the acts need not be bad." *Id.*

"substantially relevant to some contested issue in the case" and may not be offered merely "to prove the defendant's guilt based on propensity to commit crime or his character as a criminal." *Faulkner*, 314 Md. at 634. For example, other acts evidence "may be admitted if it tends to establish motive, intent, absence of mistake, a common scheme or plan, identity, opportunity, preparation, knowledge, absence of mistake or accident." *Id.* Whether other acts evidence satisfies this threshold "is a legal determination and does not involve any exercise of discretion." *Id.* We therefore review without deference a trial court's ruling as to whether an exception applies. *Browne v. State*, 486 Md. 169, 193-94 (2023).

Second, "[i]f one or more of the exceptions applies, the next step is to decide whether the accused's involvement in the other crimes [or acts] is established by clear and convincing evidence." *Faulkner*, 314 Md. at 634. We review that decision for sufficiency of the evidence. *Id.* at 635.

And *third*, if the first two parts of the test are satisfied, the trial court must "carefully weigh[]" the "necessity for and probative value of" the other acts evidence "against any undue prejudice likely to result from its admission." *Id.* We review the trial court's balancing for abuse of discretion. *Id.*; *Browne*, 486 Md. at 194.

The third stage of the analysis has undergone some evolution during the time between *Faulkner* and today. *Faulkner* itself was somewhat vague (perhaps deliberately ambiguous) about this part of the test, stating that a trial court must "carefully weigh[]" the "necessity for and probative value of" the other acts evidence "against any undue prejudice likely to result from its admission[,]" but without explaining precisely how a trial court

should do so. *Faulkner*, 314 Md. at 635. But several years later, still prior to the adoption of Title 5, the Supreme Court of Maryland expressly considered the question and adopted a highly defendant-friendly rule (which the Court termed the "exclusionary form of the rule"): a trial court must exclude other acts evidence unless its "probative value substantially outweighs the potential for unfair prejudice." *Harris v. State*, 324 Md. 490, 500-01 (1991).

Notably, the Court did not disavow *Faulkner*, but rather, simply clarified the weighing test. *Id.* at 498 (setting forth the three-part *Faulkner* test and then framing the question before it as determining the "best" way "to state a rule that will most efficiently convey appropriate concern for the potential of unfair prejudice that necessarily accompanies evidence of other bad acts, without excluding evidence which possesses a special relevance transcending mere evidence of bad character and which outweighs the potential for unfair prejudice").

Although the *Harris* weighing test did not expressly address the necessity for the other acts evidence, necessity nonetheless remained an important factor in the balancing calculus. *See id.* at 504 (contrasting the case before it with *Anaweck v. State*, 63 Md. App. 239 (1985), *overruled by Wynn v. State*, 351 Md. 307 (1998), where the "necessity for the [other acts] evidence was obvious"); *Wynn*, 351 Md. at 317 (quoting *Faulkner*); *Emory v. State*, 101 Md. App. 585, 624 (1994) (same), *cert. denied*, 337 Md. 90 (1995); *Cousar v. State*, 198 Md. App. 486, 497 (2011) (same).

This "exclusionary" version of Rule 5-404(b) balancing persisted for some years thereafter. *See, e.g.*, *Whittlesey v. State*, 340 Md. 30, 59 (1995) (stating that "the court must

determine that the probative value of the evidence substantially outweighs its potential for unfair prejudice"), *cert. denied*, 516 U.S. 1148 (1996); *Skrivanek v. State*, 356 Md. 270, 291 (1999) (same); *Rosenberg v. State*, 129 Md. App. 221, 251 (1999) (same), *cert. denied*, 358 Md. 382 (2000); *Hyman v. State*, 158 Md. App. 618, 625 (same), *cert. denied*, 384 Md. 449 (2004); *Wilder v. State*, 191 Md. App. 319, 343 (same), *cert. denied*, 415 Md. 43 (2010); *Snyder v. State*, 210 Md. App. 370, 393 (same), *cert. denied*, 432 Md. 470 (2013).[13]

In *Gutierrez v. State*, 423 Md. 476, 490 (2011), the Supreme Court of Maryland, without analysis and without citing *Harris*, stated that the balancing test under Rule 5-404(b) is simply the same as that in Rule 5-403, which states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The balancing test under Rule 5-403, in sharp contrast to the test under *Harris*, is presumptively *in favor of* admissibility rather than exclusion.[14] *See Newman v. State*, 236 Md. App. 533, 555 & n.7 (2018) (noting that Rule 5-403 requires that "the 'danger of unfair

[13] *Snyder* quoted the balancing test from *Harris* but then applied ordinary Rule 5-403 balancing, which permits exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice[.]" *See Snyder*, 210 Md. App. at 394-95.

[14] Federal courts weighing the admissibility of other acts evidence under Federal Rule of Evidence 404 also apply "inclusionary" Rule 403 balancing. *See Huddleston v. United States*, 485 U.S. 681, 691 (1988) (noting "the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice"); *United States v. Van Metre*, 150 F.3d 339, 349-52 (4th Cir. 1998) (applying Rule 403 balancing in determining whether the trial court abused its discretion in admitting other acts evidence).

prejudice' must not simply outweigh 'probative value' but must . . . do so 'substantially' and thus, "[b]y its express provisions, Rule 5-403 has steeply tilted the weighing process in favor of admissibility"). *See* 5 Lynn McLain, *Maryland Evidence* § 404:5(f) (observing that balancing under Rule 5-403 "is the obverse of that established in *Harris*"). Two years later, the Court repeated the same language from *Gutierrez*, stating that the balancing test requires a trial court to "carefully balance the probative value of prior bad acts evidence against its potential for unfair prejudice under Rule 5-403." *Burris v. State*, 435 Md. 370, 386 (2013) (citing *Gutierrez*, 423 Md. at 497-98).[15]

Most recently, the Supreme Court of Maryland revisited this issue in *Browne*, *supra*. Although the Court declared emphatically that Maryland Rule 5-404(b) is "exclusionary" rather than "inclusionary," that is, that other acts evidence is presumptively inadmissible unless its proponent establishes that it satisfies the *Faulkner* three-part test. *Browne*, 486 Md. at 188-90. The Court, nonetheless, reaffirmed that the third stage of the analysis is merely Rule 5-403 balancing, declaring that "the necessity for and probative value of the evidence must not be substantially outweighed by the risk of unfair prejudice." *Id.* at 190 (citing *Burris*, 435 Md. at 385-86, and *Gutierrez*, 423 Md. at 489-90); *Browne*, 486 Md. at 193 (citing Rule 5-403). Thus, the Supreme Court of Maryland, through a series of more

[15] *Burris* also quoted *Faulkner* about the necessity of other acts evidence as a factor a trial court must consider in weighing probative value versus unfair prejudice, *Burris*, 435 Md. at 392-93 (quoting *Faulkner*), and the Court in that case held that the trial court had abused its discretion in admitting extrinsic evidence of Burris's membership in the Black Guerilla Family in a murder trial at least in part because of lack of necessity, given the "cumulative" nature of the evidence at issue, *id.* at 395-96.

recent decisions, has overruled the unspoken balancing test of *Harris*. To the extent that Rule 5-404(b) is an exclusionary rule rather than an inclusionary one, all the heavy lifting is done by the first two parts of the three-part *Faulkner* test, especially the second part, that the other acts evidence must be established by clear and convincing evidence, which is contrary to the standard applied in federal courts under Federal Rule of Evidence 404(b). *See Ruffin Hotel of Md., Inc. v. Gasper*, 418 Md. 594, 621-27 (2011) (comparing the federal rule with the corresponding Maryland rule). *See also* 5 McLain, § 404:5(a) (noting that, in codifying Md. Rule 5-404(b), the Supreme Court of Maryland rejected the holding of the Supreme Court of the United States in *Huddleston v. United States*, 485 U.S. 681, 690 (1988), which requires only that evidence of other acts meet the standard of Federal Rule of Evidence 104(b), that it be "sufficient to support a finding that the fact does exist"—that the fact finder "could reasonably find" the other acts evidence by a preponderance of the evidence).

We summarize in tabular form the evolution of Maryland law regarding the admissibility of other acts evidence and include the equivalent federal rule for comparison:

Comparison of Standards for Admissibility of Other Acts Evidence

Faulkner	*Harris*	*Browne*	*Huddleston* (Federal)
Evidence must be "substantially relevant" to a "contested issue" and not offered merely as evidence of the accused's	Same; evidence must have "special relevance beyond general criminal propensity"	Same	Evidence must be "probative of a material issue other than character"

"propensity to commit crime" or "character as a criminal"			
Prosecution must establish the other acts evidence by clear and convincing evidence	Same	Same	Prosecution must establish that the fact finder "could reasonably find" the other acts evidence by a preponderance of the evidence
Trial court must "carefully weigh[]" the "necessity for and probative value of" the other acts evidence "against any undue prejudice likely to result from its admission	Trial court must exclude the other acts evidence unless its "probative value substantially outweighs the potential for unfair prejudice"	The necessity for and probative value of the other acts evidence "must not be substantially outweighed by the risk of unfair prejudice," i.e., Rule 5-403 balancing	Rule 403 balancing

Here, it is essentially undisputed that the other acts evidence at issue satisfies the first two prongs of the *Faulkner* analysis. In other words, evidence that Appellant was engaging in sexual relations with the victim's thirteen-year-old daughter and that the victim attempted to thwart Appellant in continuing to do so was "substantially relevant" to establish Appellant's motive for shooting at the victim. Moreover, the trial court, after hearing the daughter's testimony and observing her demeanor during the hearing in limine, found her credible and concluded that the other acts evidence had been established by clear and convincing evidence. That testimony, standing alone, was sufficient evidence to support the trial court's finding. See *Lawson v. State*, 389 Md. 570, 606-07 (2005), and

cases there cited, holding that a rape victim's testimony, standing alone, is sufficient evidence to sustain a conviction.[16]

Turning now to the heart of the dispute before us, we must decide whether the trial court abused its discretion at the third stage of the *Faulkner* analysis. In reviewing the trial court's exercise of its discretion, we must be cognizant that the Supreme Court of Maryland adopted Rule 5-403 balancing as the test the trial court was required to apply. Bearing that in mind, we cannot say that the trial court abused its discretion in concluding that the "probative value" of the other acts evidence was not "substantially outweighed by the danger of unfair prejudice."

We disagree with Appellant that the other acts evidence at issue was rendered unnecessary because the State was permitted to introduce other evidence of motive, specifically, that he previously had threatened to kill Mr. Alberto. Recently, in *Crawford v. State*, 265 Md. App. 374 (2025), we considered the extent to which other acts evidence is necessary in determining whether a trial court had exercised its discretion properly in a Rule 5-404(b) case. In that case, the defendant was on trial for four separate arsons in Howard County. *Id.* at 379. The State moved, prior to trial, to introduce evidence of eight

[16] Because the victim's testimony is sufficient to sustain a rape conviction, where the State's burden of persuasion is beyond a reasonable doubt, it necessarily follows that the victim's testimony is sufficient to establish that there was a sexual relationship in this case, where the State's burden of persuasion is the lesser standard of clear and convincing evidence. *See Darcars Motors of Silver Spring, Inc. v. Borzym*, 379 Md. 249, 270 (2004) ("Because meeting the burden of production requires different quanta of evidence depending on the burden of persuasion, a judge must account for and consider the appropriate burden of persuasion in deciding whether to allow the jury to decide an issue.").

other uncharged arsons (which had taken place in other counties). *Id.* at 384-85. "The purpose for introducing the eight, argued the State, was to prove Mr. Crawford's common scheme, motive, and identity as the perpetrator of the Howard County fires." *Id.* at 384. Over defense objection, the court granted the State's motion, Crawford was found guilty, and he was given two consecutive life sentences plus 75 years. *Id.* at 385.

On appeal, Crawford contended that the trial court had abused its discretion in granting the State's motion to introduce other acts evidence. He claimed that evidence of other, uncharged arsons was cumulative and thus, unnecessary; therefore, he argued the trial court should have limited the evidence of the other fires. *Id.* at 392-94. We rejected that claim, concluding that the trial court had properly exercised its discretion in admitting the other acts evidence. *Id.* at 395. We reasoned that the nature of the charged crimes (that arson typically is committed clandestinely and must be proven by circumstantial evidence), the fact that Crawford had compiled a list of enemies that coincided with the arson victims in the uncharged cases, and the probative value of that evidence in proving malice (an element of the charged offenses), established "'a significant necessity' for the admission of all eight fires." *Id.* at 396-97.

Here, too, there was "a significant necessity" for admitting evidence that Appellant had been in a sexual relationship with S. It is noteworthy that Appellant attempted to conceal his identity by wearing a mask when he fired the weapon at Mr. Alberto. The other acts evidence at issue was especially relevant to establish both motive and identity.

Furthermore, evidence of Appellant's prior death threat against Mr. Alberto, in isolation, paints an incomplete picture of his motive, namely, that Appellant wanted to

inflict serious bodily harm on Mr. Alberto, seemingly for no reason. That reason, of course, was furnished by evidence that Mr. Alberto had intervened to end the sexual relationship between Appellant and S. (Mr. Alberto's daughter). But the "State is not constrained to forego relevant evidence and to risk going to the fact finder with a watered down version of its case." *Cousar*, 198 Md. App. at 517 (quoting *Oesby v. State*, 142 Md. App. 144, 166 (2002)).

Moreover, the trial court was acutely aware of the risk of unfair prejudice and took measures to minimize it. That was precisely why the court prohibited any mention of the word "rape." In so limiting the testimony, the trial court was scrupulously exercising its discretion in balancing the necessity for and probative value of the other acts evidence against its potential for unfair prejudice. *Browne*, 486 Md. at 190.

Nor do we agree with Appellant that the jury was led, ineluctably, to conclude that he had committed the uncharged offense of rape in the second degree. Although it is conceivable that one or more jurors may have had sufficient legal knowledge to draw this inference, the only evidence that the jury was presented with suggested that the sexual relationship between Appellant and S. was, except for her age, otherwise consensual—a point that, if anything, was emphasized by her obvious reluctance to testify adversely to appellant. We further add that, whenever other acts evidence amounts to a crime, introduction of such evidence generally informs a jury that the defendant has committed an uncharged crime. That fact, alone, does not require exclusion of other acts evidence; otherwise, such evidence would never be admissible if the other acts are, themselves, crimes. But that is contrary to settled law.

We offer one further observation. Under the balancing test articulated in *Harris*, we may have been obligated to reach a different result. But under Rule 5-403 balancing, as recently reaffirmed by the Supreme Court of Maryland in *Browne*, it is considerably more difficult to find an abuse of discretion in a trial court's balancing of probative value of other acts evidence versus its potential for unfair prejudice. Applying that test, we conclude there was no abuse of discretion. *See Nash v. State*, 439 Md. 53, 67 (2014) (observing that "a ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling") (quoting *North v. North*, 102 Md. App. 1, 14 (1994) (en banc)).

II.

Parties' Contentions

Next, Appellant contends that the trial court erred in denying his motion for a mistrial. That motion, he asserts, was prompted by "improper questions" posed to S. "about what she may have told the prosecutor and other employees of the State's Attorney's Office" during pretrial meetings "regarding the existence of a sexual relationship with Appellant." That questioning, according to Appellant, effectively allowed the prosecutor to testify as a witness, thereby denying him his right to confront witnesses against him. Relying primarily upon *Walker v. State*, 373 Md. 360 (2003), and *Elmer v. State*, 353 Md. 1 (1999), Appellant asserts that the prosecutor's questions to S. were highly improper because they suggested their own otherwise inadmissible answers, which were cloaked in the heightened credibility of the prosecutor, who was effectively a witness not subject to cross-examination.

Appellant contends that the trial court did not properly weigh the prejudice that resulted from the prosecutor's improper questioning. According to Appellant, "the trial court's assessment of prejudice, or lack thereof, was predicated on whether evidence of the sexual nature of the relationship" between S. and appellant "would otherwise have been presented to the jury." He then goes on to assert that the court erred in equating testimony of a "physical" or "romantic" relationship between Appellant and S., admitted at other points in the trial, with the testimony, purportedly admitted through the prosecutor's improper questioning, of a "sexual" relationship between them. Given the "clear violation of *Walker*," and the injection into the case of the "collateral issue of rape in an unambiguous manner," which, he maintains, otherwise would not have occurred, the ensuing prejudice denied him a fair trial, and he thus concludes that the trial court abused its discretion in denying the motion for a mistrial.

The State counters that the improper questioning took place a full day before Appellant moved for a mistrial, even though the trial court (contemporaneously) interrupted that questioning and telegraphed to defense counsel the potential grounds for objection. According to the State, had defense counsel timely objected to the prosecutor's questioning of S., the jury never would have been exposed to the improper questioning that followed. The State suggests that defense counsel may have had a strategic reason for delaying until the following day to object because, by waiting, the case for a mistrial would have been stronger. Thus the State contends we should find either waiver or invited error.

On the merits of the claim, the State contends that the trial court did not abuse its discretion in denying the belated motion for a mistrial. According to the State, the

distinction appellant draws between a "physical" or "romantic" relationship, on the one hand, and a "sexual" relationship, on the other, ignores the context in which the testimony was given, which made it clear that those references were largely synonymous. Furthermore, according to the State, to the extent Appellant contends that the State's proffer, at the time the trial court denied his motion for a mistrial, differed from the evidence subsequently introduced, that claim is waived because defense counsel did not object on that basis when the evidence was introduced. And finally, the State asserts S. testified, **not** in response to a question relating to her pretrial conversation with prosecutors, that she and Appellant had sexual relations on one occasion. Thus, the State concludes, Appellant did not show that he was denied a fair trial, and the court did not abuse its discretion in denying his motion for a mistrial.

Additional Facts Pertaining to the Claim

During the State's direct examination of S., the following occurred:

> [PROSECUTOR]: **Do you remember speaking with the State before today, with the prosecutors before today?**
>
> [S.]: No.
>
> [PROSECUTOR]: **Do you remember speaking with [the other prosecutor] and myself?**
>
> [S.]: Yes.
>
> [PROSECUTOR]: Okay. **And do you remember telling us** when your relationship started?
>
> [S.]: On May [3, 2022].

(emphasis added).

The trial court convened a bench conference, and the following occurred:

> THE COURT: **You just made you both witnesses.**
>
> [PROSECUTOR]: (Indiscernible.)
>
> THE COURT: You asked whether or not she spoke with the two of you. She said yes. You need to ask her if she said to the two of you. So of course there was no indication that she thought that was someone else. **So let's clarify that so that you are no longer appearing to be witnesses and causing a mistrial in this case.** Thank you.

(emphasis added).

The bench conference concluded. Defense counsel did not object or otherwise comment. The State's direct examination of S. resumed:

> [PROSECUTOR]: And do you remember when you spoke to [the other prosecutor] and I if there was anybody else in that room?
>
> [S.]: Yes.
>
> [PROSECUTOR]: Do you remember seeing the gentleman sitting in the back in the gallery that was there in the room, Mr. Dominick Carter (phonetically sp.)? Do you remember him?
>
> [S.]: Yes.
>
> [PROSECUTOR]: And do you remember Ms. Davis that is sitting next to him?
>
> [S.]: Yes.
>
> [PROSECUTOR]: You remember them?
>
> THE COURT: Come on up, folks. Thank you. Come on up.

Another bench conference ensued:

> THE COURT: No, no, no. Not you all. I am sorry. That is my fault. Thank you.

[DEFENSE COUNSEL]: I was confused, too.

THE COURT: I am sorry. No, no, no. **Okay, so now you have got witnesses now.** That is going to come out of the (indiscernible.)

[PROSECUTOR]: (Indiscernible).

THE COURT: Thank you.

(emphasis added).

The prosecutor resumed her examination of S.:

[PROSECUTOR]: All right. **So when you spoke to all of us in that room, do you remember telling us when your relationship started?**

[S.]: Yeah.

[PROSECUTOR]: And when was that?

[S.]: May the 3rd.

[PROSECUTOR]: Of what year?

[S.]: Last year.

[PROSECUTOR]: 2022?

[S.]: Yes.

[PROSECUTOR]: Okay. And do you see [appellant] in the courtroom today?

[S.]: Yes.

[PROSECUTOR]: Can you point at him and identify an article of clothing that he is wearing.

[S.]: He's wearing a blue shirt and pants.

[PROSECUTOR]: Okay. Can you point at him.

[S.]: Over there (indicating.)

[PROSECUTOR]: Let the record reflect the witness has identified the Defendant.

[PROSECUTOR]: Okay. And did there come a time where you and [appellant] had a sexual relationship?

[DEFENSE COUNSEL]: Objection. May we approach?

THE COURT: Overruled. I mean, is it different than what we discussed?

[DEFENSE COUNSEL]: Well, no.

THE COURT: Overruled.

[DEFENSE COUNSEL]: Okay, thank you.

[S.]: May you repeat that again?

[PROSECUTOR]: Did there come a time where you and [appellant] had a sexual relationship?

[S.]: No.

[PROSECUTOR]: **And do you remember when you spoke to [the other prosecutor] and the people that walked out of the courtroom that were present with us and myself -- that were present with us? When we talked to you about this case, do you remember talking about a sexual relationship?**

[S.]: No.

[PROSECUTOR]: Do you remember saying that you did have a sexual relationship with the Defendant?

[S.]: No.

[PROSECUTOR]: Do you remember saying that your -- do you remember testifying earlier today?[17]

[S.]: Yes.

[PROSECUTOR]: Okay. And do you remember what you told the Court?

[S.]: No.

[PROSECUTOR]: Do you remember that you told them that you had a sexual relationship with the Defendant one time?

[DEFENSE COUNSEL]: I am going to object, Your Honor.

THE COURT: Overruled.

[S.]: No.

[PROSECUTOR]: You say you don't remember?

[S.]: (Indiscernible.)

[PROSECUTOR]: Do you remember when we explained to you what swearing means, swearing to tell the truth under oath, and what it meant today? Do you remember that?

[S.]: No.

[PROSECUTOR]: Do you remember saying that you had a one-time sexual encounter with the Defendant?

[S.]: No.

[PROSECUTOR]: You don't remember testifying to that --

[S.]: No.

[17] The prosecutor was referring to the hearing in limine held that morning, where the State successfully persuaded the trial court to admit evidence of appellant's sexual relationship with S.

[PROSECUTOR]: -- earlier today? **If I play this body camera that shows the interaction between you and the officers, would you remember then about your sexual encounter with the Defendant?**

[S.]: No.

[PROSECUTOR]: That wouldn't refresh your recollection if you heard yourself tell the officers about your relationship with him?

[S.]: No. May you repeat that again all over?

[PROSECUTOR]: Sure. **So do you remember describing the relationship between -- the sexual relationship between you and the Defendant to the officers on October 28th of 2022?**

[S.]: Yes.

[PROSECUTOR]: And in that description, do you remember what you told the officers?

[S.]: About what?

[PROSECUTOR]: About your sexual relationship with the Defendant?

[S.]: Yes.

[PROSECUTOR]: **And what did you tell the officers?**

[S.]: That he was my cousin.

[PROSECUTOR]: And what else?

[S.]: **And my boyfriend.**

[PROSECUTOR]: And then what about the sexual relationship?

[S.]: What do you mean by that?

[PROSECUTOR]: **What did you tell the officers about your sexual relationship between you and the Defendant?**

[S.]: **That there was only one time we had like sexual.**

[PROSECUTOR]: Okay. So you only had sex with the Defendant one time?

(emphasis added).

Later, the prosecutor asked S. whether she could identify appellant in photographs downloaded from his Instagram account. The following occurred:

[PROSECUTOR]: Okay. And, [S.], **do you remember when you met with the prosecutors in this case and the other people that were in that room that day that we talked about these photos?**

[S.]: No.

[PROSECUTOR]: **Do you remember telling us that you knew this was the Defendant's Instagram account?**

[S.]: (Indiscernible) showed me another picture and (indiscernible.)

[PROSECUTOR]: But do you -- **my question is do you remember telling us that this was the Defendant's Instagram account?**

[S.]: No.

[PROSECUTOR]: **Do you remember telling us what his username was?**

[S.]: No.

[PROSECUTOR]: **Do you remember telling us that his username was big_flocko313 (phonetically sp.)?**

[S.]: No.

[PROSECUTOR]: **Do you remember telling us that you found yourself in one of these pictures in his account?**

[S.]: No.

[PROSECUTOR]: **Do you remember telling the prosecutors that you were in State's Exhibit Number 8?**

[S.]: No.

(emphasis added).

The questioning then turned to whether S. recalled seeing appellant at Colmar Manor Park on the evening of the shooting:

> [PROSECUTOR]: Okay. **And this day at the park on October 28th, 2022, do you remember telling the prosecutors and the other people in that room that day that you saw the Defendant at the park?**
>
> [S.]: I had to say that 'cause my dad -- they were forcing me.
>
> [PROSECUTOR]: Who was forcing you?
>
> [S.]: The man that doing the -- the man that was out there today.
>
> [PROSECUTOR]: **When you had a meeting with the prosecutors?**
>
> [S.]: No, the man that was out there today.
>
> [PROSECUTOR]: Was it a police officer?
>
> [S.]: The one that was me (sic) in the video.
>
> [PROSECUTOR]: And for the record, that was a detective. **But when you met with the prosecutors in this case, meaning [the other prosecutor] and I, and the other people in that room that day, were there any officers there?**
>
> [S.]: What do you mean by that?
>
> [PROSECUTOR]: Were there any police officers during that meeting?
>
> [S.]: Yeah.
>
> [PROSECUTOR]: Who was a police officer in that meeting?
>
> [S.]: I don't know.

[PROSECUTOR]: **In the meeting that -- when your dad was – and the prosecutors, there was a police officer there?**

[S.]: I don't know his name.

[PROSECUTOR]: How did you recognize him to be a police officer?

[S.]: What do you mean?

[PROSECUTOR]: How did you know he was a police officer?

[DEFENSE COUNSEL]: Objection.

THE COURT: Sustained. Come on up, please.

(emphasis added).

The trial court convened a bench conference, admonishing the prosecutor for "go[ing] down a very deep rabbit-hole of confronting the witness on things that really aren't relevant." When examination resumed, the prosecutor questioned S. about what she had observed when the masked shooter fired a handgun in the direction of Mr. Alberto's feet and whether, immediately afterward, the shooter spoke to her. Direct examination of S. then concluded.

After the final witness of the day had finished testifying, the trial court convened a bench conference, during which the prosecutor declared that she wanted to call an additional witness, Rachel Lloyd, a victim witness coordinator with the Prince George's County State's Attorney's Office, who was a witness to the pretrial interview alluded to during the prosecutor's examination of S. The proffered reason for Ms. Lloyd's testimony was to impeach S.'s testimony about her conversations with Ms. Lloyd and the prosecutors during that interview (i.e., a further development of the same line of inquiry which S. had

thwarted). Because Ms. Lloyd was not on the witness list, and because the defense knew nothing about either the proposed witness or the circumstances under which the conversations occurred, defense counsel opposed the State's request, explaining that it would put him "at a disadvantage." The court asked the parties to research the matter, and it deferred a ruling until the following morning.

When the trial reconvened the following morning, the trial court ruled that Ms. Lloyd would not be permitted to testify because the principal purpose of her testimony was to impeach S. concerning "collateral matters." Thereafter, the court asked whether there was "[a]nything else before we go to the jury[.]" At that point, defense counsel declared:

> After yesterday and last night, I had the opportunity to reflect and investigate some issues. **At this point in time I would be requesting a mistrial**, and it is based on the line of questioning from the prosecutor to [S.] And in effect -- and Your Honor called us up to the bench. She was in effect -- she was effectively testifying and through the impeachment cross examination of [S.]
>
> * * *
>
> Well, the form of the questions then indicated -- because she asked if she -- whether or not she remembered meeting with the State three to five days prior or whatever the case may be. And I think it might have been at that time Your Honor had us approach, and you posed the question, have you just made yourself a witness in this trial? And she has.
>
> And I think through the form of those questions -- well, the forms of those questions indicated to the jury to believe the prior statement of [S.] rather than her testimony here today. So in effect, she was testifying through her questions, and obviously, you know, the State's witness and Madame State are supposed to be on the same team. So I think the fact that the -- she was testifying through her cross -- through her questioning led the jury to view her statements, her questions, as more heightened credibility because she is a State's attorney rather than, you know, the witness on the stand.

> And so the case I provided Your Honor with is Walker v. State, 373 Md. 360, 2003. And basically the holding is a mistrial should have been declared when the prosecutor impeached a witness with questions about a prior conversation between the witness and the prosecutor. The prosecutor was in effect testifying.

(emphasis added).

The prosecutor tried to distinguish the present case from *Walker*, asserting that in this case, "there are other people that can testify to what happened" in the pretrial interview. The trial court then turned to defense counsel, and the following occurred:

> THE COURT: **Mr. [defense counsel], I am going to turn back to you and ask you at what point did you object to those questions?**
>
> [DEFENSE COUNSEL]: **Well, I can't definitively say.** But there were a series of objections, and **I think the Court**, I would argue, **stopped the proceedings because the Court knew it was impermissible. And I don't think this is an untimely objection because the State's case is not yet over.** The Court is the gatekeeper and can rectify or correct at any point any unfairness in this trial, and only one witness has testified since [S.] testified.
>
> **And so I raise this issue now because I have had the opportunity to investigate it and support my argument with solid case law. And I don't believe my objection is untimely again because you are the gatekeeper.** You can correct any unfairness that has preceded up until my request for this request for a mistrial.

(emphasis added).

The trial court then asked whether the problem could be cured by reversing its ruling (which had denied the State's request to call the victim witness coordinator), thereby providing defense counsel an opportunity to cross-examine that witness about the pretrial conversation between the prosecutorial team and S. Defense counsel countered that to do so was an inadequate remedy because he still would be unable to cross-examine either of

the prosecutors, and he declared that cross-examination of other witnesses to the pretrial interview could not cure the unfairness caused by the prosecutor's improper questions to S., which "tainted the jury."

Finally, the trial court asked for any additional response from the State. The prosecutor pointed out that here, unlike in *Walker*, defense counsel failed to make a timely objection, and furthermore, here, unlike in *Walker*, there were additional witnesses to the out-of-court conversation who were available for cross-examination. The court discounted the curative possibility of cross-examining the other witnesses, who, in its opinion, did not carry the gravitas of the prosecutors in the eyes of the jurors. The trial court then cleared the courtroom so that it could play back the recording of the prior day's proceedings, to assist in its determination of the prejudice Appellant may have suffered as a consequence of the improper prosecutorial questioning.

After listening to the pertinent part of the recorded proceedings and hearing argument of counsel, the court denied the motion for a mistrial, reasoning as follows:

> Okay. And of course any other thing after rape is part of my prior ruling.
>
> And so I had the opportunity -- I didn't listen to all of her testimony, but on the issue that really is addressed in the Walker case, the State asked, do you remember when we spoke with other people in the room? Do you remember saying that you have a sexual relationship? The answer was no.
>
> So that is what the Walker court is talking about. The fact of a sexual relationship comes in through the question that the Walker court says becomes testimonial, not subject to cross examination and carrying the weight of the extra reliability of the prosecutor.
>
> After the witness said no, the question was asked again, do you remember talking about a sexual relationship that you did have? The answer

was no. So truthfully I didn't continue to listen after that because what I needed to determine was whether that information came out through the question as opposed -- came out through the question or whether it was simply, do you remember talking.

And so the reason that I then asked for proffers of the video is to make a determination. **So clearly this is the line of questioning that the Walker court says isn't appropriate. It was not objected to at the time of. I will set that aside for the moment and address the request for a mistrial.**

The courts have repeatedly stated that a trial court should grant a mistrial if there is clear prejudice to the defendant caused if a mistrial is denied. So that is why I wanted to know and needed to know whether past statements of a sexual relationship were otherwise either already admitted, whether shown or not, or likely to be admitted because I think that if the only mention of a prior sexual relationship between the parties, excuse me, between [S.] and the Defendant would come from the State's, according to Walker, testimony in the form of a question, then that would be a different prejudice.

But if the jury is going to hear that she has a prior sexual relationship and has admitted it before, the Court finds that that changes the evaluation of clear prejudice to the Defendant if they -- if the jury would not otherwise hear that there was a prior relationship.

Again, the body camera video is not -- has not been admitted and has been marked. I think that it has been marked as State's 14, and I had previously ruled that I would allow the prior bad act to come in through impeachment through witnesses potentially other than the State's witnesses. And because the jury -- if State's 14 is admitted.

And additionally through -- and I am sorry, I keep calling her Ms. Santos, Ms. Alberto. Additionally through the testimony of Mr. Alberto the jury heard that his daughter and the Defendant had a physical relationship.

The Court finds that the questions by the prosecutor, though improper, did not clearly prejudice the Defendant and will deny the motion for a mistrial. I will of course hear you again if for some reason the body-worn camera is not admitted for some reason, if and when it is moved.

(emphasis added).

Subsequently, the State introduced into evidence, through Officer Hidalgo's testimony, State's Exhibit 24, a redacted copy of Exhibit 14, the officer's body camera video recorded at the time of the offenses. That exhibit was played in part before the jury and included an acknowledgment by S. that she and Appellant were in a "romantic" relationship. Defense counsel did not, at that time, renew his motion for a mistrial on the ground that there was a variance between the State's proffer, which the trial court considered when it denied his motion for a mistrial, and the subsequently admitted exhibit.

Analysis

In ruling on the defense motion for a mistrial, the trial court noted that there had been no contemporaneous objection to the prosecutor's mode of questioning but declared that it would "set that aside for the moment and address" the motion on its merits—that is, that it would excuse the failure to object. We, however, cannot be so forgiving.

Maryland Rule 4-323 provides in relevant part:

> **(a) Objections to Evidence.** 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. Otherwise, the objection is waived. The grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative, so directs. The court shall rule upon the objection promptly. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court may admit the evidence subject to the introduction of additional evidence sufficient to support a finding of the fulfillment of the condition. The objection is waived unless, at some time before final argument in a jury trial or before the entry of judgment in a court trial, the objecting party moves to strike the evidence on the ground that the condition was not fulfilled.
>
> * * *
>
> **(c) Objections to Other Rulings or Orders.** For purposes of review by the trial court or on appeal of any other ruling or order, it is sufficient that a party,

> at the time the ruling or order is made or sought, makes known to the court the action that the party desires the court to take or the objection to the action of the court. The grounds for the objection need not be stated unless these rules expressly provide otherwise or the court so directs. If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection at that time does not constitute a waiver of the objection.

This is a claim that the trial court erred in denying a motion for a mistrial, where the alleged prejudice suffered by the defendant was the erroneous admission of highly prejudicial evidence—the prosecutor's reverse vouching for a hostile witness. But defense counsel did not object to the prosecutor's mode of questioning until the following day. Whether we construe this claim as an objection to the admission of evidence (i.e., the prosecutor, in effect, being permitted to testify through her questions), governed by Rule 4-323(a), or as an objection to the trial court's refusal to declare a mistrial, governed by Rule 4-323(c), the effect is the same. Regardless of how we construe the claim, it is not preserved. Nor is there any reason we should excuse defense counsel's failure to preserve the claim through a contemporaneous objection; to the contrary, there are several reasons why we should not.

For one thing, there is no reason whatsoever to think that a timely objection would have been futile or, in the words of subsection (c), that there was "no opportunity to object . . . at the time" the prosecutor posed the improper questions. To the contrary, the trial court practically telegraphed to defense counsel that there was a ground for objection by interrupting the examination and telling the prosecutor that she had made her and the co-prosecutor into witnesses and even suggesting that, if the prosecutor persisted, a mistrial would result. Under these circumstances, there is every reason to believe that the court

would have sustained a timely objection and motion to strike. As the State observes in its brief, had defense counsel timely objected the first time the prosecutor asked an improper question, the only colloquy the jury would have heard was the following:

> [PROSECUTOR]: Do you remember speaking with the State before today, with the prosecutors before today?
>
> [S.]: No.

And furthermore, that snippet of an improper question-and-answer almost certainly would have been stricken from the record and a curative instruction given upon defense request.

As the Supreme Court of Maryland has expressly stated, Rule 4-323(c) "authorizes" an appellate court, under appropriate conditions, to "decline to address a complaint over the denial of a mistrial that is not timely made." *Hill v. State*, 355 Md. 206, 220 (1999). The Court further observed that an exception to that rule applies where

> (1) the motion is not unduly delayed and timeliness is not raised as a defense in the trial court, (2) the trial court does not consider timeliness, even as an alternative ground, but denies the motion on the ground that no further relief is called for, (3) no prejudice to the court or either party is indicated, and (4) the appellate court determines that the complaint underlying the motion is valid[.]

Id. at 220-21. If those conditions are satisfied, then "a complaint that the motion was improperly denied should be addressed on appeal and not found unpreserved." *Id.* at 221.

In *Hill*, for example, the prosecutor repeatedly made improper comments during both opening statement and closing argument, "paying utterly no attention to the numerous objections that were sustained by the court." *Id.* at 211. During closing argument, the prosecutor made a golden rule argument, and the trial court overruled repeated defense objections. *Id.* at 212. In rebuttal closing argument, the prosecutor made yet another

golden rule argument, challenging the jurors to "send" a "message" to the defendant, eliciting yet another defense objection, but the court did not rule on that objection. *Id.* at 213. "Instead, the court immediately excused the alternate juror, swore the bailiff, and sent the jury to deliberate." *Id.* Shortly after the jury retired, the defense "moved for a mistrial based on the closing argument of the State regarding 'sending a message.'" *Id.* "The court denied the motion, stating as its reason that it had sustained counsel's objections and told the jury that closing arguments were not evidence." *Id.*

"Hill complained again of the prosecutor's conduct in a motion for new trial, arguing that, unlike the situation regarding the reception of evidence, when the sustaining of an objection precludes the jury from hearing and being tainted by the improper evidence, the damage from the prosecutor's improper remarks was done before an objection could be lodged." *Id.* at 213-14. The trial court denied that motion on the merits, asserting that it had sustained the "majority of the objections raised" by the defense and that it did not find that the defendant had not received a fair trial. *Id.* at 214.

On appeal, we affirmed in an unreported opinion. *Id.* Regarding the claim that Hill was entitled to a mistrial based upon the prosecutor's rebuttal closing, we held that, although the prosecutor's golden rule argument was improper, Hill's claim was not preserved because the motion for a mistrial had been untimely. *Id.* at 214-15.

The Supreme Court of Maryland vacated our decision and remanded for consideration of Hill's claim on its merits. *Id.* at 221. But the circumstances in *Hill* were vastly different than those in this case. There, the motion for a mistrial was made, in the estimation of the Supreme Court, within a minute of the conclusion of argument, and

furthermore, the defense objected promptly to the prosecutor's improper comment that elicited the motion for a mistrial. *Id.* at 213 & n.1. Here, defense counsel waited until the following day to move for a mistrial, and moreover, he never made a contemporaneous objection to the prosecutor's improper mode of questioning, even after the trial court alerted him to the problem. Precisely because of defense counsel's failure to object to that line of questioning, the jury was exposed to the prosecutor's reverse vouching for the witness, S. Furthermore, unlike in *Hill*, the prosecutor here raised the untimeliness of the defense motion, and the court itself recognized the untimeliness, although it did not rule on that basis. Under these circumstances, excusing the untimeliness of appellant's motion for a mistrial would cause incurable prejudice to the State. *Id.* at 221.

The State suggests in its brief that defense counsel may have had "a strategic reason" for delaying his objection until the following morning, rather than making it "at the time the evidence [was] offered or as soon thereafter as the grounds for objection [became] apparent." Md. Rule 4-323(a). Given how obvious the grounds for objection were at the time of the improper questioning, we cannot discount this possibility. The question whether defense counsel had a strategic reason for withholding his objection, however, is better addressed in a postconviction proceeding, where the parties will have an opportunity to develop a factual record directed toward that question.

By failing to make a timely objection, despite the court alerting him to do so, defense counsel deprived the court of an opportunity to correct (or at least substantially mitigate the effect of) the error that underlies the claim now raised on appeal. It would be contrary to the interests of justice to reward such gamesmanship, and we refuse to do so.

In passing, we make the following additional comments. It is not reasonably in dispute that the prosecutor's mode of questioning was improper and that, specifically, it was in violation of *Walker v. State*, *supra*. That case, however, is distinguishable from this case. In *Walker*, unlike in this case, trial counsel promptly objected to the prosecutorial reverse vouching, and, although the court initially sustained the objection, the prosecutor subsequently was allowed—over multiple defense objections—to engage in reverse vouching, and furthermore, the court denied two defense motions for mistrial predicated on that error. 373 Md. at 369-73 s*ee id.* at 392 ("Defense counsel, through his timely unsustained objections . . . and timely-made, but denied, motions for mistrial . . . , properly preserved for appellate review the issue of whether it was proper for the prosecutor to question Myrick about statements he allegedly made to her during a pre-trial meeting."). Here, as we have explained, the claim is not preserved.

The trial court in this case was further correct in observing that the evidence of which Appellant complains on appeal was admitted at other points in the trial, including S.'s admission that she had sex with appellant "one time"—which was elicited, not by the improper reverse-vouching questions, but through proper impeachment with the police officer's body camera video. Although appellant does not develop this point in his brief, we note that the prejudice caused by prosecutorial reverse vouching is caused primarily by the form of the questioning itself, which in effect amounts to the prosecutor's testimony that the witness is lying. But most of that prejudice was ameliorated later in the trial, when the trial court granted the defense motion for judgment of acquittal on the flagship charges,

first- and second-degree assault, as well as use of a firearm in the commission of a crime of violence.

Almost the entire relevance of the other acts evidence and the prosecutorial reverse vouching was to Appellant's motive and intent in committing an assault against Mr. Alberto. Once those charges were taken from the jury, all that remained was a severely watered-down case: reckless endangerment (with its greatly diminished mens rea) and various handgun offenses. Moreover, S.'s credibility was practically irrelevant in proving those lesser offenses. Based on the overwhelming evidence (not even contested) that Appellant possessed a loaded handgun on the night in question, that he was statutorily prohibited from possessing it because of his age, and that he discharged that weapon at Mr. Alberto's feet, we conclude that any error had no influence on the verdict.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS ASSESSED TO APPELLANT.