

Circuit Court for Anne Arundel County
Case No. C-02-CR-17-000249

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2336

September Term, 2017

ANTONIO EUGENE DIGGS

v.

STATE OF MARYLAND

Beachley,
Fader,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned)

JJ.

Opinion by Thieme, J.

Filed: December 18, 2018

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

A jury in the Circuit Court for Anne Arundel County convicted Antonio Eugene Diggs, appellant, of first-degree murder and related offenses in the shooting death of Nathan Ford.¹ Appellant, who was sentenced to a total life plus five years consecutive, contends that the trial court “err[ed] in permitting the State to offer other crimes evidence at trial[.]” For the reasons explained below, we disagree and affirm appellant’s convictions.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was charged in two separate cases for crimes that occurred on January 13, 2017, within three miles and one hour of each other. The first case, which gave rise to this appeal, involved the fatal shooting of Nathan Ford; the second involved an armed robbery of Julie Childs. Because the sole issue in this appeal challenges a pre-trial ruling admitting “other crimes” evidence regarding the Childs robbery, we shall provide a detailed summary of the motion record and a brief review of the trial record.

Motion in Limine to Admit “Other Crimes” Evidence

Before trial in the Ford murder case, the State moved to introduce “other crimes” evidence from the Childs robbery, pursuant to Maryland Rule 5-404(b).² In support of that

¹ Appellant was convicted of first-degree murder, second-degree murder, armed robbery, using a firearm in a violent crime, two counts of possessing a firearm after a disqualifying conviction, illegally possessing a regulated firearm, carrying a handgun on his person, and theft of property valued under \$1,000. He was sentenced to life with the possibility of parole for the first-degree murder, plus a consecutive five years for possessing a firearm after a disqualifying conviction and a concurrent five years for using a firearm in a violent crime. The remaining convictions were merged for sentencing purposes.

² Previously, the circuit court denied a motion by the State to consolidate the two cases, on the ground that evidence regarding the murder would not be admissible at a separate trial of the robbery case.

motion, the State proffered the following information about the evidence it sought to present:

The defendant, Antonio Diggs was charged by way of indictment in C-02-CR-17-249 with eight counts including first degree murder, armed robbery, and firearms offenses. The murder is alleged to have occurred as the result of the armed robbery of Nathan Ford, the victim in this case, on January 13th, 2017 at approximately 10:15 p.m. in the 2200 block of Conquest Way, off Annapolis Road (Route 175) in Odenton, Maryland.

Nathan Ford was walking home alone from the My Place Bar on Rt. 175 in Odenton around 10 p.m. on the night of January 13, 2017 after having used the ATM there to withdrawal [sic] \$20. Ford walked from the bar and into the wooded area behind the bar toward his home. The Defendant, who had been sitting in a vehicle on the parking lot of My Place with the co-defendant, Jessica Chaney, told Chaney he needed to “relieve himself” and walked into the wooded area behind My Place around the same time.

While walking toward his home on Conquest Way Nathan Ford was approached by the defendant, who was wearing distinctive clothing, and robbed. During the robbery Mr. Ford was shot with a revolver. A homeowners’ [sic] surveillance video was later recovered and showed Mr. Ford walking in the direction of his home and then shows another man, believed to be the defendant, walking a short distance behind him, wearing distinct clothing, just a few minutes before Ford is robbed and killed. Nathan Ford ultimately died from a gunshot wound. The defendant then took Nathan Ford’s cell phone and fled back to the area of Route 175 next to My Place Bar and got into the vehicle being driven by Chaney. When the Defendant entered Chaney’s vehicle she noticed that the Defendant was in possession of a revolver and was holding a cell phone that she knew was not his.

Following the murder and robbery of Nathan Ford, the Defendant directed Chaney to drive him to the Giant store located at 1115 Annapolis Road, a location within just a few miles (approximately 3 miles) of where the Defendant shot and killed Nathan Ford. There, the Defendant told Chaney to leave him in the parking lot in front of the Giant grocery store at that location and drive to the rear of the Giant and wait for him. Chaney did as the Defendant had instructed her. Shortly after being left in the parking lot, the Defendant approached Ms. Julie Childs, displaying a revolver, and demanded her phone, wallet and other personal belongings. Childs later

identified the Defendant in a photo lineup and also described the clothing he was wearing at the time of the robbery which is similar to the clothing that was worn by the shooter in the robbery and murder of Nathan Ford. In addition, this robbery was captured on video surveillance and shows the Defendant wearing similar clothing and sweatshirt. Immediately following the robbery, the Defendant fled to the rear of the Giant, got into Ms. Chaney's car, and they fled the scene together. The Defendant and Ms. Chaney then use [sic] Ms. Childs' credit cards to purchase a variety of things from the Fort Liquor Store and both the Defendant and Chaney were captured on video. The Defendant can be seen wearing the similar clothing and sweatshirt. This incident took place at approximately 11:00 p.m., less than an hour after the robbery and murder of Nathan Ford. As a result of this incident the defendant was charged with twelve counts including armed robbery, robbery, assault, and firearms offenses in C-02-CR-17-000248.

In the instant case it is the State's intention to introduce this evidence as circumstantial and direct evidence that the Defendant is the person who robbed and killed Nathan Ford earlier that night and in the same area. This evidence will be introduced by way of eye witness testimony and physical evidence.

In its written motion, the State identified the nature of the other crimes evidence it sought to present, as follows:

6. The State would introduce testimony of the co-defendant, Jessica Chaney identifying Antonio Diggs as the person who exited her vehicle and robbed Julie Childs at gunpoint using a revolver at the Giant Food Store.

7. The State would also call the victim, Julie Childs, to provide testimony regarding the identity of the defendant, as well as a description of the revolver used to rob her, and a description of the clothing the defendant was wearing when this offense was committed.

At the motion hearing, the State argued that it was "seeking to use information with respect to a subsequent robbery using . . . an identical firearm, a revolver, identical clothing that matches the clothing [of the killer], and an identical motive, the reason being a

robbery.” In support, the prosecutor made an oral proffer consistent with the State’s written proffer but adding more details about both crimes.

With respect to the murder of Nathan Ford, the prosecutor explained that the walk to Mr. Ford’s house from the bar was “about a two or three-minute” journey. Surveillance video footage from residences and businesses showed that the person who followed Ford was “wearing what appears to be a sweatshirt with a kind of design on the front of it[.]” In addition, there was another homeowner surveillance video with audio, so “you can hear the gunshots. You hear Mr. Ford scream. And then you see him at some point run toward his home and collapse.” Police found “no shell casings on the scene[.]” which experts would explain is consistent with a revolver.

With respect to the ensuing robbery, the prosecutor orally proffered that Julie Childs identified appellant in a photo lineup and identified the revolver from “a photograph in the defendant’s phone,” which was recovered following his arrest. After police identified Jessica Chaney “as one of the people involved” in the robbery, they found “Mr. Ford’s cell phone inside of [her] vehicle.” Video surveillance footage from the grocery store, a liquor store, and a convenience store would show both the robbery as it occurred and appellant accompanying Ms. Chaney as she was “using the credit cards that were stolen from Ms. Childs to purchase items inside of that [liquor] store.”

The State asserted that it intended to prove that

the motive of Mr. Ford’s murder was robbery. The motive of the subsequent act with Ms. Childs was robbery. In fact, we’re not certain, but the only [thing] he seems to escape with [from] Mr. Ford is an inoperable cell phone.

However, cell phone tracking does allow at least the cell phone to show that it tracks with Ms. Chaney. It corroborates Ms. Chaney’s testimony as to the cell phone being in her vehicle when the defendant returns to her vehicle.

As discussed below, the court granted the State’s motion.

Trial

At trial, the State presented footage from surveillance cameras showing that as Nathan Ford was walking home, he was followed by a man whom Jessica Chaney identified as appellant. Recordings captured the sound of four gunshots and screaming, followed by Mr. Ford running until he collapsed just outside his home. Although his girlfriend found him about thirty minutes later, he was mortally wounded by two gunshots, to his head and groin. As police and paramedics rendered aid, Mr. Ford died where he fell.

Ms. Chaney, testifying pursuant to a guilty plea agreement, recounted that she and appellant were together that night. Her testimony was consistent with the State’s pre-trial proffer. She identified appellant as the person who followed Nathan Ford, the “grey and black” sweatshirt that appellant was wearing, and a revolver shown in a photo obtained from appellant’s cell phone as the one he was carrying when he returned to her car after following Mr. Ford. She also recounted that appellant was carrying a cell phone he did not previously have, which he immediately turned off and put into the glove compartment of her car.

In accordance with the court’s pre-trial ruling, the State presented evidence relating to the Childs robbery. Over a continuing objection by defense counsel, the State elicited Jessica Chaney’s testimony that after appellant return to her car, he directed her to drive

straight to Giant, a nearby grocery store, where they parked while he “was looking for somebody to rob[.]” As they waited, appellant talked “a little bit of what happened previously before getting to Giant,” telling her that “he got into it with somebody and he thinks he may have shot him.”

After seeing “a lady walking out of the store,” appellant directed Chaney to drop him off next to the vehicle where the woman was loading groceries. Appellant “approached the woman” as Chaney “pulled off” and parked near the skating rink where appellant had instructed. Chaney narrated a surveillance video of the store parking lot, showing the movement of her vehicle and appellant “sitting on the bumper of the vehicle” where the lady was.

Chaney testified that appellant returned to her car with a wallet and keys from the “lady he just robbed.” Immediately thereafter, Chaney used credit cards that were in a woman’s name, to buy alcohol at “Fort Liquors” and tobacco products at a High’s convenience store. Surveillance cameras recorded Chaney and appellant making those purchases. Later that weekend, appellant again “said he had got into it with somebody and think [sic] he shot him, because he heard screaming.” They “ended up Googling” on appellant’s cell phone about “a shooting in Odenton and linked it.”

The State also called Julie Childs, who testified that appellant got out of a car that pulled up next to her as she was putting groceries into her vehicle. He was wearing a “two-tone” “dark hoodie” pulled up over his head. With his finger on the trigger of the revolver matching the one in the photo downloaded from appellant’s cell phone, appellant told her,

“Let me be clear: I don’t give a shit whether you live or die tonight.” He demanded her purse, but when she replied that she did not have one, he asked for her wallet and cell phone. When Childs responded that she did not have her cell phone with her, appellant made her turn out her pockets to prove they were empty. He took her wallet and keys, then instructed her to lay on the ground. Childs watched as he got into the passenger side of a car parked in the location described by Chaney.

Police investigating the Childs robbery interviewed Jessica Chaney, who initially denied involvement but then “was consistent in her statement” and reported that the cell phone appellant brought back with him after he followed Mr. Ford was still in her car. Nathan Ford’s cell phone was recovered in the glove box of Chaney’s vehicle.

After appellant was arrested, “a black hooded sweatshirt” with a Reebok logo was recovered in a warrant search of appellant’s residence. Gunshot residue was later discovered on the garment. Ms. Childs identified that garment as the sweatshirt that appellant was wearing when he robbed her.

Appellant’s cell phone also was seized and searched pursuant to a warrant. Police found a photograph of “a hand holding . . . what appeared to be a revolver in a vehicle.” Ms. Chaney identified the revolver as the one she saw appellant carrying when he returned to her car after following Mr. Ford. A forensic examination of appellant’s smart phone revealed that on January 15, two days after Mr. Ford was shot, the phone was used to perform an internet search for “shooting in Severn” and to link to an article about Mr. Ford’s murder.

DISCUSSION

Appellant contends “the lower court erred in allowing the State to introduce evidence concerning the robbery of Ms. Childs[,]” because that evidence “permeate[d] the instant trial, where the only crimes put before the jury were related to Mr. Ford’s death.” The State counters that “the trial court properly exercised its discretion in admitting, as ‘other crimes’ evidence, testimony regarding a robbery that occurred 40 minutes after the alleged shooting and attempted robbery in this case.” For the reasons explained below, we agree with the State.

Standards Governing Admission of “Other Crimes” Evidence

Md. Rule 5-404(b) governs the admissibility of evidence concerning crimes other than those for which a defendant is on trial. In pertinent part, the rule provides:

Other Crimes, Wrongs, or Acts. Evidence of other crimes . . . 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.

Md. Rule 5-404(b). This rule “is designed to protect the person who committed the ‘other crimes . . .’ from an unfair inference that he or she is guilty not because of the evidence in the case, but because of a propensity for wrongful conduct.” *Winston v. State*, 235 Md. App. 540, 563, *cert. denied sub nom. Mayhew v. State*, 458 Md. 593 (2018).

This Court recently summarized the standards for admitting evidence under Rule 5-404(b), as follows:

It is well-settled that subject to several exceptions, evidence of other crimes is not admissible in Maryland. It may be admissible, however, if the “evidence is substantially relevant to some contested issue in the case and is not offered to prove guilt based on propensity to commit crimes.”

A three-part analysis is required before other crimes evidence is admitted. First, the court must determine whether the evidence fits into one or more of the exceptions [in Rule 5-404(b)]. This is a legal determination. Second, it must be shown by “clear and convincing” evidence that the defendant engaged in the alleged criminal acts. In this regard, “[w]e review the trial court’s decision to determine if there is sufficient evidence to support” its finding. Third, the court must find that the probative value of the evidence outweighs any unfair prejudice. “This determination involves the exercise of discretion by the trial court.”

Darling v. State, 232 Md. App. 430, 462-63, *cert. denied*, 454 Md. 655 (2017) (quoting from *Hurst v. State*, 400 Md. 397 (2007); *Sifrit v. State*, 383 Md. 116 (2004); and *State v. Faulkner*, 314 Md. 630 (1989)).

In *Faulkner*, which is the seminal case establishing the three-step analytical framework for other crimes evidence, the Court of Appeals recognized that such evidence has special relevance under the identity exception in Rule 5-404(b) when

it shows any of the following:

- (a) *the defendant’s presence at the scene or in the locality of the crime on trial;*
- (b) that the defendant was a member of an organization whose purpose was to commit crimes similar to the one on trial;
- (c) the defendant’s identity from a handwriting exemplar, ‘mug shot,’ or fingerprint record from a prior arrest, or his identity through a ballistics test;
- (d) the defendant’s identity from a remark made by him;
- (e) the defendant’s prior theft of a gun, car or other object used in the offense on trial;

(f) *that the defendant was found in possession of articles taken from the victim of the crime on trial;*

(g) that the defendant had on another occasion used the same alias or the same confederate as was used by the perpetrator of the present crime;

(h) that a peculiar modus operandi used by the defendant on another occasion was used by the perpetrator of the crime on trial;

(i) *that on another occasion the defendant was wearing the clothing worn by or was using certain objects used by the perpetrator of the crime at the time it was committed;*

(j) that the witness' view of the defendant at the other crime enabled him to identify the defendant as the person who committed the crime on trial.

Faulkner, 314 Md. at 637-38 (emphasis added; citations omitted). “[E]vidence of other offenses may be received under the identity exception if it shows any of” these factors.

Cross v. State, 282 Md. 468, 477 (1978); *see Faulkner*, 314 at 637.

The Motion Record

At the hearing on the State's motion *in limine*, appellant argued that the State failed to establish the three *Faulkner* prerequisites for admitting evidence regarding the Childs robbery. With respect to its “special relevance,” either in proving the identity of Ford's killer or the motive for that shooting, defense counsel pointed out that “not one person saw the murder take place” and that “[t]here's nothing to show that there was a robbery gone bad, and then a murder.” Defense counsel maintained that “[t]he fact that there was no injury to Ms. Childs, and there was no robbery with Mr. Ford makes these cases as dissimilar as they can get and not almost identical, like the State wants the Court to believe.”

Although the prosecutor conceded that appellant’s use of the credit cards stolen from Ms. Childs was “not something that needs to be revealed[,]” he maintained that other “evidence of the robbery and the possession of the handgun and the clothing he was wearing within three miles and 40 minutes are highly probative to the motive and the identity of who killed Nathan Ford and it all should come in.”

The court granted the State’s motion, ruling as follows:

[U]nder 5-404(b), in order to admit certain evidence, *Faulkner* has identified ten separate factors. One of – only one of which is necessary, although the State has provided evidence of three.

The first of which is the defendant [is] present at the scene or in the locality of the crime on the trial. Again, we have videoed testimony, two videos. The one which is somewhat grainy, shortly leaving the bar, and we have Ms. Chaney’s testimony, but which we did not have when we dealt with the consolidation issue.

We have the defendant – the next factor we have is that defendant was found in possession of articles taken from the victim of the crime on trial. We have the cell phone, which has been identified as Mr. Ford’s cell phone, that was later discovered in Ms. Chaney’s vehicle.

And then we have that on another occasion the defendant was wearing the clothing worn by or using certain objects used by the perpetrator of the crime at the time it was committed. We have the video from the Giant. We have the photograph and we have testimony of Childs and Chaney that all support that – that factor. So, we have a particular sweatshirt on a video.

We have – we also have the revolver. We – from the argument, there is circumstantial evidence that a revolver was used to kill the victim because no shell casings were found at the scene. We also have Ms. Child’s [sic] identification of the – what appeared to be the same revolver in the robbery of her that was found on the defendant’s cell phone. So, we have her testimony as well.

The Defense conceded with regards to clear and convincing evidence that *Solomon* is on point. And because a grand jury has considered this, there is clear and convincing evidence of – of the other crimes evidence.

With regards to the probative value versus the undue prejudice, the third factor that the Court has to consider, the Court has recognized that there has to be corroboration of Ms. Chaney’s testimony, and that makes it highly probative. And addition [sic] the robbery, well, it occurred. It occurred a short time later and in close proximity to where the murder happened. And the Court finds that it’s – it’s probative as far as motive is concerned, and it’s not unduly prejudicial, which is the standard that the Court has to use. Because most evidence is prejudicial. But it’s unduly prejudiced, and the Court does not find that the evidence is unduly prejudicial.

With the exception of, and I agree with the State on this point, is that the use of the credit cards in the liquor store doesn’t add anything. The video from the liquor store can be used. But using the stolen credit cards does not add anything to the equation. And, so, therefore, the Court is going to exclude that portion of the evidence.

So, the Court will allow the robbery of Ms. Childs to be introduced with regards to the identification of the defendant.

Appellant’s Challenge

Appellant argues that the motion court’s analysis was flawed with respect to each of the three *Faulkner* prerequisites:

The allegations related to Ms. Childs had no special relevance to a contested issue at this trial, and the allegation that Mr. Diggs robbed Ms. Childs established neither a motive for Mr. Ford’s death nor Mr. Diggs’ identity as the homicidal agent. Second, the lower court erred in relieving the State of its burden to convince the court – clearly and convincingly – of Mr. Diggs’ participation in the robbery. Third, the prejudice attendant to this evidence greatly outweighed the special relevance – if any – of the allegations.

We shall address – and reject – each of appellant’s contentions in turn.

Special Relevance

Appellant argues that the evidence concerning the robbery of Ms. Childs lacked “special relevance to any contested issue concerning Mr. Ford’s death[,]” because that other crimes evidence did not establish either a robbery motive for Mr. Ford’s shooting or appellant’s identity as his killer. The State counters that evidence regarding the Childs robbery was highly relevant to show both appellant’s “motivation to rob” Nathan Ford just minutes earlier and his “identity as the shooter” of Nathan Ford, by establishing that appellant “was near the scene of the crime (a short drive away), that he had an instrumentality of the crime (the firearm), and that he had fruit of the crime (the cell phone).” We conclude that the State’s written and oral proffers established a sufficient legal and factual basis for the motion court’s ruling that evidence of the Childs robbery had special relevance.

“Evidence that shows that a particular person has a motive to commit an act also tends to identify that person as the perpetrator.” 5 Lynn McLain, *Maryland Evidence, State & Fed.*, § 404:11 (June 2018 update available on Westlaw). *See, e.g., Wilder v. State*, 191 Md. App. 319, 344 (2010) (in prosecution for first-degree assault, “[t]estimony that Wilder had earlier threatened to come to the house with a weapon ha[d] special relevance to establishing the identity of the shooter in this case, and it is also relevant to Wilder’s motive for revenge against” the victims). Although the State’s written motion focused on the identity exception in Rule 5-404(b), the prosecutor argued at the motion hearing that both the “identification and motive of the person who committed the murder of Mr. Nathan Ford . . . [were] at issue.”

With respect to motive, the State argues that

[t]he fact that Diggs committed a robbery less than an hour after the shooting in this case tends to show that he had a motive to commit robbery at a time that was very close to the time of the charged offenses in this case. That is especially true because it appears that the first robbery attempt was mostly unsuccessful. Even though the robbery occurred after the shooting, a defendant's actions after the charged offenses can shed light on the reason for committing the charged offenses. *See State v. Coleman*, 423 Md. 666, 674 (2011) (“Intent may be inferred from acts occurring subsequent to the commission of the alleged crime.”).

We conclude that the proffered evidence supports the motion court's ruling that evidence of the Childs robbery had special relevance under the motive exception in Rule 5-404(b). When considered collectively, the proffered facts were sufficient for a jury to infer that appellant's encounter with Ford was a robbery that “went wrong,” in that it resulted in a shooting. In particular, such an inference may be drawn from the evidence that Nathan Ford withdrew \$20 from an ATM before heading home; that appellant followed after Ford as he walked alone into a wooded area; that four shots were fired just before Ford ran toward his residence with mortal wounds; that appellant returned to Chaney's car carrying a revolver and Ford's cell phone; that appellant told Chaney that he “got into it” with someone and shot him; that immediately after the Ford shooting appellant directed Chaney to drive him to a grocery store, where he stalked Julie Childs before using the same revolver to take her wallet and keys.

Alternatively, evidence regarding the Childs robbery was properly admitted under the identity exception in Rule 5-404(b). Although we cannot say that the connection between appellant's possession of Ford's cell phone immediately after the Ford shooting,

and his subsequent robbery of Ms. Childs, was strong enough to establish special relevance for Rule 5-404(b) purpose, we are satisfied that the other two “identity factors” cited by the motion court established special relevance. Specifically, evidence from the Childs robbery established appellant’s presence in the vicinity at the time of the Ford shooting, carrying the same weapon that appellant carried when he returned after following Mr. Ford into the wooded area. Moreover, evidence from the Childs robbery established that appellant was wearing the same sweatshirt identified by Chaney as what appellant was wearing when he followed Mr. Ford.

Based on this record, we find the decision and rationale in *Govostis v. State*, 74 Md. App. 457 (1988), instructive. In that case, the State proffered other crimes evidence from the defendant’s accomplice, whose last name is coincidentally the same as the murder victim in this case, to establish both the defendant’s motive for murder and his identity as the killer:

Ford [the accomplice] testified that the victim had given the gun to appellant and that appellant possessed the gun at all times thereafter. Ford’s testimony that appellant committed two armed robberies in North Carolina and plotted further robberies with Glaze and Ford was but a part of a lengthy narrative detailing the entire sequence of the activities of the three men from the time Ford and appellant met [the victim] Glaze in Virginia until they left him, shot to death, in a motel room in Hagerstown, Maryland. According to Ford, he and appellant decided to steal Glaze’s car and personal effects in an effort to terminate their criminal partnership or, at least, rid themselves of one of the partners. It was Ford’s contention that appellant unilaterally took their plot one step beyond that which they had planned jointly by terminating not only Glaze’s partnership but Glaze himself. Thus the “other crimes” evidence, by establishing the existence of a criminal partnership, tended also to establish a motive for the murder of Glaze and the theft of his property.

The disputed evidence, therefore, was admissible under the motive exception to the “other crimes” exclusionary rule.

We further conclude that Ford’s testimony about the robbery committed by appellant in Rocky Mount was admissible as well under the identity exception to the exclusionary rule. That testimony, combined with and corroborated by the testimony of the Hoovers [i.e., the robbery victims] and coupled with evidence that when arrested appellant was wearing clothing similar to that worn by the man who robbed the Hoovers and was in possession of a handgun not unlike that which the Hoovers said their assailant was wielding, served to confirm Ford’s identification of appellant as the man who shot Glaze. Appellant might have been able to provide a credible non-culpable explanation for his possession of the gun eleven days after it was used to kill Glaze; the “other crimes” testimony of Ford, together with the corroborating testimony of the Hoovers and the arresting officers, tends to establish that appellant was in possession of the murder weapon two days before as well as eleven days after the murder. Evidence of possession of an object before and after an event with which that object is associated creates, in turn, a reasonable inference of possession of the object during the event. By tending to connect appellant with the murder weapon at the time it was used as such, the evidence concerning appellant’s robbery of the Hoovers came within the proof of identity exception to the “other crimes” exclusionary rule.

Id. at 465-66 (citations omitted).

As in *Govostis*, evidence regarding the Childs robbery had special relevance because it established appellant’s robbery motive for his encounter with Nathan Ford, as well as his identity as the shooter. Testimony by Childs confirmed that minutes after the Ford shooting, just three miles away, appellant committed a robbery using the same revolver and wearing the same clothing as what appellant was carrying and wearing when he returned to Chaney’s car after following Mr. Ford. *Cf. also Wilkerson v. State*, 139 Md. App. 557, 572 (2001) (evidence that defendant committed a robbery with same gun used in a murder eight days earlier was admissible to show identity because, “as the person in

possession of the weapon during the robbery on March 13, he may have also been in possession of the murder weapon as part of a similar scenario eight days earlier”).

We also find *Faulkner* instructive. In that case, the defendant was on trial for robbing a grocery store. The Court of Appeals upheld the trial court’s admission of evidence about his involvement in two other store robberies, which occurred months before and after the charged robbery. *Faulkner*, 314 Md. at 643. The *Faulkner* Court concluded that under Rule 5-404(b), evidence about the other two robberies was admissible to show identity, reasoning:

In this case most of the State’s evidence regarding the 15 November 1985 robbery is circumstantial. The only direct evidence, from Faulkner’s accomplice, Peavy, must be corroborated, because a conviction cannot stand on the uncorroborated testimony of an accomplice. This corroborative evidence, including the “other crimes” evidence, is not merely cumulative in establishing Faulkner’s guilt. It was reasonably necessary and served an appropriate probative purpose. In other words, it did more than suggest to the jury that Faulkner was a bad man or had a propensity to commit crimes. It was not an abuse of discretion for Judge Raker to admit evidence of the 19 April 1985 and 10 January 1986 robberies on the limited issue of identity, a limitation she carefully explained to the jury.

Id. at 642-43 (citations and footnote omitted).

Here, as in *Faulkner*, most of the State’s evidence regarding the Ford murder was circumstantial. The only direct evidence that appellant was the person who shot Ford during a robbery came from his accomplice, Jessica Chaney. In turn, because Chaney’s testimony implicating appellant in Ford’s murder had to be corroborated, evidence regarding the Childs robbery, which was committed with the same weapon within minutes

after Ford was shot, served a purpose other than to suggest to the jury that appellant was a bad man or had a propensity to commit crimes.

Based on this record, the trial court did not err in ruling that evidence of the Childs robbery had special relevance in establishing the killer’s motive and identity.

Clear and Convincing Evidence

Turning to the next step in the *Faulkner* analysis, appellant argues that the trial court erred in concluding that “[t]he Defense conceded with regards to clear and convincing evidence that [*Solomon v. State*, 101 Md. App. 331 (1994)] is on point” for the proposition that “because a grand jury has considered this [robbery case], there is clear and convincing . . . other crimes evidence.” In appellant’s view, the State misunderstood and misapplied the holding in *Solomon*, regarding the distinction between admitting other crimes evidence and joinder/severance of two criminal cases. *See id.* at 339 (“There is a substantive overlap between the two bodies of law, but no procedural overlap.”). Pointing to language in *Solomon* that distinguishes a joinder-related consideration of a grand jury indictment from the clear and convincing standard of proof governing a determination of whether other crimes evidence is admissible under *Faulkner*, appellant maintains that “the State erred in relying on *Solomon*’s observations – in the context of joinder or severance of charges – to argue that ‘if the grand jury has indicted, then we’re just going to skip the step of clear and convincing evidence entirely.’” Appellant contends that, “while the fact of indictment may surely be considered and weighed by the trial judge, it does not permit the judge to ‘skip’” this step of the *Faulkner* analysis. Appellant maintains that “[t]he judge must still perform

his or her gatekeeping function,” but in this instance, “the judge failed to do so” because she adopted the State’s mistaken interpretation of *Solomon*.

The State counters that appellant affirmatively waived his right to assert this challenge when defense counsel expressly conceded that under *Solomon*, there was sufficient evidence to satisfy the clear and convincing standard. We agree.

The State, in its written memorandum of law submitted before the motion hearing, argued:

In *Solomon v. State*, 101 Md. App. 331 the Court of Appeals determined that where the “other crimes” evidence sought to be used by the State as a 5-404(b) evidence are actually *crimes that have been charged* (in the instant case, both crimes were indicted upon a finding of probable cause by the Grand Jury of Anne Arundel County) the court is not required to make a finding that the “other crimes” have been established by way of “clear and convincing evidence.” *Id*[.] at 343, 344. Therefore the need for the second prong of the *Faulkner* analysis is not only unnecessary; it is not required by law. While the *Solomon* case addressed whether two separate cases should be consolidated based on the use of 404(b) evidence, the same would be true of the simple use of 404(b) evidence in a case regardless of consolidation.

Even if the court determines the State must provide clear and convincing evidence that the crime(s) sought to be introduced by the State as 404(b) evidence occurred, that very low burden is easily overcome. Not only will there be testimony of the victim, Julie Childs, about the identity, actions, handgun type and clothing worn by the Defendant . . . , there will also be the testimony of Ms. Chaney as well as video surveillance . . . where Jessica Chaney and the defendant used the credit cards that had been stolen . . . during the armed robbery.

At the motion hearing, the prosecutor clarified the State’s position on *Solomon*, arguing:

The second prong is clear and convincing evidence. And I think Ms. [Defense Counsel] and I spoke. We were not going to require people to come

in and testify. I think we'd agree that this would be testimony that would come forward. I will also say that in *Solomon*, and I think we're going to disagree on this part, but in *Solomon*, the Court said, when it talked about consolidation, that if a grand jury has indicted a case, a charged case is treated very differently than just witnesses coming in and speculating as to what happened out on the street. *Solomon* said that the clear and convincing prong did not need to be established in consolidation.

I'm not saying that they've extended that to a 404(b) hearing, because I don't think they've had the opportunity to do so. But I believe . . . Judge Moylan . . . just simply said the hurdle for the grand jury to [overcome] probable cause is greater than clear and convincing evidence. And therefore, if the grand jury has indicted, then we're just going to skip the step of clear and convincing evidence entirely. And I think we'd agree that clear and convincing evidence could be provided, and would be provided at trial by Ms. Childs[,] by Ms. Chaney, by the photographs and the videos.

Defense counsel initially challenged the State's position, but then conceded that the grand jury indictment constituted sufficient evidence to satisfy the clear and convincing requirement. We excerpt the relevant colloquy:

[DEFENSE COUNSEL]: . . . The State has to prove by clear and convincing evidence that Mr. Diggs is the one who did it. And, yes, that's a low standard, but the mere fact that a grand jury indicted him after hearing only one side of the facts isn't sufficient.

THE COURT: Doesn't *Solomon* say it is?

[DEFENSE COUNSEL]: I mean, it does, but I – I think that there's also the requirement that although there's no requirement of a mini-trial, I think that there should be a proffer or something that – that states, you know, in limine what they want to introduce. I just – can I have a minute?

THE COURT: You can.

[DEFENSE COUNSEL]: Thank you. Your Honor, I'm sorry. **I would agree that *Solomon* says that.** But I'll go back to my initial argument, which is the State still has to prove that – that Mr. Diggs is the one who committed these crimes, even though it's a low standard. And I don't think that they can rise to that.

(Emphasis added.)

In light of counsel’s statement, we agree with the trial court and the State that appellant affirmatively waived his right to complain that the motion court failed to determine that there was clear and convincing evidence of his guilt in the Childs robbery. Appellant’s “cherry-picked” excerpt from the motion hearing record not only ignores this concession by defense counsel, but it also disregards that ensuing events eliminated any dispute about that issue.

According to case records available through Maryland’s Electronic Courts record system (MDEC), on September 19, 2017, just days after the “other crimes” motion hearing held on August 30, appellant entered an Alford plea in the Childs case and was found guilty on charges of armed robbery and using a firearm in a crime of violence. *See generally* Md. Rule 5-201 (court may take judicial notice of facts “not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned”); *Lewis v. State*, 229 Md. App. 86, 90 n.1 (2016) (taking judicial notice of docket entries available on Maryland Judiciary website), *aff’d on other grounds*, 452 Md. 663 (2017). Consequently, by October 23, when trial on the Ford murder began, appellant could no longer dispute that his guilt in the Childs robbery had been established by clear and convincing evidence.

Based on this record, neither the motion court, nor the trial court erred in determining that there was clear and convincing evidence satisfying the second prong of the *Faulkner* test.

Probative Value v. Undue Prejudice

In his final *Faulkner* challenge, appellant contends that “[t]he lower court erred in admitting evidence of the [Childs] robbery, as this allegation had attendant prejudice which far exceeded its special relevance.” In his view, the motion court failed to conduct “the necessary weighing of the need for, and probity of, the evidence,” and then failed to make the required determination “that the State – as proponent – had shown that even if the evidence was not ‘unduly prejudicial,’ that ‘necessity for and probative value of the ‘other crimes’ evidence’ exceeded that prejudice.” Alternatively, appellant maintains that the court “abused its discretion because the State did not show its need for the other crimes evidence outweighed the prejudice to [him].”

As this Court has explained, “[t]he fact that the record does not reflect whether a trial court conducted the balancing test does not mean the court did not do so.” *Jones v. State*, 178 Md. App. 123, 144 (2008). In any event, this hearing record contradicts appellant’s claim that the motion court failed to make findings in support of its *Faulkner* balancing.

Noting that all other crimes evidence is prejudicial, the court correctly required a showing of “*undue* prejudice likely to result from its admission.” See *Faulkner*, 314 Md. at 635 (emphasis added). Applying that standard, the court expressly stated that it did “not find that the evidence is unduly prejudicial.” To the contrary, the court explained, evidence of the Childs robbery would be “highly probative” because it would corroborate Chaney’s testimony. In addition, given the proximity of the Childs robbery, the court found that

evidence to be “probative as far as motive” in the Ford murder. The significant probative value of that evidence, which corroborated and supported the State’s prosecution theory as discussed above, supported this determination.

Appellant’s alternative contention is that the State did not establish sufficient “need” for admitting evidence regarding the Childs robbery in an “unsanitized” form. In appellant’s view, the motion court should have prohibited any mention of the robbery itself, while limiting Ms. Childs’s testimony “to the possession of the handgun.” Appellant argues that “what the State *needed* to establish was that the person depicted in the video footage from the grocery store was the person depicted in the encounter with Mr. Ford.” According to appellant, “there was a ‘middle of the road’ approach,” in which the State would be permitted to present that testimony, but “there would be no mention of the robbery. That Ms. Childs would simply testify to the possession of the handgun,” without recounting “the highly prejudicial fact that Mr. Diggs was so attired, and possessed a handgun, in the course of the alleged robbery.”

We are not persuaded that the motion court abused its discretion in declining to “sanitize” the evidentiary record to the extent advocated by appellant. Such limitations would have unfairly undermined the State’s case, by excluding evidence that, as discussed above, strongly supported the prosecution theory that appellant’s motive for shooting Ford was robbery. As the State points out:

Rather than showing that Diggs actively *used* the weapon to rob someone less than an hour after he allegedly used the weapon to rob and shoot someone, it would have shown only that he was a person who passively and

perhaps innocuously had “possession” of the handgun. The number of people in the area that evening who passively possessed a handgun may have been large – defense counsel made a similar point in closing, stating that “certainly, this is not the only revolver in and around the County of Anne Arundel.” The number of people who possessed a handgun and used it to rob someone was likely much smaller, and thus more probative of identity.

This Court recently emphasized, with respect to the analogous standard in Md. Rule 5-403 governing undue prejudice challenges to all types of evidence, that prosecution evidence does not become “unduly” prejudicial simply because the State may have other evidence to prove its case:

When invoking Rule 5-403, defense lawyers frequently abuse the factor of necessity. The hue and cry is that the State did not need the evidence. If there is actually “unfair prejudice” in the weighing process, the State’s need for the evidence may, indeed, be a factor in assessing the probative value of the evidence. The abuse of the necessity factor occurs in cases where the evidence produces no “unfair prejudice” but only “legitimate prejudice.” Even in such a case, defense counsel still seek to limit the use of evidence by invoking the necessity principle. There is, however, no such principle protecting defendants from legitimate prejudice. In cases where the resulting prejudice is legitimate rather than “unfair,” the fact that the State’s case may not, in terms of its sufficiency, desperately need the evidence in question does not diminish in the slightest the weight of the evidence’s probative value. As *Oesby* explained:

Probative value does not depend on necessity. When we are talking only about the legitimate prejudice that inevitably results from competent evidence enjoying a special or heightened relevance, there is no downside to making a strong case even stronger.

...

In terms of legitimate prejudice, . . . 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.

Newman v. State, 236 Md. App. 533, 551-52 (2018) (quoting *Oesby v. State*, 142 Md. App. 144, 166 (2002)) (emphasis added; footnote omitted).

Here, the motion court did agree to “sanitize” the other crimes evidence by excluding evidence that appellant and Ms. Chaney used the credit cards stolen from Ms. Childs. The court did not abuse its discretion in ruling that the State was not required to further “water down” its case by excluding all other evidence of the Childs robbery.

Conclusion

Applying the correct legal standards, the trial court did not err or abuse its discretion in admitting evidence of the Childs robbery under Md. Rule 5-404(b).

**JUDGMENT OF THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**