HASAN HOWARD,	*	IN THE
Appellant	*	COURT OF SPECIAL APPEALS
v.	*	OF MARYLAND
STATE OF MARYLAND,	*	September Term, 2006
Appellee	*	No. 2914
	*	

* * * * * * * * * * * * *

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of October, 2008, three copies of the Appellant's Reply Brief in the captioned case were delivered to

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IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

SEPTEMBER TERM, 2006

NO. 2914

HASAN HOWARD,

Appellant

v.

STATE OF MARYLAND,

Appellee

APPEAL FROM THE CIRCUIT COURT FOR BALTIMORE CITY
(THE HONORABLE ALLEN L. SCHWAIT PRESIDING WITH A JURY)

APPELLANT'S REPLY BRIEF

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INDEX

TABLE OF CONTENTS

APPELLANT'S REPLY BRIEF

Page

TABLE OF CITATIONS

Page

Cases

Other Authorities

Rules

Treatises

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ARGUMENT

I.

MR. HOWARD'S CHALLENGE TO THE WRONGFUL INTRODUCTION OF ALLEGATIONS OF PAST DOMESTIC VIOLENCE TOWARDS THE VICTIM IS FULLY PRESERVED FOR APPELLATE REVIEW.

The State first argues that Mr. Howard has waived appellate review of the wrongful introduction of allegations of past domestic violence towards the victim because the objection made at trial "was on grounds other than those he raises

now." (Appellee's Brief at 2) While the State's attempt to avoid the merits of the issue is understandable, it is equally without merit.

The State's preservation argument fails to consider "one of the most fundamental tenets of appellate review: Only a judge can commit error. . . the judge can commit error, either by failing to rule or by ruling erroneously when called upon, by counsel or occasionally by circumstances, to make a ruling." *DeLuca v. State,* 78 Md. App. 395, 397-98, 553 A.2d 730 (1989). Thus, "[a]ppellate courts look only to the rulings made by a trial judge, or to his failure to act when action was required, to find reversible error." *Id.* at 398 (quoting *Braun v. Ford Motor Company*, 32 Md. App. 545, 548, 363 A.2d 562 (1976)).

Therefore, the issue before this Court is whether the trial judge was correct when he determined that Ms. Spriggs' testimony concerning Mr. Howard's "putting his hands on me" was admissible because it was "potentially prior bad acts" and "shows a common scheme." (T1. 134; App. 3). The court's ruling, clearly, was that the challenged evidence fell within an exception to the general prohibition of evidence of other bad acts. Accordingly, because "[a]ppellate courts look only to the rulings made by a trial judge," *DeLuca,* 78 Md. App. at 398, the issue on appeal must focus on whether the trial judge was correct in determining that the evidence was admissible prior bad act evidence.

Moreover, even if the State was correct in focusing on the substance of counsel's objection, and not the court's ruling, the issue would be preserved nevertheless. Counsel sought to exclude this evidence because the jury should

focus on "one specific event that happened," but the challenged evidence was "going to side track the jury" by diverting their attention "into other things that has nothing to do with this case." (T1. 134; App. 3) Thus, the objection argued against the introduction of collateral matters, unrelated to the specific incident at issue. This is precisely why other bad acts evidence is excluded: because "the introduction of such evidence is said to bring in collateral issues of which there would be no end." *Harris v. State,* 324 Md. 490, 496, 597 A.2d 956 (1991) (quoting Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 Harv.L.Rev. 954, 958 (1933)). Thus, the rule excluding evidence of other bad acts solves "[t]he problem of injecting endless collateral issues into a case", *id.,* the precise reason why Mr. Howard's attorney argued against introduction of the evidence here. The objection lodged at trial, and the argument made on appeal, are the same.

Last, even if the objection was viewed as solely a relevance objection, it is clear that because "[w]hen other crimes evidence is inadmissible, it is rejected because of its lack of relevancy . . .an objection to the admission of such evidence on the grounds that it is irrelevant will preserve the issue for appellate review because admissibility of such evidence hinges on its relevancy to a proper subject of inquiry." *Leak v. State,* 84 Md. App. 353, 360, 579 A.2d 788 (1990). Indeed, in *Leak,* as in the present case, "[t]he State argue[d] that appellant may not assert on appeal that the court erred in admitting other crimes evidence" because the

objection was on the basis that the evidence was irrelevant. *Id.* As in *Leak,* this Court must "reject that argument." *Id.*

While appellant acknowledges that the two cases cited by the State hold that an objection on relevance grounds does not preserve an other bad acts argument, it is important to note that these cases are bereft of any authority for that proposition. In contrast to these two outlying cases, Maryland law has traditionally excluded other bad act evidence because of its lack of relevance. In the seminal Maryland case on other bad act evidence*, Ross v. State*, 276 Md. 664, 669, 350 A.2d 680 (1976), the Court of Appeals held that "evidence which in any manner shows or tends to show that the accused has committed another crime wholly independent of that for which he is on trial, even though it be a crime of the same type, is irrelevant and inadmissible." (emphasis added). The Court of Appeals' view of other bad act evidence as a component of the law of relevancy continues to this day. *See Hurst v. State,* 400 Md. 397, 929 A.2d 157 (2007) (noting, in a rape case where the only contested issue was consent, that "[e]vidence that a third party did not consent to sexual intercourse with petitioner in the past has no bearing on whether [the present victim] consented to sexual activity" and was therefore "was irrelevant" to the present victim's "consent or lack of consent."). And, indeed, commentators have noted that a relevance objection will preserve for appeal an other bad acts argument. *See* Joseph H. Murphy, Jr., MARYLAND EVIDENCE HANDBOOK, § 105 at 17 (3rd ed. 1999). The objection lodged at trial has preserved the issue for review.

II.

THERE IS NO DOMESTIC VIOLENCE EXCEPTION TO THE GENERAL PROHIBITION OF EVIDENCE OF OTHER CRIMES OR BAD ACTS, AND NO REASON WHY ONE SHOULD BE CREATED IN THIS CASE.

In the present case, the State seeks to carve an exception to the Rule which generally prohibits the State from introducing evidence of prior crimes or other bad acts of the accused where the prior act in question is an act of domestic violence, and the accused is on trial for assault arising out of a domestic altercation. (Appellee's Brief at 14-16) Maryland does not recognize a "domestic violence" exception to Maryland Rule 5-404 (b), and the State's strained logic in trying to craft such an exception demonstrates why such an exception should not be recognized *sub judice*.

In support of its attempt to create a "domestic violence" exception to Rule 5-404 (b), the State points to two other jurisdictions – California and Alaska – which do allow evidence of past acts of domestic violence to be admitted against the accused. (Appellee's Brief at 14-15) The State's argument, however, overlooks the fact that in California and Alaska the exception had to be created, respectively, by statute and rule. (See Appellee's Brief at 15) The fact that evidence of prior acts of domestic violence is admissible only because of a special exception only highlights the conclusion that the common-law prohibition of other crimes evidence clearly excludes evidence of this nature. Moreover, the fact that Maryland Rule 5-404 (b) does not contain a domestic violence exception

underscores the fact that this Court is not at liberty to accept the State's invitation to create such an exception in this case. As the Court of Appeals has recognized:

> . . . when a statute expressly sets forth certain exceptions to the coverage of the enactment, this Court "cannot disregard the mandate of the Legislature and insert an exception, where none has been made by the Legislature," *Johnson v. Mayor & City Council of Baltimore City*, 387 Md. 1, 15, 874 A.2d 439, 448 (2005), quoting *Schmeizl v. Schmeizl*, 186 Md. 371, 375, 46 A.2d 619, 621 (1946). See, e.g., *Nasseri v. Geico*, 390 Md. 188, 198, 888 A.2d 284, 290 (2005) (Where there are "exceptions...expressly authorized by the Legislature, this Court has consistently" refused to recognize "exceptions... which were not authorized by the Legislature") (internal quotation marks omitted); *Selig v. State Highway Administration*, 383 Md. 655, 672, 861 A.2d 710, 720 (2004) ("'When the legislature has expressly enumerated certain exceptions to a principle, courts...should be reluctant thereafter to create additional exceptions,'" quoting *Ferrero Constr. Co. v. Dennis Rourke Corp.*, 311 Md. 560, 575, 536 A.2d 1137, 1144 (1988)); *O'Connor v. Baltimore County*, 382 Md. 102, 113, 854 A.2d 1191, 1198 (2004) ("We will not ... 'insert language to impose exceptions...not set forth by the legislature'"); *Salamon v. Progressive Classic Insurance Company*, 379 Md. 301, 311-315, 841 A.2d 858, 864-867 (2004); *Lewis v. Allstate Ins. Co.*, 368 Md. 44, 48, 792 A.2d 272, 274 (2002).

BAA v. Acacia, 400 Md. 136, 152, 929 A.2d 1 (2007). Because "[t]he rules of construction are as applicable to rules of procedure as they are to statutes," *Downes v. Downes*, 158 Md. App. 598, 616, 857 A.2d 1155 (2004), these principles guide the interpretation of Rule 5-404 (b). The rule contains several exceptions but, unlike California and Alaska, Maryland does not recognize a "domestic violence" exception to the limited prohibition of other bad acts evidence. This Court may not add such an exception to those exceptions already

within Rule 5-404 (b) and, accordingly, must reject the State's entreaty to do so in the present case.

Moreover, the State's attempt to place acts of domestic violence within "the ambit of [the] exception" recognized in *Vogel v. State,* 315 Md. 458, 554 A.2d 1231 (1989) and *Acuna v. State,* 332 Md. 65, 629 A.2d 1233 (1993) is truly specious. (Appellee's Brief at 14, 16) In *Vogel,* the Court of Appeals acknowledged a limited exception to the prohibition of other crimes evidence "in prosecutions for sexual crimes, when similar offenses have been committed by the same parties prior to the crime alleged." *Id.* at 465 (quoting *Berger v. State*, 179 Md. 410, 414, 20 A.2d 146 (1941)). The Court, however, emphasized the fact that this exception is "carefully circumscribed" and "strictly limited to the prosecution for sexual crimes in which the prior illicit sexual acts are similar to the offense for which the accused is being tried and involve the same victim." *Id.* at 466. Similarly, in *Acuna,* the Court recognized that the "sex crimes exception to the prohibition against other crimes evidence differs markedly from other evidence that is excepted from that rule." 332 Md. at 74. Indeed, this exception allows the introduction of such evidence in this situation propensity is uniquely relevant; viz., it demonstrates "a passion or propensity for illicit sexual relations with the particular person concerned in the crime on trial." *Id.* at 75 (citations omitted). This propensity evidence is allowed, however, because "in the area of sex crimes, particularly child molestation, 'courts have been likely to admit proof of prior acts to show a party's conformity with past conduct . . . because the character evidence

is believed to have greater probative value in those circumstances.'" *Id.* (quoting 5 L. McLain, *Maryland Practice: Maryland Evidence, State & Federal* § 404.1, at 344 (1987)).

While each is abhorrent in its own unique way, prior acts of violence between domestic partners are in no way comparable to the repeated sexual molestation of the same child. The *Vogel/Acuna* exception is premised upon the belief that a molester is prone is offend repeatedly; acts demonstrating propensity are admissible in this limited circumstance because of the unique propensity of a child molester. *Acuna,* 332 Md. at 75. Indeed, and unsurprisingly, the State cannot point to a single case which has applied *Vogel* and *Acuna* to allow introduction of allegations not involving the sexual molestation of a child. Accordingly, the exception is "carefully circumscribed" and "strictly limited." *Vogel,* 315 Md. at 466. The limits of this exception must remain as they have been established by the Court of Appeals, and this "strictly limited" exception, accordingly, cannot be extended so cavalierly to include acts of domestic violence.

In conclusion Maryland does not, and should not, recognize a domestic violence exception to the rule prohibiting introduction of evidence of other crimes or bad acts of the accused. The State, moreover, has submitted no compelling reason why such an exception should be created in this case. The evidence challenged here is clearly prohibited by Maryland Rule 5-404 (b), and consequently, the trial court erred in allowing the State to introduce evidence that Mr. Howard assaulted Ms. Spriggs in the past.

III.

THE LOWER COURT ERRED IN ADMITTING THE OTHER BAD ACTS EVIDENCE WITHOUT EVALUATING WHETHER THE STATE'S NEED FOR THIS EVIDENCE, AND ITS PROBATIVE VALUE, OUTWEIGHED THE PREJUDICE IT ENGENDERED.

The Court of Appeals has repeatedly emphasized "the need to ensure that adequate consideration be given to the conceded, but sometimes overlooked, potential for unfair prejudice that invariably accompanies the introduction of evidence of other bad acts." *Harris,* 324 Md. at 501. Thus, "evidence of other bad acts is generally not admissible," *id.* at 500, and, before the evidence is removed from this rule of prohibition, "the party offering the evidence has a hurdle to overcome and must shoulder the burden of demonstrating relevance other than criminal character, as well as the burden of demonstrating that the probative value substantially outweighs the potential for unfair prejudice." *Id.* at 500-01. In assessing whether the proponent of this evidence has satisfied that burden, the trial judge must "carefully weigh" evidence, giving due regard to its potential for prejudice, and may allow the evidence only where the State demonstrates "the necessity for and probative value of the 'other crimes' evidence." *State v. Falkner,* 314 Md. 630, 641, 352 A.2d 896 (1989). While this assessment is discretionary, judicial discretion must operate "in the direction of excluding otherwise admissible evidence." *Id.*

The Court of Appeals has commanded that if other crimes evidence is allowed into evidence the court "should state its reasons for doing so in the record

as to enable a reviewing court to assess whether Md. Rule 5-404 (b), as interpreted through case law, has been applied correctly." *Streater v. State,* 352 Md. 800, 807, 724 A.2d 111 (1999). While the State concedes that "the court did not expressly spell out its consideration of the factors to be applied when admitting evidence of prior bad acts," (Appellee's Brief at 17) it urges this Court to affirm on the basis that the lower court should be presumed to have performed this required function. (Id.) The State then devotes several pages to explaining how it satisfied another element of the *Falkner* test by proving the allegations by clear and convincing evidence (id. at 17-19),[1] but offers nary a word as to how probity of this evidence, and the State's need for these salacious accusations, outweighs the prejudice it engendered to Mr. Howard.

The State's failure to offer any argument as to how this prerequisite of admissibility was satisfied *sub judice* says more than any attempt to provide a *post hoc* justification for the evidence ever could. The fact remains that the trial judge never performed the "careful balancing" analysis required by *Falkner* – and

[1] The State's argument as to how Ms. Spriggs' allegations against Mr. Howard were proven by clear and convincing evidence is a bit incongruous with its later attack on Mr. Howard's use of Ms. Spriggs' past arrests for assaulting him, i.e., that the evidence of past arrests was "mere allegations." (Appellee's Brief at 20) While that may well be the case, in general, the fact that Ms. Spriggs was arrested for assaulting Mr. Howard shows at least some corroboration for the allegation – it must have been reliable and accurate enough to give the police probable cause to arrest Ms. Spriggs. It is hard to see how Ms. Spriggs' allegations, which lack any corroboration, are sufficiently reliable to satisfy the clear and convincing evidence standard, but the fact that Ms. Spriggs' had been arrested previously is a "mere accusation" and insufficiently probative to allow its admission.

required to be on the record by *Streater* – and the State offers no explanation for how this prerequisite may be satisfied on appeal. The evidence was wrongfully admitted in the absence of any finding, nor even an argument by its proponent, demonstrating "the necessity for and probative value of the 'other crimes' evidence." *Falkner,* 314 Md. at 641.

CONCLUSION

For the foregoing reasons, and those stated in *Appellant's Brief,* appellant respectfully requests that this Court reverse the judgment of the court below.[2]

Respectfully submitted,

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[2] Mr. Howard will address the State's remaining contentions at oral argument on November 10, 2008.