Circuit Court for Wicomico County
Case No. C-22-CR-21-000222

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 704

September Term, 2022

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CALVIN G. BRATTEN

v.

STATE OF MARYLAND

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Graeff,
Nazarian,
Tang,
JJ.

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Opinion by Tang, J.

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Filed: April 7, 2023

* 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.

**At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Following a jury trial in the Circuit Court for Wicomico County, Calvin G. Bratten, appellant, was convicted of theft of property valued between $1,500 and $25,000 and acting as a contractor without a license. On appeal, appellant presents two questions for our review, which we have rephrased:[1]

1. Was the evidence sufficient to sustain appellant's conviction for theft?

2. Did the court err in refusing to admit the victim's bank records?

For the following reasons, we shall affirm.

## BACKGROUND

Stephen Merritt hired appellant to replace the roof on his home. On May 26, 2020, the two signed a contract to have appellant replace Mr. Merritt's roof for $10,000. Mr. Merritt planned to pay appellant using proceeds he expected to receive from an insurance claim he had filed.

Appellant required a down payment to cover the cost of materials. Mr. Merritt paid appellant a $6,000 down payment with two checks, the first of which was for $1,000 given to appellant that day. On June 10, Mr. Merritt tendered the second check in the amount of

[1] The questions presented by appellant in his brief are:

1. Could any rational trier of fact have determined beyond a reasonable doubt that Mr. Bratten had the intent to deprive Mr. Merritt of his money when the evidence showed a compressed timeline of events, confusion through communications of the parties, and Mr. Bratten's honest belief that he was using the funds to complete Mr. Merritt's home improvement project?

2. Did the Circuit Court err in refusing to admit evidence of Mr. Merritt's bank account statements that further corroborated Mr. Bratten's lack of intent to deprive Mr. Merritt of any monies?

$5,000. He instructed appellant not to cash the check until appellant heard back from him, because he was waiting for funds, with which he could pay that check, to be deposited into his account. On June 15, when he received sufficient funds in his account, Mr. Merritt told appellant he could cash the check, which appellant did "[l]iterally within minutes."

Appellant testified that he had placed a $2,500 deposit for a special order of architectural shingles for Mr. Merritt's roof and "didn't want to miss the funds to cover this check so [he] could go pay for these materials that [he] already ordered[.]" Appellant testified that he was told that it would take up to six or seven weeks for the shingles to be delivered due to the COVID-19 pandemic.

**Roof Work Did Not Begin**

Once the down payment was paid, Mr. Merritt expected appellant to begin work on or about Sunday, June 21, which he had made clear to appellant. That day, Mr. Merritt texted appellant, "So what's the word? Any ideas yet on scheduling? Shingles bought yet?" Appellant did not respond.

The next day, Monday, June 22, Mr. Merritt texted appellant about securing the insurance proceeds to pay the balance upon completion of the project:

> [MR. MERRITT:] You up and around? Call me, it['s] important. I think we[']re ok but I want to make sure. Here[']s the claim. What I want to know is how fast that second payment is made. Says [$]5514 is recoverable. . . My notes are very clear, says I get the second payment after completion.

Appellant expressed concern regarding Mr. Merritt's ability to pay the balance:

> [APPELLANT:] After the ordeal we had with the deposit I will buy the shingles but we will not be able to replace the roof until the funds are

> secured. You told me originally when we started talking about the roof that the check was already sent to your father.

Mr. Merritt responded, "Don[']t buy anything yet. Don[']t buy anything until I talk to insurance company." Thereafter, the "money issue" "was resolved pretty quickly." Mr. Merritt assured appellant that work could proceed once he obtained from appellant a copy of the contract to submit to his insurance carrier, which appellant appeared to provide that day:

> [MR. MERRITT:] Ok making progress. I need a copy of the contract. We did one when I gave you the first $1000, then amended it when I gave you the $5000, but you kept my copy. Can I get that today to send in? . . . Once I get that we can move forward.
>
> [APPELLANT:] Yes.
>
> [MR. MERRITT:] Ok, we should be cool once I send that in, altho[ugh] he said turnaround is about a week. Can we met [sic] or do u wanna come here or me there to get contract?
>
> [APPELLANT:] I will be over in your area soon.

Appellant, however, did not begin work on the roof that week as expected. On Wednesday, June 24, Mr. Merritt texted appellant about beginning work, "So what [are] we looking at? I'm guessing [F]riday?" Despite the "absolutely beautiful [weather] that week," appellant claimed that he could not begin work because the weather forecast predicted rain at the end of the week. He texted Mr. Merritt:

> [APPELLANT:] Local weather calling for rain tomorrow and Friday. Watching weather close.
>
> [MR. MERRITT:] Hadn[']t look yet. Can I call? Question about sheds.

> [APPELLANT:] I have to keep my eyes on the weather and for people talking to my other clients. All my clients have a right to have other people come and do stuff for them. But when other clients go ask if there's a problem with me because you just gave me money for a roof that is not good. I still had to go finis [sic].

In the days that followed, appellant did not begin work on the roof. Mr. Merritt became afraid that his roof would fail as "[w]e were going into storm season. I had an insurance company that had paid for half of a roof, and I didn't have a new roof, I was afraid that . . . the house was going to start suffering damage if the roof failed." The delay prompted Mr. Merritt to end his working relationship with appellant.

**Mr. Merritt's Request for Refund**

On July 7, 2020, Mr. Merritt contacted appellant to terminate the contract and request a refund of the down payment. Appellant "basically said that he wasn't going to give the money back and that he was going to be compensated for his work. And then he said he would give part of the money back." Mr. Merritt texted appellant:

> [MR. MERRITT]: So you aren r [sic] going to refund my money? I need to know.
>
> [APPELLANT]: Partial.
>
> [MR. MERRITT]: ? You haven't put any time in other than measuring for the bid. I need my money by Thursday.

Appellant testified that he had agreed to a partial refund, explaining:

> when somebody has already got me ordering materials, it upset me a little that now he wants to cancel[.] I told [Mr. Merritt], I said I paid for some of these materials, I can't give you all your money back, now I have time invested and, you know, I can get, I have no problem giving [Mr. Merritt] his money back, but I did have a problem giving him all of his money back[.]

When asked what part of the $6,000 appellant felt he was entitled to keep, appellant estimated $600 to $800 for the time spent on various tasks:[2]

> [Mr. Merritt] called me on every, every time we turned around and want me to come over and look at something, he thought shingles were coming off, he thought he had another leak, and he thought the dormers were leaking, I'd grab my tools and my son and go over there and check it out and make sure his, make sure he's not going to have further damage inside his house, like, drywall damage from water and things like that.

Appellant acknowledged that he neither accounted for this time nor invoiced Mr. Merritt for this work.

**Appellant's Failure to Refund**

Appellant did not refund any of the down payment. Around July 9, 2020, Mr. Merritt followed up with appellant. Appellant told Mr. Merritt that the refund "would have to be payments." Mr. Merritt responded, "we need to get this taken care of or I'm going to take legal action[.]" "At that point [appellant] said we can't talk anymore."

Thereafter, Mr. Merritt filed a complaint with the Maryland Home Improvement Commission. An investigator with the Commission testified that appellant was not a licensed contractor with the State of Maryland at the time Mr. Merritt hired appellant to replace the roof.

On September 2, 2020, appellant was charged with failing to perform a contract, acting as a contractor without a license, and felony theft.

Though he testified that he never intended "to keep all the money that [Mr. Merritt] gave" him, appellant never returned any portion of the down payment, nor did he make any

[2] Appellant did not mention the $2,500 used for the materials deposit.

sort of payment plan for the refund. Appellant explained that the two were unable to agree on the refund amount and that Mr. Merritt "started threatening legal action, and when you start threatening legal action I knew communication is cut off[.]"

Upon this evidence, the jury acquitted appellant of failing to perform a contract but convicted him of felony theft and acting as a contractor without a license. The court sentenced appellant to five years of incarceration for felony theft, followed by a suspended six-month sentence for acting as a contractor without a license. We shall include additional facts in our discussion of the issues.

## DISCUSSION

### I.

Appellant argues that no rational trier of fact could have found that appellant had an intent to deprive Mr. Merritt of his money. The State counters that the evidence was sufficient to support an inference of an intent to deprive and, thus, the theft conviction. We agree with the State.

In reviewing a claim regarding the sufficiency of the evidence, an appellate court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Smith v. State*, 415 Md. 174, 184 (2010) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Making this determination "does not require [the appellate] court to 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.'" *State v. Manion*, 442 Md. 419, 431 (2015) (quoting *Dawson v. State*, 329 Md. 275, 281 (1993)). Thus, this Court defers to the jury's resolution

of "any conflicts in the evidence" as well as the "jury's inferences and determine whether they are supported by the evidence." *Smith*, 415 Md. at 185 (citations omitted).

**A.**

The State charged appellant with the unauthorized control modality of theft. Section 7-104(a) of the Criminal Law ("CR") Article, in relevant part, provides that "[a] person may not willfully or knowingly obtain or exert unauthorized control over property, if the person . . . intends to deprive the owner of the property[.]" Md. Code (2002, 2021 Repl. Vol.), CR § 7-104(a).

"Deprive" means to withhold property of another: (1) permanently; (2) for a period that results in the appropriation of a part of the property's value; (3) with the purpose to restore it only on payment of a reward or other compensation; or (4) to dispose of the property or use or deal with the property in a manner that makes it unlikely that the owner will recover it. CR § 7-101(c).

"The requirement of intentional deprivation makes theft a specific intent crime." *State v. Coleman*, 423 Md. 666, 673 (2011). "Given the subjective nature of intent, the trier of fact may consider the facts and circumstances of the particular case when making an inference as to the defendant's intent." *Manion*, 442 Md. at 434. A defendant's intent to deprive "may be inferred from acts occurring subsequent to the commission of the alleged crime." *Id.* (quoting *Coleman,* 423 Md. at 674); *see also United States. v. Latney*, 108 F.3d 1446, 1449-50 (D.C. Cir. 1997) ("[L]ater acts are most likely to show the accused's intent when 'they are fairly recent and in some significant way connected with prior material events[.]'").

**B.**

Appellant contends that the evidence was insufficient for any rational trier of fact to find that he intended to deprive Mr. Merritt of his $6,000. His argument rests on three main factual points. First, the time elapsed between the inception of the contractual relationship and cessation of communications, approximately seven weeks, was "extremely limited." Appellant argues that "it might have taken up to seven weeks to receive shingles [appellant] ordered to complete the roofing work," and, further, the contract did not specify a completion date. According to appellant, the timing and supply chain difficulties explained why appellant was not "getting the work done." Second, appellant contends that Mr. Merritt's purported inability to pay the balance of the contract and his directive not to purchase materials also explained why appellant did not start and complete the roof work.

Third, appellant argues that he did not intend to deprive Mr. Merritt of his money even after Mr. Merritt sought to terminate the contract and requested a refund, because the two could not agree on the amount of the refund and Mr. Merritt had threatened legal action, leading appellant to believe that they should cease communications.

Viewing the evidence in the light most favorable to the State, a rational juror could have found that appellant intended to deprive Mr. Merritt of his $6,000. Accepting *arguendo* appellant's first two factual points and focusing on his third point, the evidence unequivocally established that appellant failed to return any portion of the $6,000 after (1) Mr. Merritt sought to terminate the contract and requested the refund, and (2) appellant committed to a partial refund, acknowledging that, except for $600 to $800, the money

belonged to Mr. Merritt. Appellant suggests that the jury should have accepted his explanations for not refunding any portion of the $6,000 as proof that he lacked the intent to deprive. The jury, however, had "the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses." *Smith*, 415 Md. App. at 185. And it apparently rejected appellant's reasons for withholding Mr. Merritt's money and did not find his explanations credible.[3] *See Allen v. State*, 158 Md. App. 194, 251 (2004) ("The [jury] can accept all, some, or none of the testimony of a particular witness."). On this record, the evidence was sufficient for the jury to find that appellant intended to deprive Mr. Merritt of his money.

**C.**

Appellant relies on *State v. Coleman*, 423 Md. 666 (2011) to argue that there was insufficient evidence that he intended to deprive Mr. Merritt of his $6,000. In that case, our Supreme Court[4] considered whether the evidence was sufficient to sustain a conviction for theft by deception where the defendant failed to perform various construction contracts. *Id*. at 669. Coleman entered into various contracts to convey eight lots in a subdivision

[3] On cross-examination, appellant admitted that he had been convicted, in 2012, of theft. The jury was instructed that the conviction could be considered in deciding whether appellant was telling the truth.

[4] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See also* Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland….").

and build homes on those lots. *Id*. at 670. The buyers agreed to purchase the unimproved lots by obtaining loans with an initial advance. *Id*. at 671. At closing, Coleman used the initial advances to purchase the lots and conveyed title to each buyer. *Id.* The remaining balances on the buyers' loans were held in escrow from which Coleman could draw funds during construction to cover his costs. *Id*. Coleman, however, never applied for any draws because construction never started. *Id.* Coleman encountered financial difficulties and delays in the permitting process. *Id*. at 671-72. The only payments Coleman received from the buyers were the initial land advances, used to purchase the lots, and amounts ranging from $900 to $3,500 for paperwork costs such as blueprints and site plans. *Id*. at 671.

The Court held that the evidence was insufficient to support Coleman's theft conviction, noting that a defendant's "intent to commit theft may be negated by an honest belief in the right to the property." *Id*. at 676. The Court explained that "[t]here was no evidence that Coleman lacked either a right to the money he received or 'an honest belief' in that right." *Id.* The evidence demonstrated that Coleman gave value for the money received; in exchange for the initial draws and miscellaneous payments, the buyers received title to land and construction blueprints. *Id*. at 676-77. He did not receive further payments or draws. *Id*. at 677. Further, the State did not produce any evidence that Coleman received more than market value for the land he conveyed. *Id*.

Appellant argues that, like the defendant in *Coleman*, he performed some work of value, there was no evidence that he had used the down payment for any purpose other than the contract at issue, he "had the right to the $6,000" given the circumstances, and he

possessed "an honest belief" that he was going to use Mr. Merritt's money to replace the roof per the contract.

Preliminarily, we observe that appellant did not articulate or frame the "honest belief" defense at trial as he now does on appeal. In a motion for judgment of acquittal, appellant argued that the State failed to prove intentional deprivation because the evidence demonstrated that he had offered to make "partial payment based upon services rendered" and "return otherwise all the money involved in this matter." Neither appellant nor defense counsel suggested that appellant withheld the down payment, after Mr. Merritt's demand for a refund, because he honestly believed he would use the funds to replace the roof per the contract. *See Bates v. State*, 127 Md. App. 678, 691 (1999) ("A defendant may not argue in the trial court that the evidence was insufficient for one reason, then urge a different reason for the insufficiency on appeal in challenging the denial of a motion for judgment of acquittal."), *overruled on other grounds by Tate v. State*, 176 Md. App. 365 (2007).

In any event, appellant's reliance on *Coleman* is unpersuasive. The evidence in *Coleman* demonstrated that Coleman gave value (title to land) for the money received which did not exceed market value for the land conveyed. 423 Md. at 676-77. By contrast, Mr. Merritt paid appellant $6,000 towards the contracted roof replacement, and appellant admittedly did not perform work that was commensurate with the money received. *See, e.g., Manion*, 442 Md. at 437 (evidence was sufficient to demonstrate intent to deprive where defendant-contractor "failed to begin, much less complete, the projects he contracted

to perform or deliver construction materials, despite having been paid"). For the reasons stated, there was sufficient evidence to support appellant's theft conviction.

**II.**

Appellant contends that the court erred in excluding evidence of Mr. Merritt's bank records because they were relevant to the element of intentional deprivation. We disagree.

Generally, "whether a particular item of evidence should be admitted or excluded is committed to the considerable and sound discretion of the trial court and reviewed under an abuse of discretion standard." *Perry v. Asphalt & Concrete Servs., Inc.*, 447 Md. 31, 48 (2016) (internal quotations and citation omitted). However, "the determination of whether evidence is relevant is a matter of law, to be reviewed *de novo*[.]" *DeLeon v. State*, 407 Md. 16, 20 (2008). After determining the relevance of evidence, we then consider "whether the evidence is inadmissible because its probative value is outweighed by the danger of unfair prejudice, or other countervailing concerns as outlined in Maryland Rule 5-403," under the abuse of discretion standard. *State v. Simms*, 420 Md. 705, 725 (2011).

Under Maryland Rule 5-401, "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." "Evidence that is not relevant is not admissible." Md. Rule 5-402. "The real test of admissibility of evidence in a criminal case is the connection of the fact proved with the offense charged, as evidence which has a natural tendency to establish the fact at issue." *Sifrit v. State*, 383 Md. 116, 129 (2004).

**A.**

Appellant contends that the bank records were relevant because they corroborated his suspicion that Mr. Merritt did not have the ability to pay for the contracted work. Appellant "may very well have acted reasonably in his decision not to go forward with his work on Mr. Merritt's roof in the compressed time period at issue because of his skepticism in being paid." Therefore, appellant argues, the bank records were relevant to show that appellant's hesitancy was valid rather than indicative of his intent to deprive.

Preliminarily, we observe that appellant sought to admit the records on a proffer that they were relevant to the charge of failing to perform a contract, not the theft charge. On cross-examination, defense counsel questioned Mr. Merritt about his ability to pay for the roof work. The defense sought to introduce Mr. Merritt's account balances at the time the two checks for the down payment were withdrawn from the bank. The court sustained the State's objection to the introduction of the records after the following colloquy between defense counsel and the court:

> THE COURT: Okay, what is – I don't understand the relevance of this document and of this line of questioning.
>
> [DEFENSE COUNSEL]: [Mr. Merritt] has no ability to pay for the things he contracted to have done.
>
> THE COURT: But how would [appellant] have known that? Like, objectively, he wouldn't had to have known that. If there was some sort of, like anticipatory breach of the contract, like, he would've had to have objectively known. Can you proffer to me how [appellant] would have known this, other than through discovery after he's being charged with not . . . performing the contract as he agreed?
>
> [DEFENSE COUNSEL:] I would argue it totally impeaches – it impeaches the State's witness, first of all, because of, in terms of his ability

to pay, in terms of, I have additional records that show he didn't have any deposits from any insurance company for the months of April, May, June, July –

THE COURT: Can you tell me how [appellant] would have known that [Mr. Merritt] had no ability to pay the balance of the contract, if he were to complete the contract?

[DEFENSE COUNSEL]: I don't think that's the issue, I think –

THE COURT: That is the issue.

[DEFENSE COUNSEL:] —the issue is—

THE COURT: That is the issue . . . objection sustained.

[DEFENSE COUNSEL:] Well, can I at least put on the record —

THE COURT: Sure, you can make a record, absolutely.

[DEFENSE COUNSEL:] So, the record that would have been Defense Exhibit Number 2, which is the certified records from [Mr. Merritt's bank.] [They] would have included the checks that the State actually admitted into evidence, and which I think is where the State got their checks as well from, would have been his daily balances from May, from June, that showed that [Mr. Merritt] had a negative balance before someone gave him a large amount of money to pay [appellant].

In the defense's case, appellant again sought to admit Mr. Merritt's bank records. He argued that the records were relevant to the offense of failing to perform the contract, which the court rejected:

THE COURT: . . . Help me understand how [the bank records] are relevant in this case.

[DEFENSE COUNSEL]: So, [appellant] expressed, in his direct, that he had some, that he felt he was misled by Mr. Merritt during the initial conversations, that Mr. Merritt held out certain things to be true and then modified his statement, and then finally had, apparently had problems getting him the money for the downpayment. And I would argue that the records are,

> of Mr. Merritt are relevant to that. And that the ability of, his ability to pay *is relevant to the question of whether he failed to perform a contract or not.*
>
> THE COURT: That, to me, based upon the totality of everything I've heard and your arguments, it's a red herring. And it's not relevant. And even if it was relevant, the probative value of that information is outweighed by confusion of the issues before this jury and may be even unfairly prejudicial. Again, I just think it's grasping at straws and unfair.

(Emphasis added.) Appellant did not argue below that these records were relevant to negating the element of intentional deprivation as he now does on appeal. *See* Md. Rule 8-131(a); *Sifrit*, 383 Md. at 136 (challenge to trial court's decision to exclude evidence was not preserved where grounds raised below differed from that advanced on appeal).

In any event, the key issue of proving intent to deprive, based on this record, was appellant's withholding of Mr. Merritt's money *after* Mr. Merritt requested a refund and appellant agreed to return part of it. In this regard, the bank records did not have any tendency to make the intent to deprive, or its absence, more or less probable.

On this point, appellant suggests that Mr. Merritt's bank records would have been relevant to show that he withheld the funds "because he thought Mr. Merritt was only asking for a refund because he was insolvent at the time but may have eventually still wanted [appellant] to replace his roof." That suggestion, which also was not raised below, is belied by appellant's trial testimony which established that he did not return any funds because he and Mr. Merritt had not agreed on an amount and/or Mr. Merritt had threatened legal action. For the reasons stated, the court did not err in excluding Mr. Merritt's bank records.

**B.**

Even if the court erred in excluding the records, the error was harmless. An error is harmless if this Court is convinced that it "did not play any role in the jury's verdict" and is "unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record." *Bellamy v. State*, 403 Md. 308, 332 (2008). Other competent evidence established Mr. Merritt's financial condition during the period at issue. Notwithstanding the exclusion of his bank records, Mr. Merritt testified that he did not have sufficient funds in his account to pay the second installment of the down payment ($5,000) until days later. In addition, appellant expressed concern about Mr. Merritt's ability to pay for the roof work.

Based on this evidence, defense counsel argued to the jury that appellant "had his own doubts about this whole thing, that the failure to provide prompt payment led him to have concerns about whether Mr. Merritt would have the ability to pay at all." On that premise, defense counsel argued to the jury that the evidence amounted to "[m]iscommunications. Misunderstandings. They don't make a theft. They don't make a failure to perform a contract." While these arguments may have convinced the jury to acquit on the charge of failing to perform a contract, they had no apparent persuasive effect on its decision to find appellant guilty of theft. Any error in excluding the bank records was harmless beyond a reasonable doubt.

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