Circuit Court for Baltimore City
Case No. 119274002

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1213

September Term, 2021

DAVON ROBERTS

v.

STATE OF MARYLAND

Graeff,
Ripken,
Adkins, Sally D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Adkins, Sally D., J.

Filed: November 23, 2022

This appeal arises from the conviction of Davon Roberts by jury trial in the Circuit Court for Baltimore City on two counts of each of the following—attempted second-degree murder, use of a handgun in the commission of a felony or crime of violence, and reckless endangerment—and one count of false imprisonment. Roberts challenges his conviction on three grounds.[1] First, he claims the trial court erred in denying his motion to suppress his statements made to police as involuntary. Second, he argues the trial court erred in admitting recordings of certain phone calls he placed from jail as evidence of consciousness of guilt. Third, he contends the trial court erred in denying his motion for a mistrial on the grounds that the jury heard improper evidence. Finding no error, we affirm the judgment of the Circuit Court for Baltimore City.

FACTS AND PROCEDURAL HISTORY

On August 30, 2019, police responded to a shooting in the 600 block of South Fremont Street in Baltimore City. Upon arrival, an officer found Carolyn Conyers suffering from gunshots to the face and chest. Conyers would later identify the shooter as the Appellant—her boyfriend, and later, fiancé—Davon Roberts.

[1] Roberts presented three questions for review:

> 1. Did the motions court err in denying Mr. Roberts' motion to suppress his statements as involuntary?
>
> 2. Did the trial court err in allowing the State to introduce certain jail calls as evidence of "consciousness of guilt"?
>
> 3. Did the trial court err in failing to deny the motion for mistrial because of prejudicial "other crimes, wrongs or acts," evidence?

That afternoon, Julia Lebherz had been walking her dog at the nearby Conway Park when a house on South Fremont Street caught her attention. Lebherz walked to the house and found Conyers behind the storm door with Roberts blocking her way out. Lebherz attempted to intervene, after which Roberts dragged Conyers down the stairs of the house by her hair. He then walked over to a car, opened the trunk, and retrieved a gun. Lebherz testified at trial that she told Roberts, "Please don't shoot her," to which he responded, "I'm going to shoot you." Lebherz then fled the area and called the police. She later testified she heard gun shots and a bullet "whiz" by her head as she fled.

Conyers owned the house on South Fremont Street. When Lebherz came to the house, Roberts and Conyers were arguing because Conyers had failed a polygraph test that indicated she had cheated on Roberts. Conyers testified that she did not believe that Roberts had tried to kill her and that he did not shoot at Lebherz.

On September 6, 2019, police brought Roberts into the Southern District precinct for an interview. Although she was not assigned to his case, Detective Sergeant Kathleen Jackson conducted a *Miranda*[2] waiver and interview of Roberts because he "felt comfortable" with her. In the interview, Detective Jackson talked to Roberts about his mother—who was known as "Ms. Booty." Detective Jackson acknowledged that she did this to make Roberts comfortable so that he would speak with her. Roberts admitted to Detective Jackson that he shot Conyers but claimed that the shooting was an accident.

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Roberts was charged with attempted first- and second-degree murder, first- and second-degree assault, reckless endangerment, and the use of a handgun in the commission of a felony or crime of violence relating to Lebherz and Conyers, and false imprisonment relating to Conyers. While incarcerated pending trial, he made several phone calls that were recorded. The phone calls tended to indicate that Roberts wanted a certain individual to be out of town during his trial. On the calls, he mentioned the possibility of body attachments being issued to compel people to come to court. He discussed the inability for this person to use credit cards because it would leave a trail. At one point, Roberts stated, "But I gotta get this person out of Maryland. This is like—'cause—once that person's there, I'm done." Then again, he said, "Listen, I need something—it can't be in Maryland, though. It could be Delaware, it can be Jersey, it can be Philly. It cannot be in Maryland." In another call, Roberts said, "If I don't locate this girl and they got her, I'm getting life . . . . They're gonna play everything she said." The calls indicated that Roberts and his friends were able to get an Airbnb in Philadelphia for this person to be out of town, but that this person never made it to that location.

Roberts was tried before a jury in Baltimore City. Conyers and Lebherz both testified. At a pretrial suppression hearing, Defense counsel moved to suppress the statements Roberts made to Detective Jackson as involuntary. The motions court denied the motion, stating:

> All right, well, I think that the evidence shows that while I don't know very much about, because nobody asked any questions about, how far [Roberts] went in school or whether he could read or whether he was drunk or any of those preliminary questions, there's nothing in this record that says

> that he didn't understand his *Miranda* warnings when they were given, that he didn't understand, and therefore, initialed after each right. I've heard no evidence at all that would lead me to believe that this wasn't a free, knowing and voluntary statement. So for those reasons, I will deny the Defense's Motion.

Before trial, the State moved to admit Conyers' previously recorded statements on the basis that Roberts had procured her absence at trial. The State introduced the previously described phone calls from jail to support its theory that Roberts had procured Conyers' absence. The court initially granted the State's motion but later reversed its ruling when Conyers appeared to testify at trial. Over Defense counsel's objection for relevance and prejudice, however, the court allowed the State to introduce recordings of the phone calls for evidence of "consciousness of guilt."

Before trial began and on request of Defense counsel, the court excluded from evidence part of the body-worn camera footage containing statements made by an officer responding to the shooting on August 30, 2019. Upon arrival at the scene, the officer stated something along the lines of, "Weren't we just here four days ago? Is that the same people?" or "Is that the same guy as last week?"[3] Despite the trial court's ruling, the prosecutor neglected to stop the recording at trial in time to exclude the statement, allowing the statement to be played for the jury.[4] Defense counsel opted not to move to strike and

[3] The video was not transcribed in the trial transcript, so the exact phrasing of the officer's statement is unclear. We have included both iterations from the Appellant's Brief.

[4] In the bench conference following the error, the prosecutor said, "This is why I hate technology. I'm sorry I did not do this on purpose." Defense counsel responded, "I know you didn't. I know." And the court added, "For the record, I don't think either [defense counsel] or I believe that you did it on purpose."

cure the error because counsel did not want to highlight the statement in case the jury had not heard or given it much weight. Instead, Defense counsel moved for a mistrial on the basis the statement was introduced despite the court's prior ruling to exclude it. The court denied the motion, stating

> Your request for a mistrial is respectfully noted and overruled. I don't believe that what the jury heard was so prejudicial that it will deny Mr. Roberts a fair trial. So at this point, your objection is noted. I believe well-preserved, but respectfully, the request for a mistrial is denied.

The jury found Roberts guilty of attempted second degree murder, use of a firearm in commission of a felony or crime of violence, reckless endangerment, and false imprisonment as to Conyers and attempted second degree murder, use of a firearm, and reckless endangerment as to Lebherz. The jury acquitted on both counts of attempted first degree murder. Roberts was sentenced to a total of eighty years' imprisonment and now appeals his conviction to this Court.

MOTION TO SUPPRESS STATEMENTS MADE TO POLICE

Parties' Contentions

Roberts argues that the trial court erred in allowing his statements made to police to be admitted into evidence. He argues that his statements were involuntary under the Fourteenth Amendment and Article 22 of the Maryland Declaration of Rights and other Maryland common law. Specifically, he asserts that the police officer's discussion of his mother during the interrogation and her promise to speak to his mother were an improper inducement of Roberts' confession, rendering it involuntary.

The State responds that Roberts' statements to police were not made involuntarily under the totality of circumstances. The State contends that the police officer did not make an improper promise or inducement and that Roberts did not rely on the police officer's statements in making his confession. According to the State, Detective Jackson's promise to talk with Roberts' mother was not improper because it did not involve a promise to take official action resulting in leniency for Roberts. Finally, the State argues that, even if the statements should have been suppressed, the error was harmless.

Standard of Review

"Our review of [a circuit court's] denial of [a] motion to suppress is limited to the record of the suppression hearing." *Winder v. State*, 362 Md. 275, 311 (2001). We consider the evidence and its possible inferences in the light most favorable to the State, as the prevailing party on the motion. *See Smith v. State*, 220 Md. App. 256, 272 (2014). On the issue of whether a defendant's statements were made voluntarily, the Court conducts a *de novo* review of the trial judge's determination as "a mixed question of law and fact." *Winder*, 362 Md. at 310.

Discussion

For a defendant's confession or inculpatory statement to be used against him at trial, it must be "(1) voluntary under Maryland nonconstitutional law, (2) voluntary under the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article 22 of the Maryland Declaration of Rights, and (3) elicited in conformance with the

mandates of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966)."[5] *Id.* at 305–06 (2001) (cleaned up). When we must determine the voluntariness of a confession, "we generally look at the totality of the circumstances affecting the interrogation and confession." *Id.* at 307. We consider the following non-exhaustive factors in that analysis: "the length of the interrogation, the manner in which it was conducted, the number of police officers present throughout the interrogation, and the age, education and experience of the suspect." *Id.* (citing *Hoey v. State*, 311 Md. 473, 483 (1988)). Furthermore, "no confession or other significantly incriminating remark allegedly made by an accused [may] be used as evidence against him, unless it first be shown to be free of any coercive barnacles that may have attached by improper means to prevent the expression from being voluntary." *Id.* (quoting *Hillard v. State*, 286 Md. 145, 150 (1979)).

To be voluntary, a confession "must be obtained without force applied, coercion used, hope held out or promise made on the part of the authorities[.]" *Id.* at 309 (quoting *State v. Kidd*, 281 Md. 32, 35–36 (1977)). Where a defendant asserts that police elicited their confession through improper means, such as improper promises, there is a two-part test to consider whether the confession was voluntary—(1) whether a police officer "promises or implies to a suspect that he or she will be given special consideration from a prosecuting authority or some other form of assistance in exchange for the suspect's

[5] Roberts did not challenge the admissibility of his confession here or below on the basis of a *Miranda* violation.

confession" and (2) whether the suspect relied on that promise or assurance in making the confession. *Id.*

At the suppression hearing, the trial court received into evidence Detective Jackson's supplemental report which described her conversation with Roberts. Detective Jackson testified that her supplemental report—which recited her back-and-forth exchange with Roberts—included exactly what they said during the interview.[6] Before the start of the interview, Roberts asked if he could call his mother. According to her notes, the following interaction then occurred: "[Detective Jackson] said 'You mean Miss Booty? I'll call her and let her know you're Okay. You can also call her if you want, when you get to CBIF.[7]' Davon Roberts said 'You know my mother! How do you know her?' [Detective Jackson] explained that [she] had met her at a community meeting before." When the lead detective attempted to interview Roberts, he requested that Detective Jackson be the one to interview him. She obliged and administered his *Miranda* rights, which Roberts signed and initialed. Detective Jackson testified at the suppression hearing that she had administered the *Miranda* rights before talking about how Roberts' mother was going to feel about the fact that he committed the crime.

After administering *Miranda*, Detective Jackson and Roberts had the following conversation, as recorded in Detective Jackson's supplemental report:

[6] According to Detective Jackson, she can take shorthand, which is how she could write every question and answer in her notes.

[7] We think Detective Jackson's acronym in her notes refers to the Central Booking & Intake in Baltimore.

R (Suspect Davon Roberts): I just want CeCe (Victim Conyer's nickname) to know how sorry I am. Is CeCe OK?

J (Sgt Jackson, your writer): She's alive, but she's hurt. Her face . . .

R: How did her face get hurt? She wasn't facing me!

J: Well, she did have wounds in her face and another one, too, in her torso, I think.

R: That wasn't what I meant to do.

J: Was it an accident?

R: Yeah. I didn't mean it to hit her in the face.

J: Were you trying to just scare her?

R: Something like that.

J: I can see you feel bad about it. I can tell you must really care about CeCe.

R: I do. I really love CeCe. Can you tell her that for me?

J: Yes, I'll tell her when I go see her. I'm sure you guys must have really loved each other.

R: We do. I was gonna marry her.

J: They say there's a thin line between love and hate.

R: I don't hate her. It has to do with this. (R takes out a piece of paper with lots of phone numbers on it in hand-printed in blue ink. R points to a number for a polygraph company) It's this.

J: I heard you made her take a polygraph test.

R: No. She agreed to take a polygraph test. It cost $400. I just got the results from it that day. I'm so sorry! (R begins to weep copiously, and I go into the next room for a box of tissues which R uses to wipe his tears.)

J: Your mother was shocked when I told her about this.

R: I never wanted her to know.

J: It would be on the news. I had to tell her so she wouldn't hear it that way. R sobs at this statement, then is silent for a minute, crying quietly into the tissues.

J: You know your mom loves you a lot. She wouldn't believe that you had hurt Carolyn that way. She said you were doing too good. I can tell, too, that you are a nice person. You don't seem to be violent to me.

R: I'm not. It was just a mistake. I was so . . . the polygraph . . . it messed me up. R begins sobbing again.

J: It made you angry?

R: Not angry, hurt! I was so hurt. She was messing with other guys.

J: The polygraph told you that.

R: The lady who did it. She told me CeCe failed on the phone. Right before this happened.

J: Before what happened?

R: The accident. I . . . the gun . . . . . CeCe.

J: Did you shoot CeCe on purpose?

R: Of course not . . . it was an accident. I shot at her back. I can't figure out how she got hit in the face. Her face . . . her poor face . . . will never be right again.

J: She'll recover, I think. She's doing better than we expected at the time.

R: I just can't believe the shot hit her in the face. She had the gun . . .

J: CeCe was the one that brought the gun in?

R: No I did. But after I shot her, CeCe got up and picked up the gun, and went in the house.

J: Is that what you saw?

R: Yeah, as I was leaving.

J: Well you know that isn't totally what happened. People on the street had to give CeCe CPR until the medics got there. Or she would have died. She lost a lot of blood. At first, I wasn't sure she would survive it.

R begins sobbing hard.

> R: Just tell her I'm sorry, and that I love her. Just tell CeCe that . . . . (R dissolves in tears.)

On cross-examination at the suppression hearing, Roberts' counsel had the following exchange with Detective Jackson:

> Q: Okay. Do you remember telling Mr. Roberts, look, you don't want your mother to find out, I mean this is going to be a horrible thing for your mother to find out that you committed this heinous crime. It's important to explain to her so we can, you know, explain to her what happened so the community can know because it's going to put her in a bad light being a pillar of South Baltimore.
>
> A: We talked about how surprised his mom was going to be, that he would do something like this and that he just didn't seem like the type.
>
> Q: Okay.
>
> A: We talked about that. Yes.
>
> Q: Right. And now, is that conversation happening before you provided him his Miranda form and then you get into everything that happened? I mean, that's sort of what you did to make him feel comfortable, right?
>
> A: We talked about how his mother was going to feel about after we spoke about – after he did the Miranda and had some conversation about the events of 8/30. We spoke about how his mom was going to take the news after all that.
>
> We didn't speak about how Ms. Booty was going to feel at first. We just spoke about the fact that I knew her and I knew she was a good lady. We didn't talk about how she would react to the news, and so well into the interview and after the Miranda, we were at the end of the interview. We talked about how she would take the news of his problems, you know, and involvement with that crime.
>
> Q: Okay. And do you remember promising him that you would be the one that because you knew her, you would reach out to Ms. Booty and explain to her and, you know, let her know everything was going to be all right?
>
> A: I told him I had already talked to her about it.

> Q: You had already, what, advised her of the charges?
>
> A: Yes.
>
> Q: Okay.
>
> A: Yes, and I told him I would be talking to her some more, yes.
>
> * * *
>
> Q: Okay. Now, did you, for example, when you were interviewing Mr. Roberts, you were – I mean, correct me if I'm wrong. It seems like you were encouraging him to, you know, get it out on the record what happened, to get it out so that we can explain things to his mother so his mother would be, you know, she wouldn't be embarrassed by such a heinous event.
>
> A: That's one of the tactics that we use, yes.
>
> Q: And for example, it was certainly, you would agree with me, that sort of the way you explained it to Mr. Roberts that it was better for him to put it out there in his own words rather tha[n] Ms. Booty just read about it in the paper, for example?
>
> A: Yes, I thought that would be better.

Roberts argued at the suppression hearing that Detective Jackson's conduct in obtaining his confession amounted to an improper inducement. He argued that the mention of his mother put him in a vulnerable position and that Detective Jackson improperly induced him to make the confession because it would be better for him to frame the story. However, Roberts supports these arguments largely from Detective Jackson's responses on cross-examination at the suppression hearing. In *Ralph v. State*, the Court of Appeals "note[d] that it is difficult, if not impossible, to say with any degree of certainty from the question and answer itself, coming as it did at the very end of the cross-examination of the officer . . . whether the admonition or caution to tell the truth was intended as an inducement or a mere exhortation." 226 Md. 480, 486 (1961). We think, in reading Detective

Jackson's testimony on cross-examination and her supplemental report together, that Detective Jackson had already talked to Roberts' mother prior to the interview with Roberts, that she had already told his mother about the crime, and that she had believed it was better for his mother to hear about Roberts' crime from her rather than hearing about it elsewhere in the community.[8]

Although it is impermissible for an interrogator to tell a suspect "that making an inculpatory statement will be to his [or her] advantage, in that he [or she] will be given help or some special consideration," *Hillard v. State*, 286 Md. 145, 153 (1979), not all statements made to a suspect that a confession will be "better" for him are improper. *See Ralph v. State*, 226 Md. at 483 ("[The suspect] was told (as the officer frankly admitted) that 'it would be better if he told the truth,' but it does not appear why or for what purpose the statement was made or what influence the statement had on the accused."). Where stating that a confession is "better" refers more to "moral or spiritual rewards," such psychological pressure to tell the truth does not amount to an improper inducement when there has been no threat or promise in exchange for a confession. *See id.* at 486 (citing *Kier v. State*, 213 Md. 556, 562 (1957)).

The record reveals that Detective Jackson merely made an emotional plea—that it would be better for Roberts in a "moral or spiritual rewards" sense for him to explain how

[8] We also note that Detective Jackson's interview of Roberts occurred on September 6, 2019. The shooting of Ms. Conyers occurred on August 30, 2019. We are not persuaded that Detective Jackson improperly implied that Roberts needed to get ahead of the news given the time that had already passed between the crime and the interview.

the crime happened. There was no promise of leniency and no promise that Detective Jackson, or any other officer, would take official action on his behalf. Furthermore, there was no promise or inducement that Roberts would be given "special consideration from a prosecuting authority or some other form of assistance in exchange for [his] confession." *See Winder*, 362 Md. at 309.

We also conclude that Roberts' confession was not involuntary under constitutional protections.[9] Confessions are involuntary "that are the result of police conduct that overbears the will of the suspect and induces the suspect to confess." *Lee v. State*, 418 Md. 136, 159 (2011). A totality of the circumstances applies to the constitutional consideration of whether a confession is involuntary. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). In this analysis, we ask, "Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." *Id.* at 225–26 (citation omitted).

Under the totality of circumstances, the record does not demonstrate that Roberts' confession was involuntary. There is no indication that his will was overborne. Roberts seemed willing to talk to the police from the beginning of the interview. He even asked for Detective Jackson to conduct the interview specifically. Detective Jackson read

[9] "[T]he due process protections inherent in Article 22 [of the Maryland Declaration of Rights] are construed *in pari materia* with those afforded by the Fourteenth Amendment[.]" *Lee v. State*, 418 Md. 136, 158–59 (2011).

Roberts his *Miranda* rights, and he completed a *Miranda* waiver. Jackson offered Roberts some water to drink. The interview room was approximately 9 feet by 9 feet, and the interview took approximately 20 minutes to conduct. Even if the mention of Roberts' mother exerted some psychological pressure, we do not think, based on the totality of circumstances presented, that Roberts' will was overborne when he made statements to Jackson. Thus, the police conduct in eliciting inculpatory statements from Roberts did not offend the constitutional protections of due process.

For the above reasons, we conclude that Roberts' confession was voluntary under Maryland non-constitutional common law and the Due Process protections of Article 22 of the Maryland Declaration of Rights and the Fourteenth Amendment of the U.S. Constitution.

Having concluded that Roberts' confession was not involuntary, we do not consider the State's harmless error argument.

ADMISSION OF EVIDENCE FOR CONSCIOUSNESS OF GUILT

Parties' Contentions

Roberts next argues that the trial court erred by admitting his jail phone calls as evidence of consciousness of guilt. He contends that the trial court's failure to make express findings regarding the inferential steps involved in determining relevancy of consciousness of guilt renders the phone calls inadmissible. He further asserts that the content of the phone calls was too vague or equivocal to show any consciousness of guilt. Finally, if relevant to show consciousness of guilt, Roberts asserts that the evidence was

far more prejudicial than probative because they were emotional and indicated that he was incarcerated.

The State counters that the phone calls were relevant evidence and that their probative value was not substantially outweighed by unfair prejudice. The State points to the low threshold for determining relevancy and argues the calls tended to show Roberts' consciousness of guilt. According to the State, their probative value is not outweighed by the fact that the calls were emotional and tended to show that Roberts was incarcerated.

Standard of Review

The trial court exercises its discretion in admitting evidence, and this Court reviews those decisions for abuse of discretion. *Thomas v. State*, 397 Md. 557, 579 (2007). "Once a trial court has made a finding of relevance, we are generally loath to reverse the trial court unless the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion." *Decker v. State*, 408 Md. 631, 649 (2009) (cleaned up). As with rulings of relevancy, the trial court's admission of "relevant evidence over an objection that the evidence is unfairly prejudicial" is reviewed for abuse of discretion. *Thomas*, 397 Md. at 579.

Discussion

Relevant evidence is generally admissible. Md. Rule 5–402. Evidence is relevant if it has "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." Md. Rule 5–401. Notwithstanding the general admissibility of relevant

evidence, such evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." Md. Rule 5–403.

A person's conduct following a crime may be admitted at trial as circumstantial evidence to infer guilt. *Thomas v. State*, 372 Md. 342, 351 (2002). Such conduct "often is considered relevant to the question of guilt because the particular behavior provides clues to the person's state of mind." *Id.* at 352. That "post-crime state of mind may be relevant . . . because . . . the commission of a crime can be expected to leave some mental traces on the criminal." *Id.* (citation omitted).

In terms of relevancy, post-crime conduct is admissible as circumstantial evidence to infer guilt where "the fact that the accused behaved in a particular way renders more probable the fact of their guilt." *Id.* (citation omitted). That probability depends on four inferential steps: (1) from defendant's behavior to suspicious conduct, (2) from suspicious conduct to consciousness of guilt, (3) from consciousness of guilt in general to consciousness of guilt concerning the crime charged, and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged. *See United States v. Myers*, 550 F.2d 1036, 1049 (5th Cir. 1977) ("[The] probative value [of flight] as circumstantial evidence of guilt depends upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged."); *Thomas*, 372 Md. at 356 ("The relevance of the evidence as circumstantial evidence of petitioner's guilt depends on whether the following

four inferences can be drawn: (1) from his resistance to the blood test, a desire to conceal evidence; (2) from a desire to conceal evidence, a consciousness of guilt; (3) from a consciousness of guilt, a consciousness of guilt of the murder of Ms. Mitchell; and (4) from a consciousness of guilt of the murder of Ms. Mitchell, actual guilt of the murder."); *Snyder v. State*, 361 Md. 580, 596 (2000) ("The relevance of the petitioner's failure to inquire depends upon whether that evidence supports four inferences: from the failure to inquire, satisfaction of the case not being solved or actively pursued; from the satisfaction of the case not being solved or actively pursued, a consciousness of guilt; from a consciousness of guilt, a consciousness of guilt of murder; and from a consciousness of guilt of murder, actual guilt of murder.").

Although there has been a longstanding practice to admit evidence of consciousness of guilt in Maryland and other parts of the country, we "have recognized that such evidence has the potential to be 'unreliable and unfairly prejudicial.'" *Decker*, 408 Md. at 642 (quoting *Thomas*, 372 Md. at 353–54). There are times when such evidence is "too ambiguous and equivocal to support [the] inferences" required for relevancy. *Snyder*, 361 Md. at 596. Because of this potential, the court must consider how confidently it can draw the four inferences outlined above. *See Thomas*, 372 Md. at 352 (citations omitted). We think those inferential steps in this case to be (1) from Roberts' calls from jails to concealment of a witness or interference with trial, (2) from concealment or interference to consciousness of guilt, (3) from consciousness of guilt generally to consciousness of guilt concerning the attempted murder of Conyers and Lebherz and related charges, and

(4) from consciousness of guilt concerning the attempted murder and related charges to actual guilt of those charges.

In regards to the first inferential step, the State argued in its brief that Roberts' phone calls from jail "showed that Roberts attempted to make Conyers unavailable to testify against him at trial because he believed he would be convicted if she appeared[,]" which evidenced consciousness of guilt. On the other hand, Roberts asserted that the phone calls were "vague discussions of travel plans."

In one phone call, Roberts says to his friend,

> My people – my lawyer called them peoples and said they gonna try to put a body attachment on them to drag them into court.
>
> * * *
>
> But (indiscernible) this person, he said Maryland is not good. This person can't use their – their – their credit card, they can't even drive their own car, whatever it may be.
>
> Make a long story short, this what I need – I – I don't even need – listen – I just tried to call Dizzy 'cause I wanna try to use – tell him to get a room. But if – 'cause – 'cause this person wanna leave tomorrow night, if possible. Because then Thursday – Wednesday they will snatch this motherfucker up and bring this motherfucker down. I'm not on my phone right now, so this is what – the thing I'm trying to sit here and tell you is, I asked the person, "Do you feel comfortable going over" – 'cause I wanted to say Dizzy house with him and his wife. Said, "No because I don't wanna be in the house with him or whatever and I don't know who he is, whatever it may be."

Later in the same call, Roberts continues,

> But I gotta get this person out of Maryland. This is like – 'cause – once that person's there, I'm done.
>
> * * *

> Listen, I need something – it can't be in Maryland, though. It could be Delaware, it can be Jersey, it can be Philly. It cannot be in Maryland.

In another phone call, Roberts talks to his friend who is going to look for "Cee Cee" in a rented room in Philadelphia. They have the following exchange:

> Mr. Roberts: . . . . Go down there and knock like this, "Dun dun da dun dun – dun dun." Don't say, "Hello," and don't say nothing; just knock first. "Dun Dun" –
>
> Nobody answered? Knock on it again.
>
> Female Speaker: No.
>
> Mr. Roberts: Knock on it again. Say, "Cee Cee."
>
> Female Speaker: "Cee Cee."
>
> Mr. Roberts: Nobody answered? Don't sound like no TV or nothing in there?
>
> Female Speaker: Nope.
>
> Mr. Roberts: Put the code in and go inside the room, then. You know the code to the room?
>
> Let me know if the door open.
>
> Female Speaker: There's nobody – it's empty.
>
> Mr. Roberts: It's empty. She never checked in.
>
> Now that's when I get to worrying. I wonder if they grabbed this girl or she somewhere.
>
> * * *
>
> It's two things: either she changed her mind and decided she wanted to go somewhere else – I never called this morning. I went to court; or they grabbed her.
>
> * * *

> All right, now this when – this when the panic starts to check in. Now this is what I want you to do – so that's out of the question. She's not there. I have no idea if she have – see that's the thing about it, I don't have no Facebook joint. I don't know nothing. So what I gotta do now is – I don't know where she at. See this – this – this why I'm panicking now, I don't know if them people got her or she got on her bullshit and say, "No, I don't wanna go to Philly. I'm gonna go somewhere else and I'm going to turn my phone off." I know that be the case. I definitely know that would be the case. You see what I'm saying? 'Cause she will do that.
>
> * * *
>
> Listen, email Cee Cee as soon as we hang up. Email Cee Cee. Say, "Cee Cee, Davon said you're not in Philly. You're not at the location you were supposed to went at 'cause Dizzy and them just checked there. Can you let him know – can you send a phone number or let him know you somewhere so he don't think something else is wrong (indiscernible)
>
> * * *
>
> Don't say Philly; say. "Cee Cee, Davon said you're not at the location because his friend and them just checked there and no one is in that room. Can you let him – save this phone number and let him know or email him back and let him know everything is okay 'cause he thinking something is wrong right now."
>
> * * *
>
> All right, I may call you right back. So say that, "Cee Cee, Davon said you're not at the location. Where are you?"

In a third phone call, Roberts is again talking to his friend, and he says,

> Listen – listen, I need y'all to listen to this real good. Right now, I'm – I'm freaking out because they grabbed this girl. 'Cause I'm trying to figure out – listen, she didn't have no cash on her. So, I know she smart enough not to use her credit card, unless she went somewhere early this morning and got some more prepaid joints. She only put three-hundred dollars on the prepaid card yesterday.
>
> The thing about it is, I doubt if she woke up this morning and said, "You know what? I'm gonna relocate. I'm gonna go –" then again, she probably did but –
>
> * * *
>
> If I don't locate this girl and they got her, I'm getting life . . . . They're gonna play everything she said. Listen to me good, please. Please, listen to me real good. Please – please, okay?

Roberts then has his friend call "Cee Cee" from her phone so that Roberts can leave a message to ask about "Cee Cee's" location.

We agree with the State that the recorded phone calls from jail amounted to more than just "vague discussions of travel plans." They demonstrate a clear attempt by Roberts to keep Conyers out of Maryland during his trial so that she could not testify against him at trial. We conclude that this satisfies the first inferential step—from making the phone calls to an attempt to conceal a witness or interfere with his trial.

For the second inferential step—from concealment or interference to consciousness of guilt—we consider whether Roberts actions amount to an awareness of guilt. In other words, does the conduct tend to indicate guilt? We think that it does. Repeated phone calls to orchestrate the hiding of a witness from the state is indicative of an "intent to evade justice." *See Wright v. State*, 312 Md. 648, 655 (1988) (analogizing use of an alias with flight from justice because they both show "an intent to evade justice through the concealment of one's true identity").

While there may be innocent or innocuous reasons why a defendant would participate in phone calls which discuss a primary witness leaving the state, the fact that there is evidence contradicting the inference of guilt does not make the evidence inadmissible. *Decker*, 408 Md. at 641. Rather, the jury should consider the contradictory evidence in weighing the effect of the State's evidence of consciousness of guilt. *Id.* Indeed, "if [the defendant has] an explanation for the conduct that the State offered as evidence of consciousness of guilt, then 'it [is] incumbent upon him to generate that issue[.]'" *Id.* at 647 (quoting *Thomas*, 397 Md. at 578). In this case, Roberts did offer some evidence that the phone calls were innocent. Conyers testified at trial that she went out of town to see a friend in York, Pennsylvania, for her birthday. Having generated the issue, it was for the jury to decide how to weigh the State's evidence against Roberts' evidence, but the fact that there could be an innocent explanation does not completely negate the inference of consciousness of guilt.

Concerning the third inference—from consciousness of guilt generally to consciousness of guilt concerning the attempted murder of Conyers and Lebherz and related charges—we consider the extent to which the defendant's actions relate not just to a guilty conscience in general, but to a consciousness of guilt to the crime specifically charged. In *Thomas v. State*, the Court of Appeals described consciousness of guilt evidence that was too attenuated to relate to the crime specifically charged. 372 Md. at 356–58. There, the crime charged occurred more than three years prior to the conduct alleged to show consciousness of guilt. *Id.* at 357. While "[t]he evidence need not be contemporaneous with the crime[,]" *Decker*, 408 Md. at 641, there must be evidence to

show that consciousness of guilt in general is connected to consciousness of guilt of the specific crime. *Thomas*, 372 Md. at 357–58. In *Thomas*, the defendant resisted taking a blood test. *Id.* at 346. While this may have been indicative of consciousness of guilt in general, it could not have indicated consciousness of guilt of the crime charged where there was no evidence petitioner knew his blood was being tested for the particular investigation leading to his trial. *Id.* at 357–58.

This case is much different than *Thomas*. Here, when Roberts made the phone calls, he was awaiting trial for the attempted murders of Conyers and Lebherz. The conduct specifically involved one of the primary witnesses against him—Conyers. As a result, the consciousness of guilt generally demonstrated by Roberts' efforts to keep a witness from being present was specifically connected to the pending charges against him.

For the fourth and final inference—from consciousness of guilt to actual guilt—we consider the extent to which the evidence shows the defendant is actually guilty. In this case, Roberts states on one of the phone calls, "If I don't locate this girl and they got her, I'm getting life[.]" While circumstantial, a jury may infer from the evidence that Roberts was guilty of the crimes for which he was charged. Because Roberts' phone calls related directly to the timing of his upcoming trial and because they evidenced an attempt to evade justice by keeping a key witness from coming to court, this is not a case where the evidence is too ambiguous or equivocal to draw the inferential step to actual guilt.

Admission of evidence and determinations of probative versus prejudicial value are within the discretion of the trial judge. *Copeland v. State*, 196 Md. App. 309, 316 (2010). As a result, "we are generally loath to reverse [the] trial court unless the evidence is plainly

inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion." *Decker*, 408 Md. at 649 (citation and internal quotation marks omitted). Roberts contends that it was error for the trial court not to make findings regarding the inferential steps we discussed above. We disagree. Although the trial judge must consider the relevance of evidence to be admitted—which, in the case of consciousness of guilt evidence, includes the four inferential steps—nothing requires the judge to make explicit findings regarding those steps before admitting proffered evidence as relevant.

Finally, we conclude that the trial court did not abuse its discretion in determining that the probative value of the evidence was not substantially outweighed by its prejudicial effect. While there may be some risk of prejudice in that the phone calls indicated Roberts was incarcerated, we do not think that the risk of prejudice substantially outweighs the probative value of the calls. Thus, we affirm the decision of the circuit court in admitting the jail house phone call recordings.

MOTION FOR A MISTRIAL

Parties' Contentions

Roberts further argues that the trial court erred in denying his motion for a mistrial. In his view, the court should have granted the mistrial because the State improperly allowed excluded evidence of other crimes, wrongs or acts to be played for the jury. He asserts that the prejudicial nature of the evidence showing prior bad conduct interfered with his right to a fair trial because the jury may have been left with negative impressions of him. As a result, Roberts argues the trial court should have declared a mistrial.

The State responds that the trial court did not err in denying Roberts' motion for a mistrial. The State relies on the discretion of the trial court to grant or deny a motion for a mistrial. Because a mistrial is an extreme remedy, the State contends that the error was not so prejudicial as to warrant a mistrial.

Standard of Review

A trial court's decision on a motion for a mistrial is likewise reviewed for abuse of discretion. *Nash v. State*, 439 Md. 53, 66–67 (2014). The trial court's discretion in ruling on a motion for a mistrial is "generally [afforded] a wide berth" by the appellate courts. *Id.* at 68. Thus, the trial court's decision on "the need for a mistrial . . . will rarely be reversed." *Alexis v. State*, 437 Md. 457, 479 (2014) (citation omitted).

Discussion

Affording the circuit court proper discretion in its manner of "handling the progress of trial," *Alexis*, 437 Md. at 479 (citation omitted), we find no error in the circuit court's denial of Roberts' motion for a mistrial. In reviewing the trial judge's exercise of discretion, we consider, in part, whether a reasonable person could reach the same conclusion as the trial judge and whether the conclusion logically follows from the facts and reasonably relates to the purported objective. *Nash*, 439 Md. at 67–68.

Before trial, the trial judge excluded reference made in body worn camera recordings to the police officer's prior encounter with Roberts at Conyers' house on South Freemont Street. During the testimony of a responding officer, the prosecutor played recordings from his body worn camera. However, the prosecutor failed to stop the

recording before reference to the prior encounter was played. Thus, evidence that had been previously excluded by the trial judge was allowed into evidence.

After the recording had played the excluded information, the following encounter occurred at the bench:

> [Defense counsel]: I don't know if they caught that, but the officer says, "Is that the same guy from last week? Doesn't he live in (indiscernible . . .)?"
>
> [State]: I can't see the numbers; that's the problem, you know?
>
> [Defense counsel]: I mean, I didn't want to do it like that. I mean, I heard it. He said it.
>
> THE COURT: I heard it too, and it didn't register until you just said it again. I heard it too.
>
> [Defense counsel]: Well, maybe they didn't think anything of it, but.
>
> THE COURT: What do you want me to do?
>
> [State]: You can do a motion to strike and cure as to everything that's in – that they've seen up to 3 minutes and 29 seconds. I think what I did was I muted it and then I didn't – I didn't play it. Then I unmuted it and played it. That's the problem. This is exactly why –
>
> [Defense counsel]: The problem is if we highlight it –
>
> THE COURT: It's a problem, right? All right. So at this point, you're not asking for a curative instruction. Are you asking for any other relief? I know.
>
> [Defense counsel]: I'm going to be in trouble in the future if I don't ask for a mistrial.
>
> THE COURT: I totally agree.
>
> [Defense counsel]: Because we can't – if we cure it, it brings their attention to it –
>
> THE COURT: Right.

> [Defense counsel]: – so we can't do that. So you can overrule my request for a mistrial –
>
> THE COURT: I know. And it's –
>
> [Defense counsel]: – and the appellate court will deal with it, but –
>
> THE COURT: And I –
>
> [State]: This is why I hate technology. I'm sorry. I did not do this on purpose. You know –
>
> [Defense counsel]: I know you didn't. I know.
>
> THE COURT: For the record, I don't think either [defense counsel] or I believe that you did it on purpose. I am frustrated because we had resolved this prior to trial, so at this point, I'm going to deny your request for a mistrial. It was –
>
> [Defense counsel]: Just to be clear to make a record, in a pretrial motion, we had asked the court to exclude, and the court excluded from the video any indication of a prior incident that happened four days before, and the video was played, and there was reference. Even if ever so briefly to the "if this is the same guy from the prior event." So that's why I'm making my motion.
>
> THE COURT: All right. The record is clear. Your request for a mistrial is respectfully noted and overruled. I don't believe that what the jury heard was so prejudicial that it will deny Mr. Roberts a fair trial. So at this point, your objection is noted. I believe well-preserved, but respectfully, the request for a mistrial is denied.

The primary consideration in ruling on a motion for a mistrial is "prejudice to the defendant." *Rainville v. State*, 328 Md. 398, 408 (1992) (citation omitted). Several factors influence "whether the evidence was so prejudicial that it denied the defendant a fair trial." *Id.* (citation omitted). The following factors are useful in determining if a mistrial is required:

> Whether reference to [the inadmissible evidence] was repeated or whether it was a single, isolated statement; whether the

> reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; [and] whether a great deal of other evidence exists . . . .

Id. (quoting *Guesfeird v. State*, 300 Md. 653, 659 (1984)). However, the ultimate consideration "is whether the prejudice to the defendant was so substantial that he was deprived of a fair trial, and the enumerated factors are simply helpful in the resolution of that question." *Kosmos v. State*, 316 Md. 587, 594–95 (1989).

Applying these factors, we conclude that any prejudice to Roberts was not so substantial that the trial court abused its discretion in denying his motion for a mistrial. We do not find it necessary to consider whether the jury actually heard the remarks which should have been excluded. Because they made their way into evidence, we assume that the jury heard them.

On the first factor, the excluded evidence was offered only one time as "a single, isolated statement." *See Rainville*, 328 Md. at 408. The State stopped playing the recording when told to do so by the trial court and did not continue to play further recording which had been excluded. The State did not otherwise repeat the statement again during trial or in its closing argument.

Regarding the second factor, the statement was played inadvertently by technical mishap.[10] Defense counsel and the trial court agreed that they did not think the State had

[10] While the State in this case inadvertently and mistakenly played the excluded statement in court, we also caution counsel that they are responsible for ensuring that technological evidence at trial complies with any pretrial rulings on admissibility. Just because an error is an accidental technological mishap does not mean that it will excuse the playing of

offered the excluded evidence on purpose. There seems to be no intent on the part of the State to have played the excluded evidence for the jury.

On the third factor, the responding officer and his body worn camera video were not the principal witness and evidence on which the State relied. During the trial, the State offered testimony from both victims in the case—Lebherz and Conyers. It also offered the testimony of the Detective Sergeant who interviewed Roberts. Thus, there was other evidence that was more central to the State's case than the body worn camera footage of the responding officer.

On the fourth factor, there is no reason to think that the statement played had any bearing on the credibility of the responding officer.[11]

On the fifth and final factor, there was "a great deal of other evidence" from which the jury could convict Roberts. *See id.* The evidence included testimony from Lebherz identifying Roberts as the shooter, Conyers identifying Roberts as the shooter, the phone

objectionable evidence. We note that the factor to be considered—"whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement"—ordinarily implies admission of the evidence through live testimony. *See Rainville*, 328 Md. at 408. In the case of recorded video and other technological evidence, counsel is in direct control of the technology, even where they may not be soliciting the evidence from a live witness. Thus, they bear some responsibility to ensure it does not contain impermissible evidence.

[11] While the factors outlined in *Guesfeird* apply wherever a mistrial is being considered, the Court of Appeals in that case applied them to evidence that a testifying witness took a lie detector test. *See* 300 Md. 653, 656 (1984). We think this fourth factor—concerning credibility—is most relevant when the improper evidence relates to the credibility of a testifying witness or the defendant, such as references to lie detector tests, impermissible prior statements, character evidence bearing on truthfulness, etc. The statement in this case did not bear on the truthfulness of the responding officer, any other witness, or the defendant.

calls from jail circumstantially evidencing consciousness of guilt, and the inculpatory statements Roberts made to Detective Jackson that he had shot Conyers accidentally. Balancing these factors, we conclude that the trial court properly exercised its discretion in denying Roberts' motion for a mistrial. The circumstances do not show that Roberts was so prejudiced by the statement that he did not receive a fair trial. Thus, we affirm the circuit court's denial of Roberts' motion for a mistrial.

CONCLUSION

Finding no error, we affirm the judgment of the Circuit Court for Baltimore City. The motions court did not err in ruling that Roberts' confession was admissible because it was voluntarily given. In addition, the trial court did not err in admitting recordings of Roberts' phone calls from jail as relevant to show consciousness of guilt. Finally, it committed no error in exercising its discretion to deny Roberts' motion for a mistrial.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.