Circuit Court for Anne Arundel County
Case No. C-02-CR-16-2144

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1238

September Term, 2017

DAVID HISSEY, JR.

v.

STATE OF MARYLAND

Leahy,
Shaw Geter,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: October 15, 2018

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

A jury in in the Circuit Court for Anne Arundel County convicted appellant, David Hissey, Jr., of robbery, second-degree assault, reckless endangerment, and theft in an amount under $1,000. The circuit court merged, for sentencing purposes, appellant's convictions of the lesser included offenses into his conviction for robbery and sentenced him to ten years' imprisonment with all but eight years suspended and a term of five years' supervised probation.

On appeal, appellant presents two questions for our consideration, which we have rephrased slightly:

1. Did the trial court err in refusing to ask a *voir dire* question that was aimed at identifying juror bias?
2. Has appellant been denied meaningful appellate review because of an omission in the record, and even if the record is complete, did the trial court err in allowing the State to question appellant regarding a recorded telephone conversation?

For the following reasons, we affirm.

BACKGROUND

In the early evening of September 29, 2016, Debra Hendershot, her elderly mother, and her six-year-old granddaughter had gone shopping together at the Cromwell Field Shopping Center in Glen Burnie. Ms. Hendershot was loading groceries into her car when, "all of a sudden," she was "spun around" and her "purse was viciously ripped" from her left shoulder. After a short struggle with the suspect, whom she identified as appellant, Ms. Hendershot lost control of her purse, and was "knocked to the ground." Ms. Hendershot got up and chased after appellant, screaming for help. Two men

intervened and wrestled Ms. Hendershot's purse from appellant, but appellant managed to break free and continued running.

Corporal Ernie Sasser of the Anne Arundel County Police Department responded to the Cromwell Field Shopping Center, where he observed appellant "corralled" by a group of people who were "trying to contain him." After Corporal Sasser conducted a show-up identification in which Ms. Hendershot and other witnesses identified appellant, appellant was arrested.

Appellant testified that, on September 29, 2016, he had attempted to donate blood plasma, but that he was turned away because of a "track mark." Shortly thereafter, appellant observed Ms. Hendershot in the parking lot of the Cromwell Field Shopping Center pushing a shopping cart with her purse in the cart. Appellant testified that he "ran by and [] snatched the purse out of the shopping cart" and "kept running." Ms. Hendershot chased after him, screaming, "[H]elp, call the police. He snatched my purse." According to appellant, a man "jumped in front" of him, grabbed his jacket, and "ripped" the purse out of his hand.

Appellant ran behind a KFC, where he hid for 15 to 20 minutes. When appellant emerged, another man tried to stop him, stating that he was going to "beat [his] butt." Appellant ran away, but the man caught up to him and struck him numerous times. Appellant explained that he had intended only to steal Ms. Hendershot's purse, and that he had not intended to hurt her.

After the jury convicted appellant of robbery, second-degree assault, reckless endangerment, and theft in an amount under $1,000, he noted a timely appeal.

DISCUSSION

I.

Voir Dire

Appellant contends that the trial court erred in failing to ask the jury his proposed *voir dire* question No. 15, which was "aimed at exposing disqualifying juror bias," and which provided:

> The Defendant in every criminal case is presumed innocent. Unless you are satisfied beyond a reasonable doubt of the accused's guilt solely from the evidence presented in this case, the presumption of innocence alone requires you to find the accused not guilty. Is there any member of the jury panel who is unable or unwilling to uphold and abide by this rule of law?

The State responds that the trial court did not abuse its discretion in declining to ask appellant's proposed *voir dire* question because the subject of that question would be covered in the jury instructions.

The trial court ruled that it would not ask appellant's proposed question because it was a jury instruction that later would be given to the jury. Indeed, at the conclusion of the case, the trial court instructed the jury as follows:

> [Appellant] is presumed to be innocent of the charges. This presumption remains throughout every stage of the trial and is not overcome unless you are convinced beyond a reasonable doubt that the [appellant] is guilty. The State has the burden of proving the guilt of [appellant] beyond a reasonable doubt. And this burden remains on the State throughout the trial.

> [Appellant] is not required to prove his innocence. However, the State is not required to prove guilt beyond all possible doubt or to a mathematical certainty. Nor is the State required to negate every conceivable circumstance of innocence.
>
> A reasonable doubt is a doubt founded upon reason. Proof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact to the extent that you would be willing to act upon such belief without reservation in an important matter in your own business or personal affairs.
>
> If you are not satisfied of [appellant's] guilt to that extent then reasonable doubt exists and [appellant] must be found not guilty.

Under Maryland law, "the sole purpose of voir dire is to ensure a fair and impartial jury by determining the existence of cause for disqualification, and not as in many other states, to include the intelligent exercise of peremptory challenges." *Collins v. State*, 452 Md. 614, 622 (2017) (citation and internal quotation marks omitted). "The scope of *voir dire* and the form of the questions propounded rests firmly within the discretion of the circuit court." *Marquardt v. State*, 164 Md. App. 95, 143 (2005). "We have consistently held that *voir dire* need not include matters that will be dealt with in the jury instructions." *Id.* at 144 (citing cases).

Appellant acknowledges that, in *Twining v. State*, 234 Md. 97 (1964), the Court of Appeals held that the trial court did not abuse its discretion in refusing to ask prospective jurors about the presumption of innocence and the burden of proof. Appellant argues, however, that *Twining* is not controlling in the present case because *Twining* "is inconsistent with and has been implicitly overruled by" subsequent Court of Appeals decisions requiring that a trial court ask a *voir dire* question that is reasonably likely to

reveal cause for disqualification. Appellant further contends that the holding in *Twining* that jury instructions are only advisory is no longer an accurate statement of the law.

As we have explained, "'it is up to the Court of Appeals, not this Court, to decide, as appellant suggests, that the reasoning of *Twining* is 'now outmoded.'" *Marquardt,* 164 Md. at 144 (quoting *Baker v. State*, 157 Md. App. 600, 618 (2004)). Here, the trial court's instructions to the jury addressed the presumption of innocence and the State's burden of proof. We conclude that, pursuant to the precedent of *Twining* and *Marquardt*, the trial court did not abuse its discretion in refusing to ask appellant's proposed *voir dire* question because that question was an instruction on the law that was provided to the jury at the conclusion of the case.

II.

Consciousness of Guilt Evidence

During cross-examination of appellant, the State questioned appellant about a recorded telephone conversation in which he and his girlfriend discussed contacting the witnesses in this case:

> [PROSECUTOR]: You gave the names of the alleged victims to that girlfriend at the time on these phone calls, right?
>
> [DEFENSE COUNSEL]: Objection.
>
> [THE COURT]: Overrruled.
>
> [APPELLANT]: Well, she asked who was it and I told her what I read in the paper.

* * *

[PROSECUTOR]: So, do you admit that you spoke to [your girlfriend] giving the names of the victims in this case in an effort to get her to make contact with them to keep them from coming to court?

[DEFENSE COUNSEL]: Objection.

[THE COURT]: Overrruled.

[APPELLANT]: Um - - I tried to give her the names, yeah, I did.

* * *

[PROSECUTOR]: Do you deny that on October 4th, 2016 you said, "I wish there was a way you could get to the courthouse and talk to the people and beg them for mercy?"

[APPELLANT]: I was completely - - messed over the fact of what I done - - wrong.

[PROSECUTOR]: The question is a yes or no. Did you - - do you admit - -

[APPELLANT]: Absolutely.

[PROSECUTOR]: - - saying that.

[APPELLANT]: Absolutely.

[PROSECUTOR]: So, you do admit that you told [your girlfriend] that you wanted her to get to the courthouse and talk to these people, to the victims?

[APPELLANT]: To tell them that I'm sorry.

[PROSECUTOR]: And to beg them for mercy?

[APPELLANT]: Just to tell them I'm sorry for what I did.

The court then permitted the State to play the recording of the phone call, over defense counsel's objection. The recording was interrupted when defense counsel again

objected. The court sustained the objection and the recording was not played again. The portion of the recording that was played for the jury was not transcribed.

Appellant argues that he has been denied meaningful appellate review because the portion of the recording that was played for the jury concerned an inference of consciousness of guilt, and that portion of the transcription is missing from the record. The mere unavailability of a transcript, however, "does not by itself warrant a new trial." *Bradley v. Hazard Tech. Co., Inc.*, 340 Md. 202, 208 (1995). *See also Smith v. State*, 291 Md. 125, 133 (1981) ("It would wreak havoc on the administration of justice to require reversal in each and every case in which it is alleged by the appellant that portions of trial testimony have not been preserved verbatim for review."). In some cases, "deciding an appeal on the merits where possible, even if a full transcript is unavailable, serves the interests of justice and judicial economy." *Bradley*, 340 Md. at 209. This is such a case.

Prior to playing the recording for the jury, the prosecutor questioned appellant about statements that he had made to his girlfriend during the recorded call. Appellant admitted to the substance of those statements, as recounted by the prosecutor. In this particular case, the trial transcript contained sufficient descriptions of the statements made by appellant to permit us to review appellant's claim of error.

Maryland Rule 5-401 provides that 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." *Thomas v. State*, 429 Md. 85, 96 (2012). A ruling that evidence is legally relevant is a conclusion of law,

which we review *de novo*. *See Smith v. State*, 218 Md. App. 689, 704 (2014). We review a court's determination regarding potentially unfairly prejudicial evidence for abuse of discretion. *Id.*; *see, e.g.*, *Webster v. State*, 221 Md. App. 100, 113 (2015) (citation omitted).

The Court of Appeals has explained the relevance of consciousness of guilt evidence as follows:

> It is true that relevance is generally a low bar, but it is a legal requirement nonetheless. We have described relevance by stating:
>
>> To be relevant, it is not necessary that evidence of this nature conclusively establish guilt. The proper inquiry is whether the evidence *could* support an inference that the defendant's conduct demonstrates a consciousness of guilt. If so, the evidence is relevant and generally admissible.

State v. Simms, 420 Md. 705, 727 (2011) (quoting *Thomas v. State,* 397 Md. 557, 577 (2007) (emphasis in original) (internal citations omitted).

Witness tampering is one of many recognized forms of consciousness of guilt evidence. "Evidence of threats to a witness, or attempts to induce a witness not to testify ... is generally admissible as substantive evidence of guilt when the threats can be linked to the defendant[.]" *Washington v. State,* 293 Md. 465, 468 n. 1 (1982); *see also Copeland v. State,* 196 Md. App. 309, 315 (2010) ("Threats are admissible because they demonstrate consciousness of guilt"); *Saunders v. State,* 28 Md. App. 455, 459 (1975) ("an attempt by an accused to suborn a witness is relevant and may be introduced as an admission by conduct, tending to show his guilt"); *accord Byrd v. State*, 98 Md.

App. 627, 632 (1993), *abrogated in part on other grounds by Winters v. State*, 434 Md. 527 (2013).

Appellant contends that the statements elicited by the State were inadmissible consciousness of guilt evidence because the statements were not specific as to which actions, and for which offense(s), he had expressed his remorse. Appellant asserts that *Thompson v. State*, 393 Md. 291 (2006) provides a "useful analogy." In *Thompson*, the defendant fled the scene of a shooting as police arrived. *Thompson*, 393 Md. at 294. The defendant's explanation for fleeing, however, was that he had drugs in his possession. *Id.* at 299. At trial, the charges against the defendant related only to the shooting, and the evidence of drugs was excluded. *Id.* at 299. The Court of Appeals held that the flight instruction was improper because defendant's alternative explanation for his flight, which was not presented to the jury, was not directly related to the crimes for which he was on trial. *Id.* at 313-14. The evidence of his consciousness of guilt, therefore, did not necessarily relate to the crimes charged. *Id.*

In *Thompson*, the consciousness of guilt evidence pertained to a jury instruction, not the admissibility of evidence. Moreover, the issue in *Thompson* was whether any consciousness of guilt of the defendant was attributable to the crimes charged. Here, appellant's statements of remorse and his alleged attempts to contact the witnesses were sufficiently connected to the offenses with which he was charged. "[M]erely because the evidence may show that a defendant also has committed other crimes, that is not a basis upon which to exclude the evidence. The point is that the evidence must at least be

connected to the crime charged." *Thomas v. State*, 372 Md. 342, 354, n. 3 (2002) (explaining that evidence showing a general consciousness of guilt, *i.e.*, refusing to give a blood sample, flight, and using an alias, may be inadmissible unless that evidence is related to the specific crime alleged). We conclude that the trial court did not err in determining that the evidence of appellant's attempts to contact the witnesses was relevant to show a consciousness of guilt on the part of appellant for the crimes charged, nor did it abuse its discretion in permitting the State to cross-examine appellant regarding those statements.

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