Circuit Court for Baltimore City
Case No. 114310011

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1890

September Term, 2016

MICHAEL HAMILTON

v.

STATE OF MARYLAND

Graeff,
Shaw Geter,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: July 11, 2018

A jury in the Circuit Court for Baltimore City convicted Michael Hamilton, appellant, of second degree murder and wearing and carrying a deadly weapon. The court sentenced appellant to 30 years' imprisonment for the conviction of second degree murder, to be served consecutively to a three-year sentence for the conviction of wearing and carrying a deadly weapon.

Appellant presents four questions for this Court's review, which we have reordered, as follows:

1. Did the trial court err in refusing to ask voir dire questions requested by appellant?

2. Did the trial court err in admitting a recording of a jail telephone call allegedly made by appellant?

3. Did the trial court err in admitting cellphone text messages?

4. Did the trial court err in refusing to instruct the jury on self-defense and involuntary manslaughter?

For the reasons that follow, we answer each question in the negative, and therefore, we shall affirm the judgments of the circuit court.

BACKGROUND

Chantay Walker and appellant began dating in November 2013. In October 2014, Ms. Walker and appellant lived together at 2008 Payson Street, sharing a house with several other individuals.

Prior to November 2013, Ms. Walker had been dating the victim, Kevin Jowers. They remained friendly after the relationship ended.

While dating appellant, Ms. Walker occasionally met with Mr. Jowers for drinks. Appellant "wasn't happy" with Ms. Walker's drinking.

On October 8, 2014, the day before Mr. Jowers was killed, Ms. Walker visited Mr. Jowers' mother at the hospital, and then she and Mr. Jowers went for a drink at Oxford Tavern, located at Fulton and North Avenue. Ms. Walker had "[t]oo much" to drink and went home. Appellant was upset when he saw Ms. Walker intoxicated.

In the afternoon hours of October 9, 2014, Ms. Walker saw Mr. Jowers again at Oxford Tavern. After purchasing drinks, Mr. Jowers and Ms. Walker exited the tavern and stood talking, just outside the store, with Mr. Jowers facing toward North Avenue and Ms. Walker facing away from North Avenue. Ms. Walker testified that, while they were talking, an unidentified individual came from behind Ms. Walker, "hit" Mr. Jowers in the face, and "took off running."[1] Mr. Jowers then "took off running." Ms. Walker assumed that he went "to handle whoever had hit him," and she walked home.

That same afternoon, Eureka Ford was in a truck, at a stop light on Fulton Avenue, when she observed an altercation.[2] After the light changed and Ms. Ford moved her work truck forward, she saw a man standing on the corner of Fulton Avenue "bleeding holding his neck," and she called 911. She then saw the man turn, walk toward an alley, and fall to the ground.

[1] Ms. Walker also was hit in the face.

[2] Ms. Ford did not see the start of the altercation. She believed two men were involved, but she "didn't get to see what everybody else was doing. [She] just seen like everybody scattering at first." She also observed a woman at the scene of the altercation.

Ms. Ford testified that the injured man had been fighting with another man, who wore dark clothing and a "Gilligan-style bucket hat." She saw "both men fighting," and "it looked like they [were] swinging." The man with the hat fled the scene in the opposite direction from where the injured man was heading. Ms. Ford testified that a woman had been standing near the injured man prior to the fight, but she "moved back" during the fight and "ended up walking off" in the same direction as the man with the hat.

Sergeant Hillary Wheeler, a member of the Baltimore City Police Department, was in a marked patrol car at the intersection of North Mount Street and Fulton Avenue when she observed "two ladies waving." Sergeant Wheeler drove in their direction and saw a man lying face down on the concrete. Sergeant Wheeler got out of her car, ran over to where Mr. Jowers was lying, and saw that he was "bleeding very badly." When Sergeant Wheeler rolled Mr. Jowers over, she saw that he had a "catastrophic injury" above his collarbone, which was "arterial" and "spraying everywhere."

Sergeant Wheeler radioed for emergency assistance. The paramedics arrived approximately five minutes later, but Mr. Jowers died at the scene. Dr. Carol Allan, a State medical examiner, determined that Mr. Jowers had suffered "sharp force injuries," including "four stab wounds and eight cutting wounds," which were caused by a weapon "consistent with a single edged knife."[3] Mr. Jowers' death was ruled a homicide.

[3] Dr. Allan testified that a cutting wound is an injury on the skin surface, which is "longer than it is deep, and the stab wound is the opposite."

Detective Frank Miller, a member of the Baltimore City Homicide Unit, was assigned to investigate Mr. Jowers' death. Detective Miller testified that there was a blood trail from the front of Oxford Tavern to where Mr. Jowers fell in the alley. No weapons were found on Mr. Jowers' person or along the blood trail.

Detective Miller learned that Mr. Jowers was with Ms. Walker prior to his death. After speaking with Ms. Walker, Detective Miller obtained a search warrant for her phone, to download information contained within the phone; the police subsequently found text messages and phone calls between appellant and Ms. Walker.

The police also searched appellant's phone and extracted data. Appellant sent several text messages to Ms. Walker, discussed in more detail *infra*, regarding Mr. Jowers, his concern about Ms. Walker's drinking, and the deterioration of their relationship.

Detective Miller also obtained a search warrant for the residence where Ms. Walker and appellant lived. The warrant was executed on October 11, 2014, and Detective Miller recovered, among other things, several items of dark clothing, including "a black bucket hat" and a black shirt with "some red spots on the sleeve." The red spots on the sleeve of the black shirt were identified as blood. DNA testing revealed that the "major portion" of the blood on the shirt belonged to Mr. Jowers. Biological material found on the collar of the black shirt belonged to appellant.

At trial, Ms. Walker identified the black shirt and the black bucket hat as the clothing appellant was wearing on October 9, 2014, the day of the stabbing. She also identified

appellant as the individual shown in a video recording who was wearing a bucket hat and dark clothing and running away from the scene after the attack.[4]

James Moore, Ms. Walker's brother, testified that appellant and Mr. Jowers were involved in a fight in April or May 2014, the same day that appellant's brother, Raymond Hamilton, was scheduled to appear in court in Baltimore County. According to Mr. Moore, the fight occurred while he, appellant, and appellant's brother, Mr. Hamilton, were coming back from the courthouse. The State later introduced into evidence a true-test copy of Mr. Hamilton's conviction, which showed that he had a scheduled court date in Baltimore County on May 21, 2014.

Bonnetta Eads, a member of the Department of Public Safety and Correctional Services, testified that, as part of her employment with the Department, she was responsible for listening to inmate telephone calls. As discussed in more detail, *infra*, she testified regarding a call made from jail on October 17, 2014, using appellant's personal identification number ("PIN"). In the call, appellant tells another male to tell an unnamed woman to "come to Court with alcohol on her breath" and tell another man to "push it back," referring to the date of a fight.[5]

[4] Detective Miller reviewed several video recordings from City Watch cameras and a store camera in the area during his investigation, which were introduced into evidence. Several of the recordings track the movements of an individual with black clothing.

[5] The State argued that appellant was attempting to explain the blood found on the sleeve of his shirt by altering the date of the May 2014 fight to a date closer in time to the stabbing.

As indicated, appellant ultimately was found guilty of second degree murder and wearing and carrying a deadly weapon. This appeal followed.

DISCUSSION

I.

Voir Dire

Appellant contends that the "trial court erred in refusing to ask voir dire questions" he requested. The State contends that the court did not abuse its discretion in declining to ask appellant's requested voir dire questions.

A.

Proceedings Below

Prior to trial, defense counsel asked the circuit court to ask the following questions during voir dire:

> 5. Has any member of the jury panel, a family member or close friend ever:
>   a. Been a witness for the State in a criminal case?
>   b. Been convicted of a crime?
>   c. Been the victim of a crime?
>   d. Had any other experience with the criminal justice system which would or might affect your ability to sit as a fair and impartial juror in this case?
>
> 6. Has any member of the jury panel or a member of your family been a victim of physical violence?
>
> * * *
>
> 18. In every criminal case, the burden of proving the guilt of the accused rests solely and entirely on the State. The accused has no burden and does not have to prove his innocence. Is there any member of the jury panel who is unable or unwilling to uphold and abide by this rule of law?

* * *

> 23. The Defendant has an absolute right not to testify. Would anyone draw any inference of guilt from his election not to testify?

The court declined to ask these questions.

The court did ask if any prospective juror had "strong feelings concerning the charges of murder and/or carrying a deadly weapon with intent to injure, such as knives." Twenty-two jurors answered the court's "strong feelings" question in the affirmative. Nine of those jurors stated that their "strong feelings" were due, at least in part, to harm to a friend or family member. For example, one juror stated: "My nephew committed suicide with a gun, and so gun violence is very emotional to me." Another juror stated that three family members had been murdered with a knife or gun, and the juror had "no sympathy for anybody with that charge." Other jurors stated that "high school friends" had been killed or "friends who [were] victims of homicide."

At the close of the evidence, the court instructed the jury, including instructions regarding the State's burden of proof, the presumption of innocence, and the constitutional right not to testify. The court stated:

> The [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 the [appellant] beyond a reasonable doubt. This burden remains on the State throughout the trial. The [appellant] is not required to prove his innocence.
>
> * * *
>
> The [appellant] has an absolute right constitutional right not to testify. The fact that the [appellant] did not testify must not be held against the

> [appellant] and must not be considered by you in any way or even discussed by you. . . .
>
> The burden is on the State to prove beyond a reasonable doubt that the offense was committed and that the [appellant] was the person who committed it.

B.

Analysis

"Voir dire, the process by which prospective jurors are examined to determine whether cause for disqualification exists, is the mechanism whereby the right to a fair and impartial jury, guaranteed by Art. 21 of the Maryland Declaration of Rights, is given substance." *Dingle v. State*, 361 Md. 1, 9 (2000) (citations and footnote omitted). In Maryland, "the sole purpose of *voir dire* 'is to ensure a fair and impartial jury by determining the existence of [specific] cause for disqualification[.]'" *Pearson v. State*, 437 Md. 350, 356 (2014) (quoting *Washington v. State*, 425 Md. 306, 312 (2012)).

Generally, the scope and form of the questions presented during voir dire rest solely within the discretion of the trial court. *Washington*, 425 Md. at 313. Accordingly, "[a]n appellate court reviews for abuse of discretion a trial court's decision as to whether to ask a *voir dire* question." *Pearson*, 437 Md. at 356. "A court abuses its discretion where the ruling under consideration is 'well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable.'" *Thompson v. State*, 229 Md. App. 385, 404 (2016) (quoting *Consol. Waste Indus., Inc. v. Standard Equip. Co.*, 421 Md. 210, 219 (2011)).

When exercising its discretion, "[i]t is the responsibility of the trial judge to conduct an adequate voir dire to eliminate from the venire panel prospective jurors who will be unable to perform their duty fairly and impartially and to uncover bias and prejudice." *Washington*, 425 Md. at 313. The questions posed by the trial court to the venire "should focus on issues particular to the defendant's case so that biases directly related to the crime, the witnesses, or the defendant may be uncovered." *Dingle*, 361 Md. at 10.

"There are two categories of specific cause for disqualification: (1) a statute disqualifies a prospective juror; or (2) a 'collateral matter [is] reasonably liable to have undue influence over' a prospective juror." *Pearson*, 437 Md. at 357 (quoting *Washington*, 425 Md. at 313). If a requested voir dire question is not directed at a specific cause for disqualification, or is "'merely "fishing" for information to assist in the exercise of peremptory challenges,'" a trial court need not pose such a question to the venire. *Id.* (quoting *Washington*, 425 Md. at 315). On the other hand, if a requested voir dire question is reasonably likely to uncover specific cause for disqualification, then a trial court must pose such a question. *Id.*

1.

Proposed Questions Five & Six

Appellant argues that the court erred in refusing to ask the jury venire whether any prospective juror had a family member or close friend who had been the victim of a crime or physical violence. He concedes, as he must, that the Court of Appeals held in *Pearson*, 437 Md. at 354, that a trial court is not required to ask in voir dire whether a prospective

juror has been a victim of a crime because the required inquiry regarding whether a juror has "strong feelings" about a particular crime reveals the same cause for disqualification. *Id.* at 360.

Appellant asserts, however, that the court's "strong feelings" question in this case did not "adequately cover the 'family member or close friend' component of appellant's crime victim question." Additionally, he argues that the court's "strong feelings" question "focused narrowly on the crime of murder and carrying a deadly weapon," which did not adequately cover appellant's "victim of physical violence question."

The State contends that the court "properly exercised its discretion in declining to ask [appellant's] requested voir dire questions." It asserts that the court properly limited the "strong feelings" question to the relevant subject matter, i.e., murder and carrying a deadly weapon. The State argues that the court properly declined to ask the "crime victim" question because the "strong feelings" question it asked adequately covered any grounds for juror disqualification that appellant's questions meant to uncover.

We agree with the State. The circuit court complied with the requirements in *Pearson* and did not abuse its discretion in declining to ask appellant's requested questions five and six.

In *Pearson*, 437 Md. at 363, the Court of Appeals held that, "on request, a trial court must ask during *voir dire*: 'Do any of you have strong feelings about [the crime with which the defendant is charged]?'" The circuit court complied with this requirement, asking if

any prospective juror had "strong feelings concerning the charges of murder and/or carrying a deadly weapon with intent to injure, such as knives.

The Court of Appeals in *Pearson*, 437 Md. at 359, also made clear that a court is *not* required to ask whether any prospective juror has ever been the victim of a crime. The Court explained that "a prospective juror's experience as the victim of a crime lacks 'a *demonstrably strong correlation* [with] a mental state that gives rise to [specific] cause for disqualification.'" *Id.* (quoting *Curtin v. State*,, 393 Md. 593, 607 (2006)). It further stated that the "'victim' *voir dire* question may consume an enormous amount of time," noting that "[m]any (if not most) prospective jurors have been the victims of some kind of crime." *Id.*[6] The Court stated that, because a "strong feelings" question was required, an additional question as to a juror's experience as the victim of a crime would be superfluous, explaining that the "strong feelings" question already reveals "the specific cause for disqualification at which the 'victim' *voir dire* question is aimed." *Id.* at 360.

Because a question about a potential juror being a victim is not required, such an inquiry about family members or friends similarly would not be required. Indeed, as the Court stated in *Perry v. State*, 344 Md. 204, 218 (1996): "It is even less tenable to argue that a juror is disqualified simply because of the experience a member of the prospective juror's family or on the part of a close personal friend."

[6] In this regard, the Court of Appeals noted that "the 'victim' *voir dire* question necessitates that the trial court ask at least two 'follow-up' questions of every single prospective juror who responds affirmatively." *Pearson v. State*, 437 Md. 350, 360 (2014).

The same analysis applies to appellant's question six, i.e., whether the potential jurors or family members had been a victim of a crime of "physical violence." That this question was adequately covered by the "strong feelings" question is shown by the record, where 22 prospective jurors responded to the strong feelings question, several of whom because they had a family member or friend who had been a victim of a crime of violence.

The circuit court did not abuse its discretion in refusing to ask appellant's requested questions number five and six. The court's "strong feelings" question was appropriate to uncover potential causes for disqualification in this regard.

2.

Proposed Questions 18 & 23

Appellant next contends that the court erred in failing to ask his proposed voir dire questions regarding "the presumption of innocence, the State's burden of proof, and appellant's election not to testify." He acknowledges that the Court of Appeals in *Twining v. State*, 234 Md. 97, 100 (1964), held that it was not an abuse of discretion to refuse to ask a question that would be the subject of a jury instruction. He argues, however, that courts in other jurisdictions disagree with the holding of *Twining*, and he asserts that *Twining* is "outmoded."

The State disagrees. It contends that the "trial court properly exercised its discretion when it declined to ask questions that ultimately would be covered in jury instructions," asserting that inquiry into such areas has been expressly denounced by this Court and the Court of Appeals.

In *Twining*, 234 Md. at 100, the Court of Appeals held that it is "inappropriate to instruct on the law at [the voir dire] stage of the case, or to question the jury as to whether or not they would be disposed to follow or apply stated rules of law." As the State notes, the Court of Appeals has "never suggested that *Twining* is bad law," and this Court recently relied on *Twining* in finding no abuse of discretion in a trial court's refusal to ask prospective jurors whether they would be able to follow certain legal principles, such as the presumption of innocence and reasonable doubt. *Thompson*, 229 Md. App. at 404. We perceive no error by the circuit court in declining to ask these requested questions.

II.

Recording of Jail Telephone Call

Appellant contends that the "trial court erred in admitting a recording of a jail telephone call allegedly made by appellant" to his brother, Raymond Hamilton, following appellant's arrest. He asserts several grounds of error.

First, he argues that the call contained inadmissible "other crimes" evidence, noting that the call included statements regarding telling a woman to come to court "with alcohol on her breath" and encouraging a witness to give a false statement about the date of a prior fight between appellant and Mr. Jowers. Appellant asserts that these statements were evidence of the "crime of attempt to suborn a prospective witness to commit perjury."

Second, appellant contends that the call was inadmissible because it "was not properly authenticated." Third, he argues that the "call contained irrelevant statements." Finally, he asserts that the call contained inadmissible hearsay.

The State disagrees. It contends that the "trial court properly exercised its discretion in admitting a jailhouse phone call made by [appellant]."

A.

Proceedings Below

Prior to trial, in a motion *in limine*, defense counsel sought to exclude the admission of a recording of a telephone call made from jail using appellant's PIN.[7] The State advised that it intended to use the call to establish identity and demonstrate consciousness of guilt, i.e., that appellant was attempting to orchestrate testimony and affect witness credibility. Defense counsel argued that the recording was inadmissible because the contents of the call did not establish consciousness of guilt, it contained inadmissible "other crimes" evidence, and it was hearsay.

The recording between the person in jail using appellant's PIN and a male identified as "Ray" began with a conversation about money and getting appellant's phone cut off. The conversation then turned to the charges against appellant, and the following occurred:

[APPELLANT]: **Yeah. This is what I need you to do, and this is a priority, and I thought about it last night.**

[7] At trial, Bonnetta Eads, a member of the Department of Public Safety and Correctional Services, testified that, as part of her employment with the Department, she was responsible for listening to inmate telephone calls. She explained that every inmate receives a personal identification number ("PIN"), which must be entered at the time an outgoing call is placed, and inmate calls are recorded and logged based on the inmate's PIN. Inmates, however, often share PINs, so a call associated to a certain PIN may not have been placed by that inmate. Ms. Eads responded to a subpoena seeking the extraction of an inmate call, with appellant's identification number, placed on October 17, 2014, at 12:17 p.m. to a specified telephone number.

You need to get in contact with her, and because it's (indiscernible) on the joint that she was there on a regular basis, tell her, that when she come to Court, make sure she come to Court with alcohol on her breath, and play that shit out. You know what I mean? Because what that –

MALE VOICE: **All right.**[8]

*** * ***

[APPELLANT]: **Okay. Yeah. Exactly. Tell her that – you tell her that I said come drunk or with alcohol that's on your breath, and tell her play that she don't know no – she playing it, you know what I mean? I'll see (inaudible) –**

MALE VOICE: **Right.**

[APPELLANT]: You know? I can tell her, "I been tripping on that."

MALE VOICE: All necessary.

[APPELLANT]: Yeah. 'Cause I can do it when I get your help, you know what I'm saying? It's just a matter of them getting the right type of lawyer that's going to go to bat with me and do what I say, you know?

MALE VOICE: Right.

* * *

MALE VOICE: Now, they're saying they got you, though, on the camera -

[8] Although appellant did not identify the woman about whom he was speaking, immediately before this portion of the call, the speaker identified as Ray had been talking about someone named "Tey," which testimony indicated was Ms. Walker's nickname.

[APPELLANT]: Yeah.

MALE VOICE: - on my (indiscernible) and lying about all the cameras, like, you – all the cameras, they got you from being on North Avenue all the way to where you can see the door, (indiscernible.)

[APPELLANT]: Okay. What's that mean?

MALE VOICE: Well, it don't mean nothing, but I'm just saying, you know. You know what I mean? You got to (indiscernible) what they got.

[APPELLANT]: Right.

MALE VOICE: You know?

[APPELLANT]: Okay. What that mean? I can't walk around the corner, walk in the house?

MALE VOICE: Yeah. Well, they say – don't – it's nothing, but it's matter of that.

[APPELLANT]: Yeah. Who told you that?

MALE VOICE: Sheeba. The (indiscernible.)

[APPELLANT]: Uh-huh. And I need him to, you know, give a statement to – with how he saw me, and he was there with me, and they think we was fighting.

MALE VOICE: Yeah.

[APPELLANT]: Yeah. He just got to keep the date right, you know? (Indiscernible) the date.

MALE VOICE: Yeah. I know (indiscernible) that's what I'm saying. It's -

[APPELLANT]: Where he was at. Yeah. I want to push it back some. I want to bring it up further. I want to

	bring it up closer, 'cause I don't know if they can catch it, to see how old that shit is or what. I don't want a date showing that, you know, it was closer to, like, August or something like that. You know what I'm saying?
MALE VOICE:	**Yeah. Now, what things you want me to tell him?**
[APPELLANT]:	**That you can use the same date, but say August.**
MALE VOICE:	**Yeah. He can say the 21st of August.**
[APPELLANT]:	**What he – the 21st of August, yeah. That's what – we're into August. I'm going to put it there in my paperwork. I'm trying to put, like, a little journal together. Like, I said, I don't have no – I don't have nothing. I don't have no stamped envelopes, no write pad. I don't have nothing. Man, I don't have nothing.**

(Emphasis added).

In denying defense counsel's motion *in limine* the court first addressed the issue of hearsay, stating: "[T]here is clear case law that jail calls are admissible. They're not testimonial. They are admissible as a hearsay exception, because it's a statement of the other – the party opponent. It's your clients [sic] statements that come in. And in this case, he is the party opponent."

The court then determined that the statements made on the tape were not evidence of "other crimes." It explained:

> [T]his transcript from the jail call is [appellant] attempting to orchestrate testimony. That's what it is. He is trying to orchestrate testimony. I don't have to get to whether or not it's other crimes. . . .

> I believe that the statement or the request that he made of the other witness to come to the court drunk – "have alcohol on your breath." That may not be an admission, and it doesn't have to be. But again, he is orchestrating someone's courtroom behavior to come to court drunk or with alcohol on your breath, that certainly goes to that witness's credibility.

Nevertheless, the court found that, even if the evidence did constitute "other crimes," the recording was admissible. It found that the evidence was relevant to proving identity because it showed appellant's "presence at a scene or in the locality of a crime of the trial." The court continued:

> [The State] has proffered that there is information concerning the 21st of May concerning the . . . alleged fight that happened between Mr. Jowers and [appellant] that there would be clear and convincing evidence of that from Mr. Moore,[9] as well as through the other testimony that [the State] has indicated, and that the value of it is more probative than it is prejudicial.

At trial, when the State sought to play the recording of the jail telephone call for the jury, defense counsel again objected to the introduction of the recording, citing the grounds raised in its motion *in limine*, i.e., that the contents of the call did not establish a consciousness of guilt and the recording contained inadmissible "other crimes" evidence and hearsay. He also asserted that an "insufficient factual predicate [had] been established to introduce the actual calls into evidence." The court overruled the objection and the recording was played for the jury.

[9] "Mr. Moore" refers to James Moore, Ms. Walker's brother. The State did elicit testimony from Mr. Moore that appellant and Mr. Jowers had a fight in April or May 2014, the same day that appellant's brother, Raymond Hamilton, was scheduled to appear in court in Baltimore County. The State later introduced into evidence a true-test copy of Mr. Hamilton's conviction, which showed that he had a scheduled court date in Baltimore County on May 21, 2014.

B.

"Other Crimes" Evidence

As indicated, appellant contends that the recording of the jail telephone call was inadmissible because it contained "other crimes" evidence, an attempt to get witnesses to commit perjury. In support, he points to statements asking Ray to tell one witness to move the date of a prior fight between appellant and Mr. Jowers and tell a woman to come to court "with alcohol on her breath" and "play that."

The State argues that the recording was not evidence of other crimes. Instead, it was "conduct relating to the crime for which [appellant was] on trial," i.e., it was relevant to appellant's "consciousness of guilt.

Maryland Rule 5-404(b) provides:

> Evidence of other crimes, wrongs, or acts…is not admissible to prove the character of a person in order to show action in conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

"Maryland Rule 5-404(b) prohibits other bad acts evidence to protect against the risk that a jury will assume that because a defendant committed other crimes, he is more likely to have committed the crime for which he is on trial." *Smith v. State*, 232 Md. App. 583, 599 (2017). "Evidence of other crimes may be admitted, however, if it is substantially relevant to some contested issue in the case and if it is not offered to prove the defendant's guilt based on propensity to commit crime or his character as a criminal." *State v. Faulkner*, 314 Md. 630, 634 (1989). As a result, "there are numerous exceptions to [this]

general rule…[and evidence] of this type may be admitted if it tends to establish motive, intent, absence of mistake, a common scheme or plan, identity, opportunity, preparation, knowledge…or accident." *Id.*

In determining whether "other crimes evidence" is admissible, a trial court must undertake a three-step process. *Id.* First, it must determine whether the evidence can be considered an "exception" to the general inadmissibility of other crimes evidence, which is a legal determination that we review *de novo.* *Id.* The ultimate question, however, is not whether the other crimes evidence fits neatly into one of the aforementioned categories; instead, the question is whether the other crimes evidence is "'substantially relevant for reasons other than criminal character?'" *Solomon v. State*, 101 Md. App. 331, 356 (1994) (quoting *Harris v. State*, 324 Md. 490, 500 (1991)), *cert. denied*, 337 Md. 90 (1995). The issue is whether "the evidence of 'other crimes' possesses a special or heightened relevance and has the inculpatory potential to prove something other than that the defendant was a 'bad man.'" *Oesby v. State*, 142 Md. App. 144, 162, *cert. denied*, 369 Md. 181 (2002).

If this step is satisfied, the court must then decide whether the defendant's involvement in the "other crimes" can be established by clear and convincing evidence, which we review under a clearly-erroneous standard. *Faulkner*, 314 Md. at 634-635. Finally, the court must weigh the probative value of the evidence against any prejudice the evidence is likely to have against the defendant, a finding that we review for abuse of discretion. *Id.*

We address first the State's contention that the statements in the call regarding attempts to change testimony was not other crimes testimony because it was related to the crime charged. In making that claim, the State relies on *Smith v. State*, 232 Md. App. 583, 600 (2017), in which this Court held that, "if an act is part of the alleged offense, the act does not constitute an 'other' act to which the rule applies." In so holding, however, we noted that the "prohibition against 'other crimes' evidence does not apply to evidence of wrongs 'that arise during the same transaction and are intrinsic to the charged crime[.]" *Id.* We further explained that "intrinsic" means "'other crimes that are so connected or blended in point of time or circumstance with the crime or crimes charged that they form a single transaction, and the crime or crimes charged cannot be fully shown or explained without evidence of the other crimes.'" *Id.* (quoting *Odum v. State*, 412 Md. 593, 611 (2010)). Here, to the extent that appellant was attempting to suborn perjury, that action was taken after the crimes for which he was charged had concluded. Accordingly, it must be analyzed as other crimes evidence.

Here, the circuit court found that the evidence was relevant to show consciousness of guilt. We agree. Appellant's efforts to make Ms. Walker appear to be incredible indicated that he knew he was guilty and wanted to limit the damage from Ms. Walker's testimony placing him at the scene and establishing that he initiated the fight with Mr. Jowers. And the attempt to change testimony regarding the date of his prior fight with Mr. Jowers, to a date closer in time to Mr. Jowers' murder, provided an alternate explanation for the blood on appellant's black shirt. Appellant's attempts to orchestrate witness

testimony was relevant to his consciousness of guilt, which went to his identity as the assailant. *See, e.g.*, *Thomas v. State*, 372 Md. 342, 351 (2002) ("A person's behavior after the commission of a crime may be admissible as circumstantial evidence from which guilt may be inferred."); *Snyder*, 361 Md. at 593 (circumstantial evidence regarding a defendant's conduct may be admissible, "not as conclusive evidence of guilt, but as a circumstance tending to show a consciousness of guilt."); *Boston v. State*, 235 Md. App. 134, 152-53 (2017) (recorded telephone call from the detention center showed consciousness of guilt because the defendant suggested that he intended to leave the area and change contact information), *cert. denied*, 457 Md. 664 (2018); *Copeland v. State*, 196 Md. App. 309, 316 (2010) ("consciousness of guilt is an other purpose that will overcome the presumption of exclusion that is attached to other crimes evidence.") (quoting *Conyers v.* State, 345 Md. 525, 554 (1997)).

With respect to the requirement that the evidence be established by clear and convincing evidence, Ms. Eads, a member of the Department of Public Safety and Correctional Services, testified that she produced a copy of the recording in response to a subpoena from the State requesting a particular call made with appellant's identification number on a particular date. She testified that all inmates are assigned a unique PIN, which must be entered prior to making a call, and that the call in question was made by someone using appellant's PIN. Moreover, the caller referred to the recipient of the call as "Ray," and there was testimony at trial that appellant had a brother named Raymond. Finally, the content of the conversation contained references to the surveillance tapes involved in this

case. Under these circumstances, the court did not clearly err in determining that there was clear and convincing evidence that the call was initiated by appellant.

The last step in the analysis is weighing the probative value of the evidence against unfair prejudice. In determining whether a particular piece of evidence is unfairly prejudicial, the court must balance the inflammatory character of the evidence against the utility the evidence will provide to the jurors' evaluation of the issues in the case." *Smith v. State*, 218 Md. App. 689, 704 (2014).

Here, the probative value of appellant's statements on the recording was significant as they tended to show appellant's consciousness of guilt, i.e., his attempt to orchestrate witness testimony and behavior. Under the circumstances here, the circuit court did not abuse its discretion in finding that the probative value of the recording outweighed the danger of unfair prejudice. The recording was not inadmissible other crimes evidence.

C.

Authentication

Appellant next contends that the recording was inadmissible because it was not properly authenticated prior to its admission at trial. The State contends that the issue is not preserved for review, and in any event, the recording was properly authenticated.

We address first the State's preservation argument. At trial, defense counsel argued that an "insufficient factual predicate [had] been established to introduce the actual calls into evidence." The court asked defense counsel to clarify its objection. The following ensued:

THE COURT: [A]re you challenging the authentication?

[DEFENSE]: Well…I'm not really challenging. I just – I have –

THE COURT: Well, tell me what you're challenging –

[DEFENSE]: - a different letter. I'm just saying that there's – I'm not contesting the veracity of the witness, what she does, and what's presented in the document. What I'm saying is that as far as the actual calls are concerned, that there's an insufficient factual basis to lay a sufficient foundation to put the calls in evidence and play them in front of the jury.

THE COURT: Okay. Make sure that I understand you. Certification is [State's Evidence 33B], so that – you're not challenging the authentication; is that correct?

[DEFENSE]: I mean, she's not the witness, but I under –

THE COURT: Are you challenging? It's either "yes" or "no."

[DEFENSE]: No, I'm not.

THE COURT: Okay. [State's Evidence 33A] is the CD from the jail, and we've already talked about the content in the motion in limine. And so what you're saying is that you're still additionally challenging the content, not necessarily the physical CD, but the content of the CD, because you believe that there was not enough factual basis that was laid?

[DEFENSE]: Yes.

THE COURT: Okay. So as to that part…do you have any argument as to the factual basis that is laid as to what's on this CD? Or not what's on it but as to – before you play the CD?...I guess what I'm asking is this. This is, as to the calls – the certification is as to a call that was made from the jail records of Michael Warren Hamilton, with that particular – is that a PIN number, ID number – some ID

number that's on there, that it corresponds with a call that was made on October 17th; is that correct?

[STATE]: Yes.

* * *

THE COURT: Okay. So I think what she needs to indicate, that there was a call that was extracted from October 17, 2014. And then after that, I don't see what else there is to do.

[DEFENSE]: All right. Well, I just…I would still argue that there is still an insufficient basis.

THE COURT: Okay….And this is reserved. It's overruled, but that's just what I need her to put in the record. Thank you.

The State argues that the authentication issue is not preserved for review because defense counsel "affirmatively and unambiguously waived any such objection" when he stated at trial that he was not challenging "the authenticity of the call." The comments to which the State refers, however, occurred in the context of the court asking counsel whether he was challenging the authenticity of State's Exhibit 33B, which was a certification of custodian of records stating that the recording included jail call records from appellant, # 985384. The discussion then turned to State's Exhibit 33A, which was the recording of the call, and defense counsel stated, without elaboration, that he was challenging the admission of the call because a proper factual basis had not been laid.

The record could be clearer regarding appellant's objection in this regard. Although there arguably is a preservation problem, we will address the issue on its merits.

A document is authenticated when there is "evidence sufficient to support a finding that the matter in question is what its proponent claims." Maryland Rule 5-901(a). The

Rule provides a non-exhaustive list of ways in which evidence may be authenticated, including "testimony of a witness with knowledge that the evidence is what it is claimed to be" and circumstantial evidence, "such as appearance, contents, substance, internal patterns, location, or other distinctive characteristics." Md. Rule 5-901(b)(1) and (4).

"'[T]he burden of proof for authentication is slight, and the court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the *jury* ultimately might do so.'" *Johnson v. State*, 228 Md. App. 27, 59 (quoting *Dickens v. State*, 175 Md. App. 231, 239 (2007) (emphasis in original)), *cert. denied* 450 Md. 120 (2016). This Court reviews a decision to admit evidence over an authentication objection for clear error in the lower court's factual findings and for abuse of discretion in its admission of the evidence. *See Cooper v. State*, 434 Md. 209, 228 (2013), *cert. denied*, 134 S. Ct. 2723 (2014); *Easter v. State*, 223 Md. App. 65, 74-75, *cert. denied*, 445 Md. 488 (2015).

Here, the contents of the recording were properly authenticated. Ms. Eads testified that she produced the CD in response to a subpoena from the State requesting a particular call made by appellant on October 17, 2014, at 12:17 p.m. She further testified that all inmates are assigned a unique PIN, which must be entered prior to making a call, and that the call in question was made using appellant's PIN. And the certification of business records produced with the CD, which was introduced into evidence without a challenge from appellant as to its authenticity, indicated that the CD contained appellant's call records.

Moreover, the caller referred to the recipient as "Ray," and Ms. Walker's brother, Mr. Moore, had testified that appellant had a brother named Raymond. And the substance of the call, regarding Ms. Walker's intoxication, the previous fight, and the surveillance videos, constituted circumstantial evidence that appellant was the caller. *See Walls v. State*, 228 Md. App. 646, 689 (2016) (substance of call was strong circumstantial evidence that caller was the defendant, and thus, was sufficient to support its admission). The recording was sufficiently authenticated.

D.

Relevance

Appellant contends that, even if the statements that we have discussed were admissible, the remainder of the call should have been excluded as irrelevant. The State contends that this issue is not preserved for review, and to the extent that the call contained irrelevant evidence, "it was irrelevant to the point that it was harmless."

Maryland Rule 8-131(a) provides that, "[o]rdinarily, the appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court." "[T]he application of the rule limiting the scope of appellate review to those issues and arguments raised in the court below 'is a matter of basic fairness to the trial court and to opposing counsel, as well as being fundamental to the proper administration of justice.'" *In re Kaleb K.*, 390 Md. 502, 513 (2006) (quoting *Medley v. State*, 52 Md. App. 225, 231 (1982)). *Accord Alexis v. State*, 209 Md. App. 630, 668 (2013), *aff'd*, 437 Md. 457 (2014).

Moreover, "'[w]here a party asserts specific grounds for an objection, all other grounds not specified by the party are waived.'" *Webster v. State*, 221 Md. App. 100, 111 (2015) (quoting *Thomas v. State*, 183 Md. App. 152, 177 (2008)). Indeed, "'when an objector sets forth the specific grounds for his objection . . . the objector will be bound by those grounds and will ordinarily be deemed to have waived other grounds not specified.'" *Gutierrez v. State*, 423 Md. 476, 488 (2011) (quoting *Sifrit v. State*, 383 Md. 116, 136 (2004)).

Here, defense counsel objected to the introduction of the recording on the grounds that the call did not establish consciousness of guilt, and it contained inadmissible "other crimes" evidence and hearsay. He also asserted that an "insufficient factual predicate [had] been established to introduce the actual calls into evidence." Defense counsel did not object on the ground that the recording, or portions of the recording, were irrelevant. This argument, therefore, is not preserved for appeal.

In any event, even if the issue was preserved, we would find it to be without merit. Evidence is relevant if it makes "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. In other words, evidence is relevant if it is both material and probative. "Evidence is material if it bears on a fact of consequence to an issue in the case." *Smith*, 218 Md. App. at 704.

Although some portions of the call, such as the fate of appellant's cell phone and the fact that appellant did not have any writing utensils at the time the call was made, were

not relevant to the issues at trial, we agree with the State that any error in admitting them was harmless. The contents of these portions of the conversation were either cumulative to other evidence presented at trial, such as the video evidence capturing appellant at the scene of the crime, or were so mundane and innocuous that they in no way influenced the jury's verdict. *See Yates v. State*, 429 Md. 112, 120-21 (2012) (discussing as harmless the erroneous admission of evidence where the essential contents of that evidence is admitted without objection at another point in the trial); *Bellamy v. State*, 403 Md. 308, 332 (2008) (reversal not required where the trial court's error was "unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record.") (citations and quotations omitted). To the extent that portions of the call were irrelevant, admission of this evidence was harmless error.

E.

Hearsay

Appellant next contends that the recording contained inadmissible hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Unless it fits within an established exception to the rule against hearsay, "hearsay is not admissible." Md. Rule 5-802.

"In ruling on the admissibility of hearsay evidence, the trial judge must examine the nature of the out-of-court statements, as well as what they are offered to prove." *Richardson v. State*, 324 Md. 611, 621 (1991). On appeal, this Court makes a *de novo*

determination whether a statement constitutes hearsay. *Parker v. State*, 408 Md. 428, 436 (2009).

Here, in ruling on the motion *in limine*, the court explained that "jail calls are admissible," noting that the call contained statements of a party opponent, i.e., appellant. On appeal, appellant implicitly concedes that the statements he made on the recording are admissible as a statement made by a party opponent. *See McClurkin v. State*, 222 Md. App. 461, 483, *cert. denied*, 443 Md. 736, *cert. denied*, 136 S.Ct. 564 (2015). He contends, however, that the recording included statements made by a non-party opponent. Specifically, he points to a statement made by "Ray" that "the person alleged to be Appellant was captured on camera."

The State contends that this statement was not hearsay because it was not offered for the truth of the matter asserted. We agree.

The general rule is that "'a relevant extrajudicial statement is admissible as nonhearsay when it is offered for the purpose of showing that a person relied on and acted upon the statement and is not introduced for the purpose of showing that the facts asserted in the statement are true.'" *Parker v. State*, 408 Md. at 438 (quoting *Graves v. State*, 334 Md. 30, 38 (1994)). Here, as the State notes, Ray's statement about the videos, which was not "zeroed in on . . . at trial," "may have prompted [appellant's] comments in the phone conversation about how Raymond had to help change Walker's and Moore's testimony." The statement in this regard, however, was not offered to prove the existence of video

surveillance. Accordingly, it was not offered for the truth of the matter asserted, and it was not inadmissible hearsay.

In any event, even if the statement was hearsay, its admission was harmless error because it was cumulative of other evidence. *See McClurkin*, 222 Md. App. at 485 (admission of the call was harmless error because the hearsay contained within was cumulative of other evidence). The State introduced actual video surveillance footage depicting an individual wearing clothing that appellant had worn the day of the murder. A statement indicating that the police had this footage merely repeated what evidence the jury had at its disposal to review.

III.

Text Messages

Appellant contends that the "trial court erred in admitting cellphone text messages" he sent to Ms. Walker. He argues that the messages were irrelevant because, even though they may have indicated some tension between appellant and Ms. Walker, this tension was due to Ms. Walker's drinking, not her relationship with Mr. Jowers. He also asserts that, even if the text messages were relevant, their probative value was outweighed by the danger of unfair prejudice because they were "needlessly cumulative" of other evidence and were "simply embarrassing, needlessly placing appellant in an unfavorable light."

The State contends that the text messages, with one exception, were relevant to explain appellant and Ms. Walker's "deteriorating relationship" and the fact that appellant

"disliked and blamed [Mr.] Jowers." It further argues that those messages, although embarrassing, were not unduly prejudicial in light of their probative value.

Prior to trial, defense counsel filed a motion *in limine* to exclude the following messages obtained from appellant's cell phone, which were sent to Ms. Walker:

> Lmoa, I'll b glad when he comes home. My brother Is doing 6 mo. Out Towson & he'll b home in sept. [Sent at 11:29 p.m. on July 19, 2014]
>
> On the bus daddy going to doctors I saw sorry ass Kevin on north ave. Just wanted to let u know so no line would say they they [sic] saw me me [sic]and someone spok. [Sent at 5:37 p.m. on September 9, 2014]
>
> Baby, I have ur money. I got so upset how intoxicated u were, I took it & put it up so u wouldn't drink. Im sorry, but I dont like to see my baby like that. [Sent at 2:29 p.m. on September 29, 2014]
>
> The drinking and calling Kevin, Im not gonna marry you if u cant Keep ur word. Its not fair to me to have to deal wit those issues. I dont bring ANY drama to u, so I should b treated the same. [Sent at 2:52 p.m. on October 2, 2014]
>
> U probably wont b there when I get back, but then I expect that from u. Im sorry for loving u, cause no One else does when they wanna see u fucked up like u were so they can talk abt u & laughing, knowing that ur home Is & has falling apart. Misery loves company & u dont see it. I cant & wont live like that so dont expect anything more from me other than friendship. [Sent at 3:13 p.m. on October 9, 2014]

The court denied defense counsel's motion. It found that the text messages were statements of a party opponent and the text messages were "very probative" with respect to appellant's relationship to the victim, Mr. Jowers, and his deteriorating relationship with Ms. Walker, and they were not "more prejudicial than they are probative."

Generally, evidence that is relevant is admissible; evidence that is not relevant is not admissible. *See* Md. Rule 5-402. A determination whether evidence is relevant is a legal

conclusion that we review de novo. *Smith*, 218 Md. App. at 704. Even if evidence is relevant, it is admissible "subject to the court's exercise of discretion to exclude it … 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.'" *Odum*, 412 Md. at 615 (quoting Md. Rule 5-403).

With respect to the first text message, stating that appellant's brother is coming home from jail, with no reference to Mr. Jowers, the State concedes that this message was not relevant. We agree.

The admission of irrelevant evidence, however, does "not require reversal if it appears that the evidence was not prejudicial.'" *Thomas v. State*, 301 Md. 294, 320 (1984) (quoting *Hopkins v. State*, 193 Md. 489, 499–500 (1949)). *Accord Myers v. State*, 58 Md. App. 211, 240 ("[T]he error in admitting the irrelevant evidence was, viewed in the totality of the evidence, absolutely harmless beyond a reasonable doubt."), *cert. denied*, 300 Md. 484 (1984). Appellant does not set forth any prejudice resulting from the admission of this text message, and we conclude that there was no prejudice from its admission.

With respect to the admission of the other four text messages, they reference either appellant's opinion of Mr. Jowers, i.e., "I saw sorry ass Kevin [Jowers] on north ave.," or they refer to the status of appellant's relationship with Ms. Walker, i.e., "I got so upset how intoxicated u were," "The drinking and calling Kevin [Jowers], Im not gonna marry you if you cant Keep ur word," "U probably wont b there when I get back, but then I expect that from u. Im sorry for loving u, cause no One else does." These messages are probative of appellant's general animosity toward Mr. Jowers and his inability to process Ms. Walker's

continued relationship with Mr. Jowers, all of which bear on a material fact, i.e., appellant's motivation for killing Mr. Jowers, who was with Ms. Walker at the time of the attack. *See Snyder*, 361 Md. at 605 ("Evidence or previous quarrels and difficulties between a victim and a defendant is generally admissible to show motive.").

Even if legally relevant, evidence may be excluded "if the probative value of such evidence is determined to be substantially outweighed by the danger of unfair prejudice." *Andrews v. State*, 372 Md. 1, 19 (2002). "Probative value relates to the strength of the connection between the evidence and the issue . . . to establish the proposition that it is offered to prove." *Smith*, 218 Md. App. at 704 (citations and quotations omitted). "We determine whether a particular piece of evidence is unfairly prejudicial by balancing the inflammatory character of the evidence against the utility the evidence will provide to the jurors' evaluation of the issues in the case." *Id.* at 705. On the one hand, evidence of a "highly incendiary nature" may be admissible if it provides significant aid to the jury's understanding of a fact in issue; on the other hand, similar evidence should not be admitted if the evidence's probative value is weak, particularly when the evidence "might produce a jury inference that the defendant had a propensity to commit crimes or was a person of general criminal character." *Id.* (citations and quotations omitted). "This inquiry is left to the sound discretion of the trial judge and will be reversed only upon a clear showing of abuse of discretion." *Malik v. State*, 152 Md. App. 305, 324, *cert. denied*, 378 Md. 618 (2003).

Here, although the messages may be, as appellant contends, "embarrassing" or "unfavorable," that does not, as the State points out, render them unfairly prejudicial. "It has been said that '[p]robative value is outweighed by the danger of '*unfair*' prejudice when the evidence produces such an emotional response that logic cannot overcome prejudice or sympathy needlessly injected into the case.'" *Odum*, 412 Md. at 615 (quoting F. Murphy Jr., Maryland Criminal Evidence Handbook § 506(B) (2007 Supp.)) (emphasis in original). We are not persuaded that the admission of these text messages produced "such an emotional response" that logic was overcome. The circuit court did not abuse its discretion in admitting the text messages.

IV.

Jury Instructions

Appellant's final contention is that the trial court erred in refusing to give a jury instruction on self-defense and involuntary manslaughter. He contends that there was "some evidence" to suggest that he actually believed that he was in immediate or imminent danger of death or serious bodily harm.

The State disagrees. It contends that the court did not abuse its discretion in refusing appellant's requests because the facts of the case did not necessitate the giving of those instructions.

A trial court "may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." Maryland Rule 4-325(a). To be entitled to an instruction, the party requesting it must establish: "'(1) the

instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given.'" *Howard v. State*, 232 Md. App. 125, 163 (quoting *Vielot v. State*, 225 Md. app. 492, 505 (2015)), *cert. denied*, 453 Md. 366 (2017).

Appellant contends that the circuit court erred in finding that he failed to satisfy the second prong. He argues on appeal, as he did below, that Ms. Ford's testimony that she saw two people fighting, as well as evidence of a previous fight between appellant and Mr. Jowers, constituted some evidence that appellant believed he was in imminent danger of death or serious bodily harm.

The circuit court rejected this argument, stating:

> I know that Ms. Ford talked about there being a fight, but Ms. Ford did not testify and there's – it has not been generated that the victim was the aggressor, or that the [appellant] was not the aggressor. . . . [T]here's nothing that shows me anywhere that the [appellant] believed he was in imminent danger. It hasn't been generated that that is what the belief was, or that he believed that the force that he used would be reasonable hasn't been generated in any way even for me to get to it because there's no evidence, number one, as to – even if it was a fight, if the jury believes that, that's fine. But it doesn't mean that it is self-defense.

Indeed, the court stated:

> Ms. Walker testified that the hand came out of nowhere, if the jury were to believe that that hand was [appellant's] hand, that the hand came out of nowhere, Ms. Walker places the [appellant] as the aggressor, if the jury were to believe that the person who committed this offense was in fact, [appellant].
>
> But there is no evidence, it has not been generated, that this was self-defense.

The court ruled that the requested instructions were not generated by the evidence, reiterating that there was no evidence that appellant was not the aggressor and no evidence of appellant's belief.

In deciding whether an instruction is applicable to the facts of a case, a trial court must determine "whether there exists 'that minimum threshold of evidence necessary to establish a *prima facie* case that would allow a jury to rationally concluded that the evidence supports the application of the legal theory desired.'" *Vielot*, 225 Md. App. at 505 (quoting *Bazzle v. State*, 426 Md. 541, 550 (2012). Because this preliminary determination is a question of law for the judge, we review the court's decision under a *de novo* standard of review. *Page v. State*, 222 Md. App. 648, 668, *cert. denied*, 445 Md. 6 (2015). Moreover, "[i]n looking to that threshold question, we will consider the admissible evidence in the light most favorable to the appellant." *Jacobs v. State*, 32 Md. App. 509, 510 (1976). *See also Dashiell v. State*, 214 Md. App. 684, 697 (2013).

A.

Self-Defense

Appellant requested that the court give Maryland Criminal Pattern Jury Instruction 4:17:2, which states, in pertinent part, as follows:

> VOLUNTARY MANSLAUGHTER (PERFECT/IMPERFECT SELF-DEFENSE)
>
> Voluntary manslaughter is an intentional killing, which is not murder because the defendant acted in partial self-defense. Partial self-defense does not result in a verdict of not guilty, but rather reduces the level of guilt from murder to manslaughter.

You have heard evidence that the defendant killed (name) in self-defense. You must decide whether this is a complete defense, a partial defense, or no defense in this case.

In order to convict the defendant of murder, the State must prove that the defendant did not act in either complete self-defense or partial self-defense. If the defendant did act in complete self-defense, your verdict must be not guilty. If the defendant did not act in complete self-defense, but did act in partial self-defense, your verdict must be guilty of voluntary manslaughter and not guilty of murder.

Self-defense is a complete defense, and you are required to find the defendant not guilty, if all of the following four factors are present:

(1) the defendant was not the aggressor [[or, although the defendant was the initial aggressor, [he] [she] did not raise the fight to the deadly force level]];

(2) the defendant actually believed that [he] [she] was in immediate and imminent danger of death or serious bodily harm;

(3) the defendant's belief was reasonable; and

(4) the defendant used no more force than was reasonably necessary to defend [himself] [herself] in light of the threatened or actual force. [[This limit on the defendant's use of deadly force requires the defendant to make a reasonable effort to retreat. The defendant does not have to retreat if [the defendant was in his or her home] [retreat was unsafe] [the avenue of retreat was unknown to the defendant] [the defendant was being robbed] [the defendant was lawfully arresting the victim]].

In order to convict the defendant of murder, the State must prove that self-defense does not apply in this case. This means that you are required to find the defendant not guilty, unless the State has persuaded you, beyond a reasonable doubt, that at least one of the four factors of complete self-defense was absent.

Even if you find that the defendant did not act in complete self-defense, the defendant may still have acted in partial self-defense. [If the defendant actually believed that [he] [she] was in immediate and imminent danger of death or serious bodily harm, even though a reasonable person

> would not have so believed, the defendant's actual, though unreasonable, belief is a partial self-defense and the verdict should be guilty of voluntary manslaughter rather than murder.] [If the defendant used greater force than a reasonable person would have used, but the defendant actually believed that the force used was necessary, the defendant's actual, though unreasonable, belief is a partial self-defense and the verdict should be guilty of voluntary manslaughter rather than murder.]
>
> In order to convict the defendant of murder, the State must prove that the defendant did not act in complete self-defense or partial self-defense. If the defendant did act in complete self-defense, the verdict must be not guilty. If the defendant did not act in complete self-defense, but did act in partial self-defense, the verdict must be guilty of voluntary manslaughter and not guilty of murder.

To justify a jury instruction on perfect self-defense, the defense must show some evidence of the following four elements: (1) the accused must have had reasonable grounds to believe he was in imminent or immediate danger of death or serious bodily injury from another; (2) the accused must have actually believed he was in such danger; (3) the accused must not have been the aggressor or provoker of the conflict; and (4) the accused must not have used more force than was reasonably necessary under the circumstances. *Thomas v. State*, 143 Md. App. 97, 113, *cert. denied*, 369 Md. 573 (2002).

The elements of imperfect self-defense are the same as for perfect self-defense, except that "the extent of force or the perception of danger, or both, are 'objectively unreasonable.'" *Id.* Imperfect self-defense applies if a person actually, but unreasonably, believes he or she must "escalate a non-deadly combat to the deadly level." *Lambert v. State*, 70 Md. App. 83, 97, *cert. denied*, 309 Md. 605 (1987).

Perfect self-defense, or the honest and objectively reasonable use of force in the face of an imminent or immediate threat, "is a complete defense to a charge of criminal

homicide 'and, if credited by the trier of fact, results in an acquittal.'" *Thomas*, 143 Md. App. at 113 (quoting *State v. Marr*, 362 Md. 467, 472-73 (2001)). Imperfect self-defense, on the other hand, involves an honest but *unreasonable* use of force and does not result in an acquittal; rather, "it negates 'the element of malice required for a conviction of murder and thus reduces the offense to manslaughter." *Id.* As the Court of Appeals explained in *Marr*, 362 Md. at 474:

> [A] defendant who commits a homicide while honestly, though unreasonably, believing that he/she is threatened with death or serious harm and that deadly force was necessary does not act with malice, and, absent malice, cannot be convicted of murder. Nonetheless, because the killing was committed without justification or excuse, the defendant is not entitled to full exoneration and would be guilty of voluntary manslaughter.

Here, the circuit court found that an instruction regarding self-defense was not generated because there was no evidence, despite Ms. Ford's testimony that there was a fight, that appellant believed he was in imminent danger. We agree. A defendant's belief that he or she was in imminent danger is an "absolute requirement." *Bynes v. State*, __ Md. App. __, No. 1318, Sept. Term, 2017, slip op. at 9 (filed Jun. 4, 2018). There was no evidence presented to show appellant's state of mind, reasonable or otherwise, when he killed Mr. Jowers.

Appellant argues, however, that the jury could have drawn a series of "inferences," which show, albeit indirectly, his state of mind at the time of the killing. We are not persuaded. *See Newman v. State*, 156 Md. App. 20, 69 (2003) (rejecting the defendant's contention that he was entitled to an instruction on self-defense based on "a fanciful game of 'what if'"), *rev'd on other grounds by* 384 Md. 285 (2004).

Indeed, this Court and the Court of Appeals have upheld a trial court's refusal to give a self-defense instruction under circumstances similar to that presented here. *See, e.g.*, *Lambert*, 70 Md. App. at 99 (upholding refusal to give self-defense instruction where, during fight with the victim, Lambert stabbed the victim 26 times, noting that although "someone in [Lambert's] position might have entertained an honest but unreasonable belief that he needed to use deadly force to defend himself, the evidence furnishes no indication that [Lambert] did, in fact, so believe."). *Accord State v. Martin*, 329 Md. 351, 368 (1993) (trial court did not err in refusing to give an imperfect self-defense instruction where there was no evidence, from any source, of Martin's subjective belief at the time of the killing). The court here did not err or abuse its discretion in refusing to instruct the jury on self-defense, either perfect self-defense or imperfect self-defense.

B.

Involuntary Manslaughter

Appellant contends that the court erred in refusing his request to give a jury instruction on involuntary manslaughter. His entire argument in this regard is that

> [t]he jury could have concluded, based upon Ford's testimony, and the bad-blood between Appellant and Jowers, that Appellant and Jowers were fighting and that Appellant, in an attempt to merely scare Jowers or retaliate against him by nicking him with his knife, and thus acting in a grossly negligent manner, stabbed him in a manner causing death.

The State, noting the cursory argument on this contention, disagrees. It argues that the evidence did not support an involuntary manslaughter instruction, asserting that, based

on the victim's severe injury, appellant's argument that it was the result of a negligent intent to "nick" Mr. Jowers is "a physical impossibility."

Involuntary manslaughter based on gross negligence requires evidence that the defendant acted "in a manner that created a high risk to, and showed a reckless disregard for, human life." *Jarrett v. State*, 220 Md. App. 571, 585 (2014). Although involuntary manslaughter is a lesser included offense of murder, a court is not required to instruct on a lesser included offense unless "the evidence is such that the jury could rationally convict only on the lesser included offense." *Costley v. State*, 175 Md. App. 90, 128 (2007). In *Costley*, we upheld a court's refusal to instruct the jury on involuntary manslaughter where the evidence demonstrated that Costley had repeatedly stabbed his mother-in-law, and the severity of her injuries, including the seven cutting wounds, and numerous stab wounds, offered a "'compelling inference' that [Costley's] actions 'must have been with the intent either to kill or to do such serious bodily harm that death would be the likely result.'" *Id.* at 129-30.

Here, as in *Costley*, the evidence adduced at trial would not permit a rational jury to convict only on involuntary manslaughter. It is inconceivable that appellant's infliction of twelve separate knife wounds on Mr. Jowers' body, including a "catastrophic injury" above his collarbone, which was "arterial" and "spraying everywhere," resulted, as appellant argues, from a negligent intent to "nick" Mr. Jowers. The circuit court did not err or abuse its discretion in declining to give an instruction on involuntary manslaughter.

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