Circuit Court for Baltimore City
Case No. 114349004-05

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1634

September Term, 2016

MICHAEL HAUCK

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Graeff,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: October 4, 2017

A jury in the Circuit Court for Baltimore City convicted Michael Hauck, appellant, of first-degree murder and first-degree arson. The trial court sentenced appellant to life in prison for the murder conviction and a concurrent thirty years for arson. Appellant noted this timely appeal and presents seven issues for our review, which we have combined and rephrased as follows:[1]

1. Is the evidence insufficient to sustain appellant's convictions?

[1] Appellant's questions presented, verbatim from his brief, are as follows:

1. Is the evidence sufficient to establish Mr. Hauck's criminal agency?

2. Did the trial court err in refusing to instruct the jury concerning the voluntariness of Mr. Hauck's recorded statement, and that they were to disregard that statement unless the State proved that the statement was voluntary?

3. Did the trial court err in refusing to allow Mr. Hauck to introduce into evidence a paycheck stub which would have shown he was working at the time the State alleged he committed the murder charged in this case?

4. Did the trial court err in refusing to redact the reference to "jail" from the description of recorded telephone calls Mr. Hauck made from prison?

5. Did the trial court err in allowing the State to introduce into evidence outgoing text messages without the corresponding incoming text messages?

6. Did the lower court err in failing to take remedial action after the State vouched for a witness in closing argument?

7. Did the court err in considering argument on pending motions when Mr. Hauck was not present?

2. Did the trial court abuse its discretion in refusing to instruct the jury concerning the voluntariness of appellant's recorded statement?

3. Did the court err in making certain evidentiary rulings concerning appellant's paycheck stubs, text messages, and jail calls?

4. Did the court abuse its discretion in permitting improper rebuttal argument?

5. Did the court err in considering argument on pending motions when appellant was not present?

For the reasons that follow, we answer these questions in the negative and affirm.

BACKGROUND

At 4:58 A.M. on October 28, 2014, firefighters responded to a report of a fire at 4409 Furley Avenue in Baltimore.[2] Firefighter Andrew Swab stated that a fire had engulfed the back porch of the home. He stated that he recovered a body from the first floor, and he recognized that the person had "[i]njuries incompatible with life" prior to attempting CPR.

Baltimore City Fire Department Captain Michael Friedman responded to the scene to investigate.[3] Captain Friedman testified that there had been two fires at the residence: one on the back porch and the other in the basement furnace's firebox. He opined that two concurrent fires suggested arson and testified that his investigation supported his

[2] Terry Henderson, a neighbor, testified at trial that he was watching television when he heard a "boom" and saw the neighboring porch in flames.

[3] At the time of trial, Captain Friedman had retired. We also note that the court accepted Captain Friedman as an expert in fire investigation, as well as in the fields of fire origin and cause.

theory that the fires were intentionally set.[4] As to the porch fire, Captain Friedman stated that the fire had been set against the back door, and, detecting an odor of gasoline, he believed an accelerant was used. The smaller fire in the basement was the result of a disabled firebox, which was an attempt to build up sufficient natural gas to cause an explosion, according to Captain Friedman. Gregory Klees, an examiner from the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"), testified that there were no toolmarks on the gas valve, however.[5]

From the residence, investigators recovered several items, including a black rag and a white rag, as well as a melted piece of red plastic, from the back porch. Additionally, police recovered several flashlights and hammers, as well as a stained towel found near the body. Police also located an ID, indicating that the body was Patricia Tracey.

Dr. James Locke, who was accepted as an expert in forensic pathology, performed the autopsy of Tracey. Dr. Locke testified that Tracey's death was a homicide, the result of four blunt force injuries to the back of her head. He noted that the wounds exhibited a curved pattern, and there were no skull fractures. Tracey's brain, however, showed signs of hemorrhage, as did the area around four fractured ribs. Dr. Locke testified that the

[4] Indeed, Jeremy Neagle, an engineer with the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"), who was accepted as an expert in engineering and the examination of equipment and appliances as related to fire investigation, stated that the fire was not caused by a faulty electrical appliance or wiring.

[5] The court accepted Klees as an expert in toolmark identification.

injuries were "recent," and that the victim had been dead anywhere from two to five days at the time of the fire.

Baltimore City Police Department Detective Brian Lewis was assigned as the lead investigator. ATF agents and technicians assisted in the investigation. ATF technician Michelle Evans testified that the recovered rags and melted plastic indicated the presence of gasoline.[6] Additionally, ATF technician Amy Michaud, accepted as an expert in trace evidence, stated that the black and white rags contained several light red-brown to red-brown and dark brown human hairs, as well as white and red-brown animal hairs. Furthermore, Michaud noted that one hair had dark banding at the root, indicating that it had been removed after death. Michaud testified that the hairs on the rags were not similar to appellant's, but the recovered banded hair was similar to Tracey's. The recovered towel had blood stains on it, but DNA testing of the stains was inconclusive, and only Tracey's DNA was found under her fingernails.

At trial, the State adduced the following evidence of events leading up to Tracey's murder and the fire. Julie Parrish testified that she was a friend of Tracey, and she knew appellant.[7] She stated that in early October, Tracey and appellant were arguing about keys to 4409 Furley Avenue. Parrish recalled that at one time, Tracey hid at Parrish's home because she felt harassed by appellant. Parrish specifically remembered an incident on October 8, 2014, during which appellant called to inform her that she might

[6] The court accepted Evans as an expert in the fields of fire debris and explosive analysis.

[7] Parrish stated that she and Tracey sometimes cleaned houses together.

see Tracey soon because Tracey had fallen out of his truck. Appellant told Parrish that Tracey had asked to be let out, and when he refused to stop, she jumped out. Indeed, Tracey arrived a short time after the call, bloodied about the face and head, injuries for which she received medical treatment the following day.

Parrish next saw appellant and Tracey on October 15th, and they were "bickering" about the October 8th incident. The next day, appellant told Parrish that he could not get in touch with Tracey and that he needed to contact her so that he could get his clothes and other items from the house.

On October 21st, John Dieter III observed appellant and Tracey at a gas station. Dieter testified that Tracey was sitting in the passenger seat of appellant's light blue truck. He stated that Tracey was usually a friendly, outgoing person, but on this occasion, she was "froze[n] in one direction" and not looking around at people. Dieter also testified that appellant appeared unhappy. Appellant and Tracey drove away, and Dieter was unable to later contact her.

Rita Turpen, a friend of appellant's, testified that on the weekend of October 24th, she celebrated appellant's birthday with him. Turpen stated that she was with appellant for most of the weekend, shooting pool at bars and using cocaine. During the weekend, Turpen stated that appellant informed her that Tracey was not answering his phone calls, and that he had things at the house he needed to get.

Neighbors Terry and Bernadette Henderson testified about an argument between appellant and Tracey that occurred prior to the fire. Terry recalled that appellant visited Tracey often, and he saw her at the neighboring house every day. Terry stated that

appellant was often at the house, working on equipment and fixing lawnmowers. Terry recalled that four or five days prior to the fire, he observed Tracey trying to leave the house and get onto the front porch. He saw appellant grab her and pull her back into the house. Terry then heard appellant and Tracey arguing with appellant yelling, "You took my beer, you took my stuff. You little whore." After approximately fifteen or thirty minutes, Terry heard silence, and appellant then left. Terry did not see appellant again. Two days after the argument, Terry knocked on Tracey's door, but no one answered.

Bernadette also stated that appellant visited Tracey often. She recalled that she last saw Tracey on the Wednesday, Thursday, or Friday before the fire.[8] During the "[d]ay time," she observed Tracey on the porch, talking with and trying to get away from appellant. Bernadette testified that appellant was talking loudly, cursing, "raising hell," calling Tracey names, and pulling her into the house. Bernadette stated that once back in the house, she heard appellant screaming and "cussing her out so big." After about five or ten minutes, appellant left.

On October 28th, after visiting the scene of the fire, Howard Bleakley, Tracey's son, went to appellant's place of employment. Bleakley testified that appellant appeared "nervous." Bleakley asked appellant what had happened, and appellant responded that he did not know and that he last spoke with Tracey five or six days ago. Bleakley testified "that wasn't normal."

[8] This would have been the 22nd, 23rd, or 24th.

Between October 16th and 29th, Parrish testified that she saw appellant "basically almost" every day. According to her, appellant complained every day about not being able to contact Tracey and get into the house to obtain his clothes. Parrish recalled that in the early morning of the 28th, appellant told her that he was "concerned" about an alibi because police had taken bloody clothes from his home, which he said was "going to have all the DNA and everything from Patty all in these clothes." Parrish testified that appellant may have become upset with Tracey because she "did favors for other men as [a] means of getting by," and he wanted her to get an AIDS test.

At trial, the State also played recordings of several phone calls appellant made from prison. In these conversations, appellant claimed that the last time he saw Tracey was on October 13th or 20th. The State also played portions of the audio and video-recorded interview appellant had with Detective Lewis, which occurred on October 28th. Appellant claimed that he last saw Tracey on October 13th and that he was asleep at the time of the fire. He also stated that a man in "an older red car with historic plates" may have been sufficiently "pissed off" at Tracey to hurt her.

Detective Lewis testified that police had investigated a claim that a red Jeep had been seen at the house the day before the fire, but police were unable to determine any connection between the Jeep and the fire. Detective Lewis also noted that appellant was not singed or burned at the time of the interview.

Vincent Ayd, appellant's employer, testified on behalf of appellant. He stated that he employed appellant as a fulltime mechanic at his hardware store, and appellant generally worked from 8:30 to 6:30 Monday through Friday.

Carol Hauck, appellant's mother, also testified. She stated that appellant sometimes stayed at her house. On the night of October 27th, Mrs. Hauck recalled that appellant went to sleep around 9:00 P.M. Around 2:30 A.M. on the 28th, however, appellant woke her up because one of her nine cats was sick. Mrs. Hauck testified that appellant went back to bed, but she stayed up with the animal. Appellant woke up around 7:00 A.M. and went to work, according to Mrs. Hauck. Mrs. Hauck later took the sick animal to be euthanized.

The jury subsequently convicted appellant of first-degree murder and first-degree arson. The court sentenced appellant as indicated above. We will discuss more facts as necessary below.

DISCUSSION

I. Sufficiency of the Evidence

Appellant first contends that the State failed to adduce sufficient evidence of his involvement in either Tracey's murder or the arson. As to the murder, he concedes that the State had established sufficient evidence of an argument that occurred between Tracey and him prior to the fire, but he asserts that there was no evidence that this argument turned deadly, or even that appellant struck her. Furthermore, appellant asserts that the State's theory of the case was that the murder occurred during the day, and appellant was at work. As to the arson, appellant contends that the State failed to produce any evidence showing any connection with the fire. Appellant asserts that he was at his mother's house at the time of the fire. Moreover, appellant points out that the door to the home was locked when Terry visited two days after the argument, but it was open on the

morning of the fire. Appellant asserts that his only connection to the fire was the State's theory that he set it to cover up Tracey's murder.

The State responds that there was sufficient evidence of appellant's involvement in both crimes. Concerning the murder conviction, the State contends that there was sufficient evidence that appellant and Tracey were in a contentious relationship and that the Hendersons were the last people to see Tracey alive when they witnessed the argument between Tracey and appellant. Accordingly, the State maintains that there was sufficient circumstantial evidence that appellant struck fatal blows to Tracey once they were inside the house. The State also contends that appellant showed a consciousness of guilt in his interactions with people following the murder. As to the arson, the State maintains that appellant had motive and means to commit the crime.

In reviewing a criminal conviction for sufficient evidence, we ask "whether, 'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Hall v. State*, 233 Md. App. 118, 137 (2017) (quoting *State v. Coleman*, 423 Md. 666, 672 (2011)). "Our concern," then, "'is only with whether the verdicts were supported with sufficient evidence – that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt.'" *Id.* (quoting *State v. Albrecht*, 336 Md. 475, 479 (1994)). Significantly, we note that "'[w]eighing the credibility of witnesses and resolving any conflicts in the evidence are tasks proper for the fact finder[,]'" and "'we give due regard to the [fact finder's] finding

of facts, its resolution of conflicting evidence, and . . . its opportunity to observe and assess the credibility of witnesses.'" *Fone v. State*, 233 Md. App. 88, 115 (2017) (quoting *Larocca v. State*, 164 Md. App. 460, 471-72 (2005)) (internal citations omitted).

As to appellant's involvement in the murder, there was sufficient circumstantial evidence to permit the jury to infer that appellant was the murderer. Several witnesses, notably Parrish, testified that appellant and Tracey had a contentious relationship. The Hendersons also recalled an argument between Tracey and appellant that occurred anywhere from three to five days before the fire. Both Terry and Bernadette stated that they observed appellant pull Tracey back into the house, followed by loud arguing. After a short period of time, appellant left, and neither Terry nor Bernadette ever saw Tracey again, despite usually seeing her around the neighborhood on a daily basis. Dr. Locke testified that Tracey had been dead between two and five days prior to the fire. A rational jury could, therefore, infer that appellant inflicted the fatal injuries to Tracey in the course of this argument. Moreover, there was evidence of a consciousness of guilt in that appellant appeared "nervous" in the hours following the fire, according to Bleakley, and appellant expressed a concern to Parrish about his need for an alibi and the police taking a pile of bloody clothes from his home because of "all the DNA and everything from Patty all in these clothes."

Although appellant contends that the State's theory of the case was that appellant killed Tracey during his normal work hours when he would have been at work, the evidence of the time of the argument was that it occurred in the "[d]ay time." Accordingly, there was no testimony of a specific time when the murder occurred.

Moreover, the testimony as to appellant's work schedule was general in nature, and Ayd did not testify specifically that he saw appellant at work during any of the possible days that the argument occurred.

As to the arson, we are persuaded that there was sufficient circumstantial evidence of appellant's involvement in this crime, as well. The State's theory of the case was that appellant committed arson in an attempt to cover up the murder of Tracey. A rational fact finder may conclude that motive is evidence of guilt. *See Gutierrez v. State*, 423 Md. 476, 517 (2011). Moreover, there was evidence that appellant had the means to commit arson: Terry testified that appellant repaired lawnmowers at the property and kept a supply of gasoline there – including in a red plastic can – which was the accelerant used to start the back porch fire. Furthermore, in the interview with Detective Lewis, appellant stated that Tracey kept a spare key to the house in a sock on the front porch. Police found a sock on the front porch, but no key. A rational jury could, therefore, infer that appellant had access to the house. Additionally, although the human hairs detected on the recovered white and black rags were not similar to appellant's, there were animal hairs on the rags, and Mrs. Hauck testified that at the time of the fire, she owned nine cats, and appellant sometimes spent the night there. Taking the evidence in the light most favorable to the State, we are persuaded that a rational jury could conclude that there was sufficient evidence of appellant's involvement in the arson to sustain his conviction.

Appellant points out that his mother testified that appellant was asleep at the time of the fire, and she was taking care of a sick cat that was later euthanized. It is within the province of the jury, however, to credit or discredit a witness's testimony, and we must

defer to that judgment. *See Darling v. State*, 232 Md. App. 430, 465 ("[W]eighing 'the credibility of witnesses and resolving conflicts in the evidence are matters entrusted to the sound discretion of the trier of fact.'" (quoting *In re Heather B.*, 369 Md. 257, 270 (2002))), *cert. denied*, 454 Md. 655 (2017).

II. Jury Instruction

Prior to reading instructions, appellant requested the court to instruct the jury with Maryland Criminal Pattern Jury Instruction ("MPJI-Cr") 3:18.[9] The court refused. On

[9] This instruction reads:

> You have heard evidence that the defendant made a statement to the police about the crime charged. [You must first determine whether the defendant made a statement. If you find that the Defendant made a statement, then you must decide whether the State has proven] [The State must prove] beyond a reasonable doubt that the statement was voluntarily made. A voluntary statement is one that under all circumstances was given freely.
>
> [[To be voluntary, a statement must not have been compelled or obtained as a result of any force, promise, threat, inducement or offer of reward. If you decide that the police used [force] [a threat] [promise or inducement] [offer of reward] in obtaining defendant's statement, then you must find that the statement was involuntary and disregard it, unless the State has proven beyond a reasonable doubt that the [force] [threat] [promise or inducement] [offer of reward] did not, in any way, cause the defendant to make the statement. If you do not exclude the statement for one of these reasons, you then must decide whether it was voluntary under the circumstances.]]
>
> In deciding whether the statement was voluntary, consider all of the circumstances surrounding the statement, including:
>
> (1) the conversations, if any, between the police and the defendant;
>
> (2) [whether the defendant was advised of [his] [her] rights;]

(continued)

appeal, appellant contends that the court abused its discretion in refusing to so instruct the jury because the instruction was applicable and was generated by the evidence. Specifically, appellant asserts that several times in his interview with Detective Lewis, he invoked his right to an attorney, but the interview continued, violating his constitutional rights. Accordingly, he argues that the jury should have been permitted to assess whether his statement to Detective Lewis was voluntary.[10] Appellant contends that his case is similar to *Hof v. State*, 337 Md. 581 (1995), and that a defendant does not forgo the right

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(continued)

> (3) the length of time that the defendant was questioned;
>
> (4) who was present;
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> (5) the mental and physical condition of the defendant;
>
> (6) whether the defendant was subjected to force or threat of force by the police;
>
> (7) the age, background, experience, education, character and intelligence of the defendant;
>
> [(8) whether the defendant was taken before a district court commissioner without unnecessary delay following arrest and, if not, whether that affected the voluntariness of the statement;]
>
> (9) any other circumstances surrounding the taking of the statement.
>
> If you find beyond a reasonable doubt that the statement was voluntary, give it such weight as you believe it deserves. If you do not find beyond a reasonable doubt that the statement was voluntary, you must disregard it.

[10] Appellant notes that he is not challenging the court's pre-trial ruling on the timeliness of the motion to suppress the statement.

to contest the voluntariness of a statement by failing to timely raise the issue in a motion to suppress.

The State maintains that appellant waived this issue by failing to raise it in a timely motion to suppress. Accordingly, the State contends, the court correctly refused to instruct the jury with MPJI-Cr 3:18 because it is only applicable where the court has denied a pre-trial motion to suppress. If appellant did not waive the issue, then the State argues that the instruction was not properly generated by the evidence.

The Court of Appeals has observed that "'[t]he main purpose of a jury instruction is to aid the jury in clearly understanding the case, to provide guidance for the jury's deliberations, and to help the jury arrive at a correct verdict.'" *State v. Bircher*, 446 Md. 458, 462 (quoting *Appraicio v. State*, 431 Md. 42, 51 (2013)), *cert. denied*, 137 S. Ct. 145 (2016). Ordinarily, an instruction is applicable if it correctly states the law, is generated by the evidence, and is not otherwise covered by the given instructions. *See Preston v. State*, 444 Md. 67, 81-82 (2015). "[T]he decision whether to give a jury instruction 'is addressed to the sound discretion of the trial judge.'" *Id.* at 82 (quoting *Gunning v. State*, 347 Md. 332, 348 (1997)).

In *Hof*, the Court of Appeals observed that Maryland utilizes a "two-tiered approach" in assessing the voluntariness of a defendant's statement: "[B]oth the trial court and the jury must pass upon the voluntariness of a defendant's confession." 337 Md. at 604. The Court elaborated upon the procedure as follows:

> "The practice in this State . . . is that the court first hears evidence without the jury to determine whether a confession is voluntary and should be admitted. If it decides to admit it, the same evidence is then given to the

> jury, as it has the final determination, irrespective of the court's preliminary decision, whether or not the confession is voluntary, and whether it should be believed. In so doing, the jury is entitled to have before it all of the evidence which affects the voluntary character of the document, and which the court passed upon in admitting it."

Id. (quoting *Dempsey v. State*, 277 Md. 134, 143-44 (1976)). The Court also noted that the burden is on the State to demonstrate that the statement was voluntary, and the "State's burden of proof is triggered by 'proper objection.'" *Id.* at 606 (quoting *State v. Kidd*, 281 Md. 32, 38 (1977)). "Whether an objection to the admissibility of a [statement] is a proper one . . . is determined by reference to State procedural requirements, *i.e.*, State rules regarding the form and timing of objections." *Id.*

Rule 4-252(a) provides that a defendant desiring to challenge "[a]n unlawfully obtained admission, statement, or confession" must raise it in a motion prior to trial. Subsection (b) of that rule states that such mandatory motions "shall be filed within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to Rule 4-213(c)," with an exception inapplicable in this case. Because appellant is not challenging the court's ruling that his pre-trial motion to suppress was untimely, we accept that ruling. As such, appellant waived the issue of the voluntariness of his statement to Detective Lewis. *See* Rule 4-252(a) (noting that matters not raised are waived except for "good cause shown").

Accordingly, the court properly refused to propound MPJI-Cr 3:18 because the issue had been waived. Moreover, in the commentary to MPJI-Cr 3:18, the Committee on Pattern Jury Instructions noted that "[a]dmissibility of a statement **must first be determined by the court** out of the presence of the jury . . . . If the statement is

determined by the court to have been voluntarily given, the issue is then submitted to the jury." MPJI-Cr 3:18 cmt. (2d ed. 2016) (internal citations omitted) (emphasis added). The court had not ruled on the admissibility of the statement outside of the presence of the jury, and, therefore, MPJI-Cr 3:18 was inapplicable.

Furthermore, appellant's reliance on *Hof* is misplaced. In that case, the trial court had instructed the jury to assess Hof's statement if it determined that the State complied with *Miranda*, but the court refused Hof's request to instruct the jury as to the factors it could consider in analyzing the State's compliance with *Miranda*.[11] 337 Md. at 601. The Court of Appeals determined that the given instruction was "wholly inadequate." *Id.* at 602. The Court, however, then observed that the voluntariness instruction had not been generated by the evidence at trial, even though Hof had properly objected to his statement's admission in a pre-trial motion to suppress. *Id.* at 603, 617. In this case, appellant failed to properly object in a pre-trial motion to suppress. *Hof* is inapposite, then, not only because Hof timely and properly objected in a pretrial proceeding, but also because the issue in that case was "whether . . . 'proper challenge' to the admission of a confession necessarily presents for review the voluntariness of a confession." *Id.* at 610. Without a "proper challenge" to appellant's statement, the voluntariness instruction is inapplicable in this case.

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

III. Evidentiary Issues

Next, appellant challenges three evidentiary rulings of the court. During trial, the court excluded appellant's paycheck stubs, refused appellant's request to admit the entirety of text message conversations between appellant and Tracey, and permitted the State to refer to recorded phone calls made by appellant as "jail calls."

This Court has noted that our review of evidentiary matters ordinarily involves two considerations: "'First, we consider whether the evidence is legally relevant, a conclusion of law which we review *de novo*.'" *Smith v. State*, 218 Md. App. 689, 704 (2014) (quoting *Brethren Mut. Ins. Co. v. Suchoza*, 212 Md. App. 43, 52 (2013)). 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." Rule 5-401. Stated another way, to be admissible, evidence "must be both relevant and material. Evidence is material if it tends to establish a proposition that has legal significance to the litigation. Evidence is relevant if it is sufficiently probative of a proposition that, if established, would have legal significance to the litigation." *Paige v. Manuzak*, 57 Md. App. 621, 632 (1984). If the evidence is relevant, then "'whether a particular item of evidence should be admitted or excluded is committed to the considerable and sound discretion of the trial court[.]'" *Gross v. State*, 229 Md. App. 24, 32 (2016) (quoting *State v. Simms*, 420 Md. 705, 724 (2011)), *cert. denied*, 451 Md. 259 (2017).

The Paycheck Stubs

At trial, appellant sought to introduce into evidence his paycheck stubs. The court determined they were not relevant because they did not show appellant's schedule or time off. On appeal, appellant contends that his paycheck stubs were relevant because they showed that he was working at the time the State alleged he killed Tracey. The State maintains that the paycheck stubs were not relevant because they did not denote hours worked, and there was no dispute that appellant worked. Furthermore, because the only evidence as to the time of the argument was "[d]ay time," even if appellant's paychecks denoted his hours, they would not be helpful to the jury's consideration in this case.

We are persuaded that the paycheck stubs were not relevant in this case. Because the paycheck stubs merely demonstrated that appellant worked at Ayd's hardware store, they were not material nor relevant to the jury's consideration in this case. The paycheck stubs did not indicate whether appellant had taken any time off, nor did they denote hours worked. In excluding the stubs, the court observed, "But there's no question that he was working." The jury was not tasked with determining whether appellant worked or not. Rather, the jury had to determine if appellant was involved in the murder of Tracey and arson at her residence. The paycheck stubs did not make the existence of any fact necessary to the jury's determination more or less likely. Accordingly, they were irrelevant, and the court properly excluded them.

"Jail Calls"

Prior to playing the recorded phone calls for the jury, the State read a stipulation, over objection, which referred to the calls as "jail calls."[12] On appeal, appellant contends that the court erred in permitting the State to refer to them as "jail calls," because it was not relevant and was also unduly prejudicial. Appellant maintains that the court should have required the State to simply refer to the calls as "recorded calls," because there was no probative difference between referring to them as "jail calls" or "recorded calls." Appellant compares the reference to "jail calls" to requiring him to attend trial in prison garb, which the Supreme Court discussed in *Estelle v. Williams*, 425 U.S. 501, 504-05 (1976).

The State maintains that the court properly permitted the reference to "jail calls" because it was relevant and probative to explain why the calls were recorded. The State also contends that any error in referring to the calls in this manner was harmless because the phrase "jail calls" was mentioned just once to the jury.

In *Estelle*, the Supreme Court observed that requiring an accused "to go to trial in prison or jail clothing" provided a "constant reminder of the accused's condition implicit in such distinctive, identifiable attire [such that it] may affect a juror's judgment." 425 U.S. at 504-05. Appellant argues that referring to his recorded phone calls as "jail calls"

[12] The stipulation read to the jury at trial provided as follows: "When the Defendant placed the jail calls in State's Exhibit 55, the Defendant was fully aware that those calls were being recorded at the time. The Defendant placed each phone call, and each call was voluntarily made by the Defendant. Both parties, State and Defense, hereby stipulate and agree to this fact."

similarly could affect the jurors' judgments because the reference reminded them that he was incarcerated. The situations are not similar, however.

Requiring a defendant to go to trial in prison attire is a continuous and visual reminder to the jury of the defendant's status. Merely referring to the recorded calls as "jail calls," however, is not. In this case, the reference to the calls as being made from jail was isolated, as the State called them "jail calls" just once. At no other point in the trial did the State refer to them as "jail calls" in the presence of the jury, and the State made no reference at all to them in closing arguments.[13] Even if we considered the reference to "jail calls" to be problematic, it amounts to harmless error. *See Dionas v. State*, 436 Md. 97, 109 (2013) ("'To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record.'" (quoting *Bellamy v. State*, 403 Md. 308, 332 (2008))).[14] We are persuaded beyond a reasonable doubt that the single reference to "jail calls" was unimportant to the jury's verdict in this case.

[13] The State also posits that the recorded calls were exculpatory.

[14] In determining whether a defendant was wearing so-called "jail attire" at his trial, the Supreme Court of Utah reasoned that even if it considered the outfit to remind the jurors of jail, "it does not strike us that there would be anything strange, shocking, or prejudicial if the jury became aware that a man who had been arrested and charged with robbery was in custody and being held in jail." *State v. Archuletta*, 501 P.2d 263, 264 (Utah 1972). Similarly, we do not think the jury would be surprised to find that a person charged with murder and arson was being held in jail.

Text Messages

The State introduced into evidence outgoing text messages sent from appellant to Tracey in the period leading up to her disappearance and murder. On appeal, appellant contends that the court should have admitted the incoming text messages sent from Tracey to appellant. He argues that Rule 5-106 compels the introduction of the complete conversation, not just appellant's texts. Alternatively, appellant contends that the introduction of just his text messages was unduly prejudicial and confusing to the jury because a conversation occurs between two people. Accordingly, the inclusion of the other part of the conversation was necessary.

The State maintains that appellant failed to preserve this issue because there was no proffer made at trial as to the contents – or even the whereabouts – of Tracey's texts to appellant, if any existed. Furthermore, the State contends, Rule 5-106 is inapplicable because the State was not presenting partial records of the text messages; rather, the State introduced into evidence all of the text messages it had.

We agree with the State that appellant failed to proffer what the incoming text messages would have said, or, even, if there were any. As such, the issue is not preserved. *See Pickett v. State*, 222 Md. App. 322, 345 (2015) ("'Where evidence is excluded, a proffer of substance and relevance must be made in order to preserve the issue for appeal.'" (quoting *S. Kaywood Cmty. Ass'n v. Long*, 208 Md. App. 135, 164 (2012))).

Even if we overlooked the lack of a proffer of the incoming text messages, Rule 5-106 is inapplicable. Rule 5-106 provides: "When part or all of a writing or recorded

statement is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." This rule, referred to as the rule of completeness, is applicable where a party seeks to introduce portions of a record or statement, and the non-moving party believes that the fact-finder should see the entirety of the record. *See Wagner v. State*, 213 Md. App. 419, 466-67 (2013). It is inapplicable, therefore, when the moving party seeks to admit the entirety of the record. In this case, the State did not have any incoming text messages sent from Tracey to appellant – and apparently neither did appellant. As such, there was nothing with which to complete the document, and nothing redacted from the document, and Rule 5-106 was inapplicable.

IV. Rebuttal Arguments

During closing argument, defense counsel commented on the text messages in evidence as follows:

> Well, the State started, as I just started to go on, was the text messages. And what do we get out of the text messages? Well, it's clear in some way Patty [Tracey] is responding. When you look at the phone, there are lots of phone calls between Mr. Hauck and Ms. Tracey. There are missed calls from Patty. There are calls. Where are the text messages?
>
> Ladies and gentlemen, Mr. Hauck on October 28th voluntarily here's my phone. Here's my pass code. This will show you my communication with her. He wasn't hiding it, making up text messages, deleting some, keeping in some. No. What happened to Patty's responses to the text messages? They're [sic] responsibility. They had the phone –
>
> * * *
>
> – from October 28th. They had the phone. It was their duty to preserve it. Why in the world would anyone delete part of the text messages and not the

> other ones where they're saying fuck you kind of? I mean, it just doesn't make sense.

During the State's rebuttal closing argument, the following occurred:

> [THE STATE]: And the text messages – I just want to make one comment about that. So I'm assuming that the Defense is implying that either I or Detective Lewis –
>
> [DEFENSE COUNSEL]: Objection.
>
> [THE STATE]: – deleted text messages in the inbox. Now why would any of us do that? Do you believe –
>
> [DEFENSE COUNSEL]: Objection
>
> [THE STATE]: – Detective Lewis would put his job on the line for that? And remember, this was a flip phone, and Defendant in his statement says he's not used to working cell phones. For all he knows, when I delete it from the inbox it's gone. More than likely, since there are 99 messages in that sent box, he doesn't realize that when he sends a message, it stays on that phone. Defendant admits this – oh, no, this text messaging is new to me. He says that in his statement.

In this case, appellant asserts that the prosecutor improperly vouched for the credibility of Detective Lewis and/or herself in rebuttal arguments. Essentially, appellant maintains that the prosecutor bolstered the credibility of Detective Lewis and herself by implying that they would not destroy evidence for reasons of job security. Additionally, appellant contends that the court's failure to respond or take any remedial action in the face of these improper comments was problematic because the comments prejudiced him.

The State maintains that the prosecutor's comments were a proper response to defense counsel's insinuation that Detective Lewis and/or the prosecutor destroyed evidence. The State characterizes the comments as an invited response to defense

counsel and, therefore, not a basis for reversal. The State also contends that the comments were harmless because they were isolated.

In considering the propriety of closing arguments, this Court has observed that "'the prosecutor is allowed liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom.'" *Brewer v. State*, 220 Md. App. 89, 111-12 (2014) (quoting *Lee v. State*, 405 Md. 148, 163 (2008)). The Court of Appeals has remarked:

> "There are no hard-and-fast limitations within which the argument of earnest counsel must be confined – no well-defined bounds beyond which the eloquence of an advocate shall not soar. He may discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of witnesses. He may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions."

Donaldson v. State, 416 Md. 467, 488-89 (2010) (quoting *Spain v. State*, 386 Md. 145, 153 (2005)). "The determination of whether a portion of counsel's argument is improper or prejudicial rests largely within the trial judge's discretion because he or she is in the best position to determine the propriety of argument in relation to the evidence adduced in the case." *Ingram v. State*, 427 Md. 717, 728 (2012). Stated another way, "[r]eversal is only required if [the] prosecutor's improper comment actually misled the jury or was likely to have influenced the jury to the prejudice of defendant." *Brewer*, 220 Md. App. at 112.

Certainly, the appellate courts of this State have consistently regarded vouching as improper in closing arguments: "'[O]ne technique in closing argument that consistently has garnered our disapproval as infringing on a defendant's right to a fair trial, is when a

prosecutor vouches for (or against) the credibility of a witness.'" *Jones v. State*, 217 Md. App. 676, 696 n.8 (2014) (quoting *Donaldson*, 416 Md. at 489). In *Spain v. State*, *supra*, the Court of Appeals determined that it was improper for the prosecutor to vouch for the credibility of a law enforcement witness by asserting that he would suffer job consequences if he lied. 386 Md. at 157-58. The Court reasoned that "[b]y invoking unspecified, but assumed, punitive consequences or sanctions that might result if a police officer testifies falsely, a prosecutor's arguments imply that a police officer has a greater reason to testify truthfully than any other witness with a different type of job." *Id.* Viewed in isolation, then, the prosecutor's comments in rebuttal were problematic because they vouched for Detective Lewis.

We have observed, however, that "'[n]ot every improper remark . . . necessarily mandates reversal, and what exceeds the limits of permissible comment depends on the facts in each case.'" *Shelton v. State*, 207 Md. App. 363, 386 (2012) (quoting *Degren v. State*, 352 Md. 400, 430-31 (1999)). Indeed, the Court of Appeals has held that the "prosecutor is permitted to address issues raised by the defense." *State v. Gutierrez*, 446 Md. 221, 242 (2016). In certain cases, a prosecutor's comments may be regarded as an "invited response" to improper comments from defense counsel: "'[W]here a prosecutorial argument has been made in reasonable response to improper attacks by defense counsel, the unfair prejudice flowing from the two arguments may balance each other out, thus obviating the need for a new trial.'" *Whack v. State*, 433 Md. 728, 751 (2013) (quoting *Mitchell v. State*, 408 Md. 368, 381 (2009)). The invited response doctrine is applicable where defense counsel first makes an improper argument, and the

prosecutor's improper response, in essence, "'balance each other out[.]'" *Sivells v. State*, 196 Md. App. 254, 284 (2010) (quoting *Lee*, 405 Md. at 163-64).

We are persuaded that the invited response doctrine is applicable in this case, and the court did not abuse its discretion in permitting the rebuttal comments. The Court of Appeals has held that "[a]n improper argument by defense counsel sufficient to invoke the 'invited response' doctrine is one that goes outside the scope of permissible closing argument and 'invite[s] the jury to draw inferences from information that was not admitted at trial.'" *Mitchell*, 408 Md. at 382 (quoting *Lee*, 405 Md. at 166). Defense counsel implied that Detective Lewis and/or the prosecutor deleted text messages from appellant's phone – an assertion that was not based on any evidence at trial. Accordingly, defense counsel's improper remark invited the prosecutor's improper vouching of Detective Lewis in response. The prosecutor's rebuttal, then, did no more than "'to right the scale,'" and reversal is not mandated. *Id.* (quoting *United States v. Young*, 470 U.S. 1, 13 (1985)).

V. Right to Be Present

Prior to trial, on July 12, 2016, the court heard arguments concerning scheduling and motions. Appellant was not present, and, at the outset of the hearing, defense counsel stated: "I waive his [appellant's] presence for the purposes of our scheduling and discussion. Furthermore, I have advised him that I would be having this meeting with the Court and that we would be discussing various pretrial issues, and he was fine with my being here on his behalf." The court then heard arguments as to various motions, but made no rulings. The next day, the first day of trial, with appellant present, the parties

reiterated the arguments in support of and against the motions. The court then denied appellant's motions to sever and to suppress.

On appeal, appellant contends that the court violated his right to be present in hearing arguments on the motions outside of his presence. Appellant argues that Rule 4-231 mandated his presence at the pre-trial hearing, and the court did not resolve whether appellant was aware of the pre-trial hearing or had given permission to his counsel to proceed in his absence. He asserts that this error was not harmless because he was not present at a critical stage of the proceedings.

The State argues that Rule 4-231 was inapplicable either because the pre-trial hearing solely focused on issues of law and was, therefore, not a critical stage of the proceeding, or the court reheard arguments and ruled on the motions the next day in the presence of appellant. Moreover, the States contends, defense counsel waived appellant's presence, which is permissible.

Rule 4-231(b) provides that a defendant has the right to be present "at a preliminary hearing and every stage of the trial, except (1) at a conference or argument on a question of law" or when the State enters a *nolle prosequi* or stet. The right to be present may be waived by a defendant who is: 1) voluntarily absent; 2) "engages in conduct that justifies exclusion from the courtroom; or 3) [] personally or through counsel, agrees to or acquiesces in being absent." Rule 4-231(c).

In *State v. Hart*, 449 Md. 246, 266 (2016) (quoting *Williams v. State*, 292 Md. 201, 218 (1981)), the Court of Appeals explained that a defendant's counsel may waive the right to be present: "'Today, with the complexity of many criminal trials and the

absolute right of counsel if there is a danger of incarceration, our system proceeds upon the assumption that it is primarily counsel's function to assert or waive most rights of the defendant[.]'" Reasoning that a defendant "'will ordinarily be bound by the action or inaction of his attorney[,]'" the Court held that "'[i]f the defendant himself does not affirmatively ask to be present at such occurrences or does not express an objection at the time, and if his attorney consents to his absence or says nothing regarding the matter, the right to be present will be deemed to have been waived.'" *Id.* (quoting *Williams*, 292 Md. at 219-20).

In this case, defense counsel affirmatively waived appellant's presence at the July 12th hearing. As such, appellant waived this issue. Moreover, we are persuaded that any error was harmless because the court reheard arguments and decided the motions the next day in the presence of appellant. At that time, he could have discussed with his counsel any matter of import to the proceedings. *See Hart*, 449 Md. at 265 (noting that the right to be present "'vindicates two primary interests: enabling the defendant to assist in the presentation of a defense, and ensuring the appearance of fairness in the execution of justice'" (quoting *Pinkney v. State*, 350 Md. 201, 209 (1998))). Accordingly, we do not perceive any violation of appellant's right to be present.

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