In the Circuit Court for Baltimore City
Case No. 814344001

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2760

September Term, 2014

TIERRA BROWN

v.

STATE OF MARYLAND

Meredith,
Nazarian,
Thieme, Raymond, G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: March 9, 2017

A jury in the Circuit Court for Baltimore City convicted Tierra Brown, appellant, of second-degree assault. Ms. Brown was sentenced to a term of three years' imprisonment. In this appeal, Ms. Brown presents the following questions for our review:

> 1. Did the trial court abuse its discretion when it refused to ask two of Appellant's proposed voir dire questions?
>
> 2. Did the trial court improperly admit evidence of prior bad acts committed by Appellant?
>
> 3. Did the trial court allow improper and prejudicial closing argument by the State?

Perceiving no error, we affirm.

BACKGROUND

At the trial in this case, there was evidence of the following. On May 13, 2014, Shakiera Carter was inside her home when she "heard a whole lot of commotion outside[.]" Ms. Carter went outside "to see what was the noise" and spotted Ms. Brown with two other girls. Ms. Carter then began walking down the street to meet some friends. As she was walking, Ms. Carter "felt like somebody . . . was following" her. When she turned around, she saw Ms. Brown and the two other girls.

Ms. Brown then stated: "I'm not going to hit you," but Ms. Carter was punched.[1] Ms. Carter fell, "and that's when they was kicking me and stuff and [Ms. Brown] hit me in my head with a hammer." At some point, Ms. Brown said to Ms. Carter: "[Y]ou thought I tried to kill you before. I'm really going to kill you now." Ms. Brown and the two other

[1]Ms. Carter initially testified that one of the other girls struck her first, but she later testified that Ms. Brown was the one who threw the first punch.

girls eventually "fled the scene." Ms. Brown was later arrested and charged with second-degree assault.

At the start of Ms. Brown's trial, defense counsel submitted to the trial court a list of proposed questions to be asked of prospective jurors during voir dire. This list included the following two questions which the trial judge declined to ask:

> 9. A Defendant in every criminal case is presumed innocent. Unless you are satisfied beyond a reasonable doubt of the accused's guilt solely from the evidence presented in this case, the presumption of innocence alone requires you to find the accused not guilty. Is there any member of the jury panel who is unable to uphold and abide by this rule of law?
>
> 10. In every criminal case, the burden of proving the guilt of a Defendant rests solely and entirely on the State. A Defendant has no burden and does not have to prove his or her innocence. Is there any member of the jury panel who is unable to uphold and abide by this rule of law?

As the trial court was reviewing defense counsel's proposed voir dire questions, the State objected to the above questions on the grounds that both questions were akin to jury instructions. The court agreed and refused to ask the two questions. But the court offered to ask the panel if any juror would be unable to follow the court's instructions; defense counsel declined the court's offer. The transcript reflects:

> THE COURT: I mean I'm happy to ask the jurors is there anyone that thinks they won't be able to follow my instructions on the law when I give them to them, but I can't, I mean we're not going [to] pick jury instructions one at a time and ask them, are you going to follow this jury instruction. Are you going to follow that jury instruction. . . . I don't believe that one is required by law unless you can tell me that it is.
>
> [Defense]: I just think that under the traditional rationale of why voir dire exist[s] that there should be a question to ask these core principles of ---

> THE COURT: I'm sure that's not the first time that particular question has come up. So, but do you have some ---
>
> [Defense]: I don't have a case.
>
> THE COURT: --- something to support it, sure. Okay. Okay. So did you want me to ask the jury generically whether or not, without, without conceding your objection obviously. Did you want me to ask the jury generically whether or not any of them believed that they could not follow my instructions?
>
> [Defense]: No, Your Honor.

During the trial, Ms. Carter was permitted to testify that, two weeks before the instant assault, she and Ms. Brown "had words" at Ms. Carter's aunt's house. Ms. Carter also indicated that, during that altercation, Ms. Brown hit her. During Ms. Carter's testimony, the prosecution intimated that Ms. Brown was referencing this prior altercation when she stated during the instant assault: "[Y]ou thought I tried to kill you before. I'm really going to kill you now."

Prior to Ms. Carter's testimony, Ms. Brown had asked the trial court to preclude the State from referencing the previous altercation. The trial court denied the motion, stating:

> The Court believes that the probative value of that evidence far outweighs the prejudicial value. It is part and parcel to the entire story line behind the entire case. It happened in close proximity of the assault that's in question and it was sort of the discussion that [led] to possibly the assault in this particular case. I mean, it is completely relevant and probative. It is also probative for some of the reasons that the State stated in terms of motive, in terms of the victim being placed in fear and in terms of the victim being able to identify the Defendant as well.

Ms. Carter was the only person to testify at trial. During closing arguments, the prosecution made the following comment: "Ladies and gentlemen of the jury, you heard

the testimony of Shakiera Carter, which is uncontroverted." Defense counsel objected, and the trial court overruled the objection.

DISCUSSION

Introduction

Ms. Brown argues that the trial court erred in failing to ask the two proposed voir dire questions, which, according to Ms. Brown, were specifically designed to identify juror bias. Ms. Brown also contends that the trial court erred in admitting evidence of the prior altercation between Ms. Brown and Ms. Carter, as this was inadmissible "prior bad act" evidence. Finally, Ms. Brown avers that the trial court abused its discretion in allowing the State to reference the "uncontroverted" nature of Ms. Carter's testimony because, she contends, this was an improper commentary on "[Ms. Brown]'s failure to testify or to present witnesses in [her] defense."

The State counters that the trial court acted within its discretion in refusing to ask the proposed voir dire questions, as the questions focused on the jurors' willingness to follow the trial court's instructions on particular points of law, and such questions "do not fall within any of the mandatory categories of inquiry." The State also maintains that Ms. Brown's "prior bad act" --- the altercation at Ms. Carter's aunt's house --- was admissible because it was relevant in showing Ms. Brown's identity as the perpetrator and her motive in committing the instant assault. Finally, the State asserts that the statement made by the prosecutor during closing arguments was an isolated remark that did not, either directly or indirectly, comment on Ms. Brown's exercise of her right to remain silent.

For the reasons set forth below, we agree with the State.

I.

Voir Dire

Ms. Brown contends that the trial court erred in not asking her proposed questions during voir dire. Ms. Brown concedes that "the Court of Appeals held in *Twining v. State*, 234 Md. 97, 198 A.2d 291 (1964), that the trial judge did not abuse his discretion in refusing to propound a voir dire question relating to the presumption of innocence and the burden of proof." But Ms. Brown urges us to hold that "*Twining* is no longer controlling." She insists that the trial court was required to ask her proposed questions because a "juror who is unable or unwilling to apply the standard of guilt beyond a reasonable doubt has a bias or preconception that prevents him from implementing the constitutional requirements relating to the presumption of innocence and the burden of proof[.]" She asserts that the two questions were "reasonably likely to result in the disqualification for cause of one or more prospective jurors," and that the trial court "abused its discretion in refusing to ask the proposed questions." We disagree.

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)). Therefore, a trial court is required to ask a proposed voir dire question "if and only if the voir dire question is 'reasonably likely to reveal [specific] cause for disqualification[.]'" *Id.* at 357 (quoting *Washington*, 425 Md. at 313).

The Court of Appeals has identified two types of inquiry suitable for uncovering a specific cause for disqualification: 1) questions designed to determine whether a prospective juror meets the minimum statutory qualifications for jury service; and 2) questions designed to discover a prospective juror's state of mind regarding any matter reasonably likely to have undue influence over him. *Washington,* 425 Md. at 313. Although the breadth of matters "reasonably likely to have undue influence" over a juror is, in theory, rather broad, the Court of Appeals has indicated that such inquiries should be limited to those biases "directly related to the crime, the witnesses, or the defendant[.]" *Dingle v. State*, 361 Md. 1, 10 (2000).

A trial court does not abuse its discretion by refusing to ask voir dire questions that are not directed at a specific ground for disqualification, that merely fish for information to assist in the exercise of peremptory challenges, that probe the prospective juror's knowledge of the law, that ask a juror to make a specific commitment, or that address sentencing considerations. *Pearson, supra*, 437 Md. at 357; *State v. Shim*, 418 Md. 37, 44-45 (2011); *Stewart v. State*, 399 Md. 146, 162 (2007).

In *Twining*, 234 Md. at 100, the Court of Appeals considered whether the trial court abused its discretion by refusing to ask prospective jurors whether they would give the defendant the benefit of the presumption of innocence and the burden of proof beyond a reasonable doubt. The *Twining* Court concluded that the trial court did not abuse its discretion, and stated: "**It is generally recognized that it is inappropriate to instruct on law at this 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." *Id*. (emphasis added). The *Twining* Court further noted that the principles that the defendant sought to highlight in the requested voir dire questions were "fully and fairly covered in subsequent instructions to the jury." *Id.*

In her brief, Ms. Brown acknowledges that her arguments are at odds with the Court of Appeals's holding in *Twining* and the numerous cases that have cited *Twining*. She nonetheless urges us to hold that her proposed voir dire questions fit into the now-required areas of inquiry designed to discover "potential biases or predispositions that prospective jurors may hold, which, if present, would hinder their ability objectively to resolve the matter before them." In addition, she argues that the 1964 holding in *Twining* rested on the premise that jury instructions, at that point in history, were merely advisory, which is no longer the law. She notes that, "[i]n *Stevenson v. State*, 289 Md. 167, 188 (1980), and *Montgomery v. State*, 292 Md. 84, 91 (1981), the Court of Appeals made clear that instructions on the presumption of innocence and burden of proof are 'binding' on the jury and 'not advisory.'" (Parallel citations omitted.)

But we are not persuaded that the Court of Appeals's holding regarding voir dire in *Twining* is either inconsistent with more recent precedents from Maryland's appellate courts or that it applied only during the days when jury instructions were said to be advisory only. In *State v. Logan*, 394 Md. 378, 398-99 (2006), the Court of Appeals cited *Twining* for the proposition that "it is 'generally recognized that it is inappropriate . . . to question the jury as to whether or not they would be disposed to follow or apply stated rules of

law[.]'" The Court further stated in *Logan*: "[V]oir dire is not the appropriate time to instruct the jury on the law applicable to the case." *Id.* at 400.

In *Marquardt v. State*, 164 Md. App. 95, 144 (2005), this Court began its discussion "by stating that this Court has not, nor could it, retreat from *Twining*. We have consistently held that voir dire need not include matters that will be dealt with in the jury instructions." And in *McFadden v. State*, 197 Md. App. 238, 250 (2011), *disapproved of on other grounds* by *State v. Stringfellow*, 425 Md. 461 (2012), this Court recognized the continuing validity of the holdings in *Twining* and *Marquardt*, reiterating that "[i]t has been held inappropriate to question the jury [during voir dire] as to whether or not they would be disposed to follow or apply stated rules of law because they are covered in subsequent instructions to the jury." (Internal quotation marks omitted). *See Thompson v. State*, 229 Md. App. 385, 404 (2016) ("Numerous appellate decisions of this Court and the Court of Appeals have held that propounding *voir dire* questions concerning rules of law covered by jury instructions is inappropriate."); *Baker v. State*, 157 Md. App. 600, 615-18 (2004) (holding that voir dire questions about burden of proof and a defendant's right not to testify were not required, and stating: "In any event, it is up to the Court of Appeals, not this Court, to decide, as appellant suggests, that the reasoning of *Twining* is 'now outmoded.'"); *Wilson v. State*, 148 Md. App. 601, 656-60 (2002) (trial court did not commit an abuse of discretion by refusing to pose requested voir dire questions that "closely resemble[d] jury instructions" and asked whether any member of the panel was "unable or unwilling to uphold and abide by this rule of law"); *Carter v. State*, 66 Md. App. 567, 577 (1986) (applying *Twining*).

Moreover, the trial court in this case indicated that the principles of law addressed by Ms. Brown's proposed questions would be covered during jury instructions. As an alternative to Ms. Brown's proposed questions, the court offered to ask the venire if any juror was unable or unwilling to follow the court's instructions. This proposal, which defense counsel declined, was a reasonable alternative to Ms. Brown's improper inquiry into specific principles of law. *See Nance v. State*, 93 Md. App. 475, 482 (1992) (trial court does not abuse its discretion in refusing to ask a requested voir dire question if the court poses an alternative question that "adequately covered the information elicited by the requested question.").

Here, the trial court did not abuse its discretion by declining to pose Ms. Brown's requested voir dire questions.

II.

Prior Bad Acts

Ms. Brown contends that the trial court erred in admitting evidence of the prior altercation with Ms. Carter because, she argues, this was "irrelevant propensity evidence" that was "unfairly prejudicial." Ms. Brown claims that the court erred in finding that the testimony about the prior altercation fit within an exception to the exclusionary rule, and, she asserts, the probative value of the evidence was clearly outweighed by the unfair prejudice. Ms. Brown also claims that the court erred in failing to make an express finding that the prior bad act was established by clear and convincing evidence. We disagree.

Generally, "evidence of a defendant's prior criminal acts may not be introduced to prove that he is guilty of the offense for which he is on trial."[2] *Straughn v. State*, 297 Md. 329, 333 (1983). "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). *Accord* Maryland Rule 5-404(b). 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 considering whether to allow "other crimes evidence," a trial court must undertake a three-step process, which we review under three separate standards. *Faulkner*, 314 Md. at 634. First, the trial court must determine whether the evidence falls under one of the exclusionary "exceptions" noted above, such as motive, intent, identity, or absence of mistake. *Id.* This determination by the trial court is a legal one, which we review *de novo*. *Id.* Next, the court must decide whether the defendant's involvement in the "other crimes" can be established by clear and convincing evidence. *Id.* This we review under a clearly-erroneous standard. *Id.* at 634-635. Finally, the court must weigh the probative value of the evidence against any undue prejudice the evidence is likely to have against the defendant. *Id.* We review this decision for abuse of discretion. *Id.* *See In re*

[2] For the purposes of our discussion, the terms "prior bad acts" and "other crimes" have the same meaning and are used interchangeably.

Adoption/Guardianship No. 3598, 347 Md. 295, 312 (1997) ("There is an abuse of discretion 'where no reasonable person would take the view adopted by the [trial] court[.]'") (internal citations omitted).

In the present case, we hold that the trial court did not err in admitting evidence of Ms. Brown's "prior bad acts." The prior altercation between Ms. Brown and Ms. Carter was relevant to Ms. Brown's motive, and also was relevant to show that she had the requisite intent to commit the assault in question and in helping to establish Ms. Brown's identity as the perpetrator. *Emory v. State*, 101 Md. App. 585, 606 (1994). The prior altercation also provided background and context for the instant assault, and a reasonable inference could be drawn that Ms. Brown was referencing the prior altercation when she stated during the instant assault: "You thought I was going to kill you before." *See id.* at 615 ("It is permissible to use 'other crimes' evidence where several offenses are so connected in point of time or circumstances that one cannot be fully shown without proving the other.").

Ms. Brown insists that, because Ms. Carter knew Ms. Brown (from the prior altercation), identity was not an issue in this case, and "the only issue was whether the alleged incidents actually occurred." Further, she contends that motive and intent were not shown by the evidence of the prior bad act because there was no "obvious relationship" between the instant assault and the prior altercation.

Ms. Brown's arguments are unavailing. Our inquiry is whether the prior altercation is "substantially relevant for reasons **other than criminal character**[.]" *Solomon v. State*,

101 Md. App. 331, 356 (1994) (emphasis added). In other words, the trial court's admission of the prior altercation under the "identity" exception does not fail simply because Ms. Carter knew Ms. Brown's "identity" prior to the assault. Rather, the prior altercation was admissible because it "enjoyed a special or heightened relevance in helping to establish the identity of [Ms. Brown] as the perpetrator of the crimes on trial." *Oesby v. State*, 142 Md. App. 144, 162 (2002).

Nonetheless, even if identity were removed from the equation, we would still hold that the prior altercation was admissible under one of the other exceptions noted above. *See Moore v. State*, 73 Md. App. 36, 44 (1987) ("For [other crimes] evidence even to qualify for admission, it must fall within **one** of the exceptions that the court has recognized . . . as having independent relevance[.]") (Emphasis added). As discussed above, the prior altercation and the instant assault were circumstantially connected. The prior altercation occurred just two weeks prior to the instant assault and resulted in a similar outcome, namely an assault by Ms. Brown against Ms. Carter. In addition, Ms. Brown referenced the prior altercation during the instant assault, a fact that the State used to establish Ms. Brown's motive and intent in committing the assault in question. *See Harrison v. State*, 324 Md. 122, 155 (1975) (Prior bad acts are admissible where two events are "so linked in point of time or circumstances as to show intent or motive.").

We also find no error in the trial court's failure to state on the record a finding that the prior act was shown by "clear and convincing" evidence. The State points out that Ms. Brown did not argue this point to the trial court, and did not object that the court failed to

announce an express ruling on the clear and convincing standard. Moreover, our review does not require an express finding by the trial court, provided there is no evidence that the trial court employed the wrong burden of persuasion. *Emory*, 101 Md. App. at 623. Absent such evidence, which is not present here, "[a] reviewing court looks only at the legal question of whether there was some competent evidence which, if believed, could persuade the fact finder as to the existence of the fact in issue." *Id.* at 622. *See also Wilder v. State*, 191 Md. App. 319, 344 (2010) ("Although the trial court did not articulate the basis for its ruling, it overruled defense counsel's objection only after an extensive argument by the State in favor of admissibility. We presume that the trial judge knew the law and properly applied it in overruling the defense objection to [the bad acts] testimony."); *Hill v. State*, 134 Md. App. 327, 354 (2000) ("Although the trial court did not expressly state its reasons on the record [for admitting the other crimes evidence], the record discloses that it was aware of the governing rule and appreciated the importance of the evidence and its impact on the trial.").

Here, the proposed evidence that the prior bad act occurred was sworn testimony of an eyewitness, namely, the victim of the prior assault. That testimony was sufficient to satisfy the clear and convincing requirement. As we stated in *Page v. State*, 222 Md. App. 648 (2015), "[c]lear and convincing means that the witness to a fact must be found to be credible, and that the facts to which [he] ha[s] testified are distinctly remembered . . . so as to enable the trier of the facts to come to a clear conviction, without hesitance, of the truth of the precise facts in issue." *Id.* at 665 (internal citations omitted). The proffered

testimony of Ms. Carter was sufficient to support the trial court's admission of the other crimes evidence under a clear and convincing standard.

Finally, the trial court was within its discretion in determining that the probative value of the prior altercation outweighed any unfair prejudice to Ms. Brown. As noted, the evidence was presented to establish motive, intent, and the ongoing nature of a feud between Ms. Brown and Ms. Carter, all of which were relevant to the present prosecution. In addition, the prior altercation was relevant to the underlying charge, second-degree assault, in that it tended to show that Ms. Carter was reasonably in fear of imminent physical contact by Ms. Brown based, in part, on the prior altercation and Ms. Brown's reference to the altercation during the instant assault. Again, this is not a situation in which the State introduced evidence of the prior altercation merely to show Ms. Brown's propensity to commit assaults, which is the purpose of the general rule excluding "other crimes" evidence. *Id.* at 667. The trial court's admission of the prior altercation was not an abuse of discretion.

III.

Closing Argument

Ms. Brown's final contention is that the prosecution's comment during closing arguments regarding the "uncontroverted" nature of Ms. Carter's testimony was improper because it was "susceptible of the inference by the jury that [the jury] was to consider the silence of [Ms. Brown] as an indication of her guilt[.]" Citing *Smith v. State*, 367 Md. 348, 359-60 (2001), Ms. Brown avers that the comment "clearly constituted reversible error"

and the trial court abused its discretion in failing to sustain defense counsel's objection. We disagree.

"The regulation of argument rests within the sound discretion of the trial court." *Warren v. State*, 205 Md. App. 93, 132 (2012). "On review, an appellate court should not reverse the trial court unless that court clearly abused the exercise of its discretion and prejudiced the accused." *Degren v. State*, 352 Md. 400, 431 (1999). "In other words, we defer to the trial court's evaluation of the effect of a comment upon the jury." *Juliano v. State*, 166 Md. App. 531, 545 (2006). "When assessing whether reversible error occurs when improper statements are made during closing argument, a reviewing court may consider several factors, including the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused." *Spain v. State*, 386 Md. 145, 159 (2005).

In the present case, we conclude that the trial court did not abuse its discretion in failing to sustain the objection of the prosecution's use of the word "uncontroverted." Not only was the comment isolated, but, under the circumstances, it was unlikely to be construed by the jury as a comment on Ms. Brown's failure to testify. During opening statements, defense counsel asserted that the jury should keep in mind that the State wanted them to "take a leap of faith and believe [Ms. Carter's] word," but that there was "no proof to back up anything she says." With that backdrop, after Ms. Carter was the sole witness in the case, it was fair response to defense counsel's opening statement for the prosecutor to point out that her testimony was uncontroverted.

We note that, just before the prosecutor described Ms. Carter's testimony as uncontroverted, the trial court had addressed any improper inference the jury may have drawn from the prosecution's comments by instructing that the jury "need not believe any witness even if the testimony is uncontradicted." The trial court also instructed the jury that Ms. Brown "has an absolute constitutional right not to testify" and that Ms. Brown's failure to testify "must not be held against [Ms. Brown] and must not be considered by you in any way or even discussed by you." Under the circumstances, it would have been irrational for the jury to infer that the prosecutor's description of the sole witness's testimony as uncontroverted was an effort to persuade the jury to disregard the trial judge's explicit instructions.

We addressed a similar fact pattern in *Williams v. State*, 137 Md. App. 444 (2001). In that case, the defendant was convicted of possession of cocaine based solely on the uncontradicted testimony of two police officers. *Id.* at 447. During closing, the prosecution remarked that the officers' testimony was "uncontradicted." *Id.* On appeal, the defendant argued that the prosecution's remark was an improper attack on the defendant's right not to testify. *Id.* at 457-458. In rejecting the defendant's argument, we held that the statement was permissible, as it was unlikely that the jury would perceive the statement as a comment on the defendant's failure to testify because "[i]n closing, the defense challenged the officers' credibility[.]" *Id.* at 458. We also noted that juries are free to consider the uncontroverted nature of testimony and that "these considerations are not inconsistent with the right of the defendant not to testify[.]" *Id.* (internal quotations

omitted). Finally, as in the instant case, the trial court in *Williams* instructed the jury that it need not believe uncontradicted testimony and that the defendant's silence could not be considered. *Id.*

Ms. Brown argues that, in this case, the comment implicated her failure to testify because "[t]he only other person who could have rebutted [Ms. Carter's] testimony was Ms. Brown." This is not correct because Ms. Carter had testified that there were two other assailants with Ms. Brown, and neither of them was called.

Further, we note that Ms. Brown could have asked the trial court to remind the jury again of her right not to testify, but she failed to request any re-instruction.

In sum, we hold that the prosecution's comment in the present case was unlikely to be regarded as a commentary on Ms. Brown's right to remain silent, and the court's instructions adequately apprised the jury that it would be improper to consider in any way the defendant's failure to testify.

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