Circuit Court for Howard County
Case No. 13-K-17-57760

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2704

September Term, 2018

TREMAYNE MIDDLETON DORSEY

v.

STATE OF MARYLAND

Fader, C.J.,
*Wright,
Wells,

JJ.

Opinion by Wright, J.

Filed: November 18, 2019

*Wright, J., now retired, participated in the hearing of this case while an active member of the Court; after being recalled pursuant to Maryland Constitution, Article IV, Section 3A, he also participated in the decision and adoption of this Opinion.

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

A jury in the Circuit Court for Howard County convicted appellant, Tremayne Middleton Dorsey, of five counts, including: assault in the first degree; assault in the second degree; resisting a lawful arrest; theft of property with a value less than $1,000; and driving with a suspended license. Dorsey was sentenced to a period of four years' imprisonment. In his appeal, Dorsey presents the following questions for our review, which we have rephrased for clarity:[1]

1. Did the trial court err by refusing to sever the theft charge from the remaining charges?

2. Did the trial court err by declining to ask prospective jurors whether any of them held a bias against people with tattoos?

3. Did the trial court err by excluding the expert testimony of Dr. Amy Hawes?

[1] The issues as presented in Dorsey's brief read as follows:

1. Whether the trial court erred by refusing to sever the theft charge from the remaining charges, where evidence as to the other charges would not have been admissible at a separate trial of the theft charge.

2. Whether the trial court erred by declining to ask prospective jurors whether any of them held a bias against people with tattoos, when an affirmative answer to that question would have been grounds for a challenge for cause.

3. Whether the trial court erred by excluding testimony of a proposed defense expert witness that was relevant both to the key question of the defendant's intent and to impeach the State's two most important witnesses.

Finding no error, we answer all three questions in the negative and affirm the judgment of the circuit court.

BACKGROUND

Just before 3:00 a.m. on February 24, 2017, Mrs. Susan Mooney woke up in her family residence in Clarksville, Maryland. Rising to get herself a drink of water, Mrs. Mooney glanced out of her bedroom window overlooking the front of her home. Looking out, she noticed an unfamiliar car, a "large Cadillac," parked midway up her driveway and facing out toward the street. Seeing the unidentified vehicle, Mrs. Mooney woke her husband and decided to call the police.

Roughly thirty minutes later, at about 3:30 a.m., an officer responded to Mrs. Mooney's call. After knocking on the front door and announcing herself, Officer Amy Frasier spoke with the Mooneys, who explained the situation involving the strange vehicle. The Mooneys expressed their desire to have the vehicle towed, and Officer Frasier placed a call to a local towing company. About fifteen to twenty minutes later, the tow truck arrived, backed into the Mooneys' driveway, and lowered its bed to retrieve the vehicle.

As the tow truck operator was preparing to load the car, Officer Frasier, who was waiting outside, noticed an individual in dark clothing emerging from somewhere near one of the homes further up the road. The person began to approach the Mooneys' residence. Officer Frasier, in turn, began walking down the road to meet them. Upon meeting the person, later identified as Dorsey, Officer Frasier engaged him in conversation. Out of that conversation, which was noncombative, Officer Frasier was

able to confirm that the vehicle in the Mooneys' driveway did, in fact, belong to Dorsey. When Officer Frasier inquired as to why Dorsey was in the neighborhood, he stated that he visited the neighborhood to go jogging. The officer next asked to see Dorsey's identification, which he stated was in his vehicle. The two then proceeded back up the street to the Mooneys' residence in order for Dorsey to retrieve it.

Upon returning to the car, Dorsey reached in, got his license out of his vehicle, and presented it to Officer Frasier. He then leaned against the rear driver's side door of the car and began smoking while Officer Frasier called for backup and performed a computer check. The front driver's side door remained open. Officer Frasier testified that she was only a few feet away from Dorsey while she performed the checks on Dorsey's license. Officer Frasier received a response via police radio indicating that Dorsey had a warrant for his arrest. At this point Officer Frasier testified that Dorsey began to move, and she indicated that he was being placed under arrest. Dorsey entered his vehicle and Officer Frasier grabbed him in an effort to pull him out and prevent him from driving off. A brief struggle ensued with Dorsey pushing Officer Frasier away as he attempted to start the car. Officer Frasier testified that she drew her weapon while Dorsey put the keys in the ignition, started the car, and put his hands on the steering wheel. Seeing that he did not reach for a weapon, she stated that she re-holstered her firearm.

After starting the vehicle, Dorsey first drove forward, hitting the rear of the tow truck. He then reversed with the front driver's side door still open—striking Officer Frasier with the door, spinning her around, and knocking her away from the car. Officer Frasier reoriented herself, moved in front of the car, and redrew her weapon. Dorsey put

the car into drive and drove forward, at a speed the tow truck operator testified to be in the range of five to eight miles an hour. Officer Frasier testified that she then moved out of the way of the vehicle and simultaneously fired a single shot. That shot penetrated the front driver side window, striking Dorsey in the neck. Dorsey then swerved right before making a hard left, driving across the Mooneys' lawn, crashing into a tree, and becoming lodged in an embankment at the edge of the yard. Backup officers arrived soon thereafter, and Dorsey was transported to a hospital.

The next day, several officers returned to the area to search for additional evidence. A few houses down from the Mooney residence, on the same street, officers located a pile of items, including a driver's license, credit card, gift cards, change, a flashlight, and gloves. Mr. Dean Drumheller, a nearby resident, testified that the change, credit card, and driver's license belonged to him and had been removed from his vehicle without his knowledge or consent. DNA taken from the gloves and flashlight came back as a match for Dorsey.

On April 19, 2017, Dorsey was indicted by a grand jury on five counts: assault in the first degree; assault in the second degree; resisting a lawful arrest; theft of property with a value less than $1,000; and driving with a suspended license. On May 2, 2017 Dorsey filed for a Bill of Particulars and on May 12, 2017, the State filed its response. The State explained that the first count of assault in the first degree stemmed specifically from Dorsey's conduct in driving his car at Officer Frasier, whereas the second count of assault in the second degree was based on Dorsey's "struggling with the officer while attempting to get in his car and hitting her with the door of his car while backing up." As

to the third count, the State explained that the charge of resisting arrest was based on "all [Dorsey's] actions from the time that the officer informed him that he was under arrest, including physically pulling away, getting in his car, and attempting to drive away."

In August of 2017, Dorsey filed a Motion for Severance of Counts pursuant to Md. Rule 4-253(c). Dorsey sought to sever count 4, the theft charge, from the remaining charges, citing the lack of mutual admissibility of evidence along with the likelihood of prejudice. Dorsey argued that there was no applicable exception that would permit evidence of the assault charges to be considered with the theft charge. The State responded by arguing that the evidence was mutually admissible, and that the consideration of prejudice in this instance did not outweigh considerations of judicial economy favoring a single collective trial of all counts. On September 1, 2017, a motions hearing was held, and the circuit court denied the motion to sever finding that the evidence was, in fact, mutually admissible and that potential prejudice did not warrant separate trials.

The matter proceeded to jury trial in June of 2018. During jury selection, Dorsey's counsel submitted several *voir dire* questions. Number 22 was as follows: "The Defendant has tattoos and dreadlocks, [sic] does any member of the jury panel have any strong feelings about people who have tattoos and/or dreadlocks?" With respect to that question, the following colloquy ensued:

> THE COURT: [H]ave you all taken a look at the court's proposed *voir dire*?
>
> [STATE:] Yes, Your Honor.

[DEFENSE:] Yes, Your Honor.

THE COURT: Alright, any comments or questions concerning?

[STATE:] Nothing from the State.

THE COURT: Defense?

[DEFENSE:] Yes, Your Honor. There are — there are some questions that I submitted that are not on the list.

THE COURT: Okay, which ones?

* * *

[DEFENSE:] Number 22 and number 27.

* * *

THE COURT: Now why wouldn't 22 be included in any prejudices or biases against the defendant? Why do you specifically — well first of all, I'm not that close to him, but I don't see any tattoos from the clothes he's wearing unless he has something on his neck or his face that I can't see from where I am. Clearly, I see dreadlocks. But why wouldn't that be included in the general—do you have—in my number 15?[2]

[DEFENSE:] Your Honor, number 15 is a general question and doesn't come to any specific things that might bring ideas to mind in someone's mind. Necessarily if they think of just biases or prejudices they may just think of skin color. They may not think of other things that would have a bias or prejudice. They would have it they wouldn't think about it as a bias or prejudice unless it's brought up specifically. And the tattoos are going to be visible in the—if we are allowed to introduce photos from when he's getting medical treatment or shock trauma. Where the bullet went in, all of those pictures will have tattoos on them.

THE COURT: I'm not too sure. [The State] want to be heard concerning their request?

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[2] The circuit court's proposed question number 15 read as follows: "Does any member of the panel have any fixed opinions, biases or prejudices against the defendant in this case?"

> [STATE:] Your Honor this—I feel—the State feels that tattoos are a common place item. They don't generate any strong feelings or biases and as far as the dreadlocks go, the defendant's going to stand up when you introduce all the parties. They'll see that he has dreadlocks and that will be covered by your number 15—any fixed opinions, biases, or prejudices against this defendant. They will have seen him and already assessed whether they have strong feelings about dreadlocks.
>
> THE COURT: Okay. I agree with the State on that one. I'm going to decline—I'm going to decline to give that as well.

At the close of *voir dire* questions, Dorsey's counsel renewed her objection to the failure to ask Question 22. The Court incorporated its earlier comments before stating that the objection was both noted and overruled.

During the course of the proceedings, Dorsey sought to offer the testimony of two expert witnesses. One of those witnesses, forensic pathologist Amy Hawes, was expected to offer testimony regarding the trajectory of the bullet. Specifically, Dr. Hawes was expected to testify that the bullet which struck Dorsey in the neck traveled on a path that was from left to right and back to front. Prior to trial, the State had filed a motion in limine to exclude Dr. Hawes' testimony on grounds of relevance but deferred on receiving a ruling until trial where the scope of Dr. Hawes' testimony could be ascertained. In a bench conference the State addressed the issue, supplementing its pre-trial motion by stating, in relevant part:

> Maryland Rule 5-402 precludes the introduction of evidence that is not relevant. The State's position is that the medical testimony of the bullet trajectory in this case or the injury of the—the trajectory of the gunshot is not relevant to the issues that are before this jury. This jury has been selected to try the criminal case of State of Maryland versus Tremayne Middleton Dorsey. That is to decide whether [Dorsey] committed a first-degree assault by driving a vehicle at a police officer in his attempt to get

> away; that he placed her life in jeopardy by driving his vehicle at a high speed into her in a short distance . . . .
>
> [T]here's no allegation that her weapon was drawn prior to him beginning to accelerate the vehicle and drive at her. All of the testimony that's before the court is that the police officer saw the vehicle. It was already in motion and coming at her. While she attempted to get out of the way, pulled her weapon and fired while on the move. That is the testimony that the court heard. So, the trajectory of the bullet and when the officer fired has no impact on what the defendant's intent was at the time that he committed the first-degree assault. He's already begun that behavior. That crime had already been committed at the time that her weapon was even drawn. So, there's no allegation that he was fleeing from the police officer because she had drawn her weapon and he was resisting an unlawful [sic] arrest.
>
> There's no information that the weapon had any impact on him at all with regard to committing this first-degree assault. He had already begun that behavior and . . . was in the process of completing the act of committing the first-degree assault at the time that the weapon was drawn. So, it's the State's position that where the bullet struck Mr. Dorsey—which is all that this testimony is—is not relevant to what his intent was at the time that he began his action, and that's what the jury is ultimately going to decide.

*   *   *

The defense responded by contending that Dr. Hawes' testimony was relevant to the issues of body placement as well as to undermine Officer Frasier's credibility. It stated, in part:

> Madame State . . . said the trajectory of the bullet comes into play while the vehicle is being driven. What we have is Dr. Hawes, whose testimony as a forensic pathologist is to connect the dots of the wound from . . . back-left to slightly front-right . . . . What that does is it solidifies the body position. And that directly goes to the credibility of whether or not Officer Frasier was able to move the way she said before firing the weapon.
>
> What it provides is a basis for the juror, who is not a forensic pathologist, to isolate the body so that they then can be assisted in figuring out body position and determining where the players are . . . . [T]hat is relevant, Your Honor, to the direct issue because the jury is tasked to decide where things were, where things are moving and what is going on. So, the path of

> the bullet locking in one of those pieces, which is the fixture of the body, will impact the jury's ability to make sense of what was happening and whether Officer Frasier was credible in her testimony.
>
> * * *
>
> If a car is driving at somebody, it's different than driving past somebody. And it's up to the jury to decide if she was able to jump out of the way like she said. The trajectory of the bullet will help lock in the position of where the bullet came in and putting together all the rest of the testimony to determine who was moving and where.
>
> * * *

Incorporating the arguments of the State, the circuit court granted the State's motion to exclude Dr. Hawes' testimony.

The jury acquitted Dorsey of first-degree assault, but he was found guilty on the four remaining counts. At sentencing on October 25, 2018, Dorsey was sentenced to a prison term of four-and-a-half years. He filed this timely appeal.

DISCUSSION

I.

As to severance, Dorsey's contentions focus on the issue of mutual admissibility. He maintains that "[b]ecause evidence of the arrest-related charges would have been inadmissible at a separate trial of the theft, the trial court erred as a matter of law in allowing all five counts to be tried together." Dorsey seeks specifically to undercut the two arguments upon which the circuit court based its ruling—that the evidence was, in fact, mutually admissible, and that the consideration of prejudice did not outweigh considerations of judicial economy. First, Dorsey argues that the "arrest-related

charges," as he defines them, would be inadmissible in a separate trial on the theft count because they could not serve as consciousness of guilt evidence. In support of his position, Dorsey relies on *Thomas v. State*, 372 Md. 342 (2002), and *Thompson v. State*, 393 Md. 291 (2006). Dorsey highlights the language in *Thomas* which emphasizes the tenuous nature of consciousness of guilt evidence. In the same manner, Dorsey uses *Thompson* to focus upon the prejudice a criminal defendant could face when forced to rebut an incriminating inference with other incriminating information—a situation he avers that he would have to confront with specific regard to the outstanding warrant. Second, Dorsey contends the arrest-related charges and theft charge could not be considered part of a single criminal transaction. Noting that the theft and arrest-related charges could have been prosecuted separately, Dorsey argues the temporal and geographic distinctions between the charges would be better served by separate prosecutions. He asserts that the State attempted to supplement a weak case on the theft charge by trying it together with the other counts.

The State responds to Dorsey's arguments regarding the potential prejudice arising from the admission of evidence relating to the arrest-related charges by noting that the case upon which Dorsey principally relies, *Thompson*, has been inappropriately cited. In response, the State emphasizes that *Thompson* is concerned with jury instructions rather than the admissibility of evidence. The State also notes that, during the circuit court proceedings, Dorsey never raised the issue of prejudice arising from the potential introduction of his prior warrant. Moreover, the State highlights two factual distinctions between this case and *Thompson*. Here, unlike *Thompson*, Dorsey never argued below

that there was an alternative explanation for his flight. In addition, the State contends that the purported alternative reason for Dorsey fleeing was far less prejudicial than in *Thompson*. With respect to whether all of the conduct underlying the counts occurred during the same transaction, the State maintains that all of the alleged crimes were related in both time and geography.

A.

Before addressing the parties' arguments on their merits, we will, for clarity, survey the law informing their contentions.

Joinder and severance in criminal cases find their baseline authority in Md. Rule 4-253. The portion of the Rule relevant to these proceedings reads as follows:

> **(c) Prejudicial Joinder.** If it appears that any party will be prejudiced by the joinder for trial of counts, charging documents, or defendants, **the court may**, on its own initiative or on motion of either party, order separate trials of counts, charging documents, or defendants, or grant any other relief as justice requires.

Id. (emphasis added). As the Maryland Rule makes clear, the decision to sever would ordinarily be left to the discretion of the trial court upon a showing of prejudice to any party. *See Epps v. State*, 52 Md. App. 308 (1982). Prejudice, for purposes of Md. Rule 4-253, has been specifically construed to refer to the "prejudice resulting from the reception of evidence that would have been inadmissible against that defendant had there been no joinder." *Galloway v. State*, 371 Md. 379, 394 n.11 (2002) (quoting *Ognowski v. State*, 87 Md. App. 173, 186-87 (1991)). The provision "embodies a balancing approach between 'the likely prejudice caused by the joinder . . . [and] the consideration of economy and efficiency in judicial administration.'" *State v. Hines*, 450 Md. 352, 369

(2016) (quoting *Frazier v. State*, 318 Md. 597, 608 (1990)) (alterations in original).

However, while the language of the provision itself treats joinder as a matter of discretionary judgment, subsequent authority has sharply circumscribed—and in a certain respect eliminated—that discretion in the context of a jury trial. In *McKnight v. State*, 280 Md. 604, 612 (1977), the Court of Appeals held that in a trial before a jury, "a defendant charged with similar but unrelated offenses is entitled to a severance where he establishes that the evidence as to each individual offense would not be mutually admissible at separate trials." Elaborating on that holding in the subsequently decided *Graves v. State*, 298 Md. 542, 545-46 (1990) (emphasis added), the Court explained:

> [t]he *McKnight* holding took away the discretion of the trial judge presiding at a jury trial to join similar offenses where the evidence as to them was not mutually admissible. As we have indicated, *in such circumstances, there [is] prejudice as a matter of law which compel[s] separate trials*. The rationale underlying the *McKnight* holding was our concern that a jury would be unable to set aside the likely prejudice engendered by the joinder.

Consequently, though courts may be left with the "nagging incongruity . . . that we continue to label the reason for appellate reversal on this issue not 'legal error,' . . . but 'abuse of discretion,'" it cannot be the latter because "there is no longer any discretion to be abused." *Wieland v. State*, 101 Md. App. 1, 11 (1994), *superseded by statutory amendment*, Ch. 632, 1996 Laws of Md., *as recognized in Robinson v. State*, 353 Md. 683, 697-98 (1999). Indeed, "all that remain[s] discretionary . . . [is that even] when evidence bearing on another charge is *prima facie* admissible, the judge still must weigh the probative value of the evidence against the danger of unfair prejudice." *Id.* Thus, while various cases on the subject

> do ritualistic lip service to the principle that the decision to grant a motion to sever or to join is one committed to the discretion of the trial judge . . . this is an area where the reviewing courts have been far less deferential than in many other areas involving the review of discretionary decisions and, with some regularity, have not hesitated to reverse the decisions of the trial court, showing little or no deference in the process.

Id. at 9 (citations omitted).

Consequently, in the context of jury trials concerning the potentially prejudicial joinder of offenses, mutual admissibility is the gravamen of the court's consideration. Mutual admissibility straightforwardly concerns itself with whether "evidence of one crime would be admissible at a separate trial of another charge." *McKnight*, 280 Md. at 610. The Court of Appeals explained:

> [I]f a judge could determine that the evidence of any two or more offenses would be mutually admissible, that is, evidence of one crime would be admissible at a separate trial on another charge, then joinder of those offenses would be permissible because the defendant would not suffer any *additional* prejudice as a result of the joinder. Thus, mutual admissibility became the precondition for similar offense joinder.
>
> The analysis of mutual admissibility is made by answering a hypothetical question: Would evidence of each charge be admissible in a separate trial of each other charge?

Conyers v. State, 345 Md. 525, 549 (1997).

An assessment of mutual admissibility implicitly involves the consideration of "other crimes" evidence. Such evidence is generally barred by a broad exclusionary rule providing that "evidence which in any manner shows or tends to show that the accused has committed another crime wholly independent of that for which he is on trial, even though it be a crime of the same type, is irrelevant and inadmissible." *Ross v. State*, 276 Md. 664, 684 (1976). The rule protects defendants from unnecessary exposure to

evidence of criminal propensity which might otherwise obscure a jury's capacity to assess the merits of a particular case and specific crime charged. There are, however, a number of notable exceptions to the rule, as where it is offered to show motive, intent, absence of mistake, identity, or common plan. *Id.* at 669-70.

Another exception exists where multiple criminal episodes may be considered part of a single transaction. The Court of Appeals discussed this subject in *Odum v. State*, where it explained, in relevant part:

> the strictures of "other crimes" evidence law, now embodied in Rule 5-404(b),[3] do not apply to evidence of crimes (or other bad acts or wrongs) that arise during the same transaction and are intrinsic to the charged crime or crimes. We define "intrinsic" as including, at a minimum, other crimes that are so connected or blended in point of time or circumstances 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. Our conclusion is in accord with the interpretation that various federal courts of appeal have given to Federal Rule of Evidence 404(b), from which Maryland Rule 404(b) is derived.

412 Md. 593, 611-12 (2010); *see also Tichnell v. State*, 287 Md. 695 (1980) (joining for a single trial counts related to a breaking and entering, murder, and theft of a police vehicle after noting "proximity of time and space"); *Smith v. State*, 232 Md. App. 583 (2017).

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[3] The text of Md. Rule 5-404(b) reads:

> (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or other acts including delinquent acts as defined by Code, [Md. Code (1973, 2013 Repl. Vol.), Courts & Judicial Proceedings Article (5-101 to end) § 3-8A-01] is not admissible to prove the character of a person in order to show action in the 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, absence of mistake or accident, or in conformity with [Md.] Rule 5-413.

B.

The issue of preservation has been raised by the State, and therefore, we will address that issue preliminarily. Appellate courts generally will not decide issues raised for the first time on appeal. *See* Md. Rule 8-131 ("Ordinarily, 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 . . . ."). As discussed above, the State asserts that "in arguing for severance, Dorsey made no claim that he would be prejudiced because the jury would find out that there was a warrant for his arrest." Consequently, "the claim that severance was improper because it would result in admission of the evidence regarding the outstanding warrant is not preserved."

In the September 1, 2017 motions hearing, Dorsey's counsel offered the following in support of his motion for severance:

> Any information about the theft and the assault case would be prejudicial to the defendant. However, it's more than that, Your Honor. The theft could possibly be admissible as evidence of guilt for a fleeing and eluding. Maybe even a resisting arrest. However, the assault is not mutually admissible in the theft case. It's in her memorandum; the State indicated that that would be evidence of guilt. However, it's too attenuated. The incidences are too attenuated in order for that to be the case.
>
> When Mr. Dorsey came upon the police officer at his car, he didn't run away right away. He didn't jump in his car right away. He didn't attack the police officer trying to get away. He had a cigarette. He had a drink. They talked. He gave her his license. It was not until the information came back on his license that he had a warrant that things started happening as far as him trying to get away. So, the instances are not connected like boom, boom. And the fact that there was this gap—I don't believe that there is evidence of guilt that associates the *assault* with the *theft*.

(Emphasis added). In her comments, Dorsey's counsel does mention his prior warrant,

but only for the purpose of highlighting the temporal distinction between the alleged theft and subsequent alleged assault. She emphasizes that there was a period of calm interaction disrupted only after the revelation of the warrant. Consequently, she argues that the theft was too remote—"too attenuated"—to be evidence of guilt sufficient to link it to the assault. Though Dorsey continues, on appeal, to contest the admissibility of evidence of the arrest-related charges in a trial of the theft, the basis for his argument before the circuit court is analytically distinct from his first argument asserted here. Rather than straightforwardly positing that the events were sufficiently distinguished by differences in time and geography, he instead offers a more abstract argument, focusing on the inferences that may be drawn from evidence admitted with respect to the arrest-related charges and how it placed him in an untenable position.

Dorsey's contention is rooted in an assertion that the Court of Appeals' reasoning in *Thompson* should apply to the instant matter, though the case is admittedly not analogous in several respects. In that case, the Court considered a matter where four pedestrians walking near Baltimore's Inner Harbor were assailed by two men riding bicycles. *Thompson*, 393 Md. at 294. One of the men on bicycles directed the four pedestrians to place their wallets on the ground. *Id.* After the pedestrians ignored the order, the man who demanded that they produce their wallets pulled a gun and fired five shots, striking one of the pedestrians in the arm. *Id.* Police eventually reported to the scene of the shooting, where Detective Frank Mundy encountered a man fitting the description of the assailant, later identified as Warren Thompson. *Id.* When Detective Mundy attempted to stop him, Thompson—who was riding a bicycle at the time—

attempted to ride away, but was quickly apprehended by other officers. *Id.* While being interrogated by police, Thompson indicated that he pedaled away not because he was fearful after having committed the shooting, but rather because he was then in possession of a substantial amount of cocaine. *Id.* at 314-15. Thompson was charged with several counts related to the shooting. *Id.* at 294-95.

Following a pretrial hearing, due to issues with the chain of custody for the cocaine recovered from Thompson on the night of the arrest, all reference to the drug evidence was deemed inadmissible, and Thompson's statement to police regarding drugs was redacted. *Id.* at 295. Following Thompson's acquittal as to some charges and a hung jury as to others, the State opted to try Thompson a second time. *Id.* at 296. During this second trial, before jury instructions were issued, the State requested a flight instruction to which defense counsel objected. *Id.* at 298-99. Defense counsel explicitly argued that the flight instruction could be misleading—because no evidence regarding the drug possession was admitted, the only inference the jury was likely to draw was that Thompson fled because he was responsible for the shooting. *Id.* The objection was overruled, and Thompson was ultimately convicted of five counts before being sentenced to forty years in prison. *Id.* at 300. After the conviction was affirmed by the Court of Special Appeals, the Court of Appeals granted certiorari.

The Court of Appeals reversed our decision, holding that the trial court abused its discretion in giving the flight instruction. *Id.* at 316. The Court explained that consciousness of guilt evidence, like evidence of flight, only warrants a jury instruction where it meets a four-prong test borrowed from the Fifth Circuit case *United States v.*

Myers, 550 F.2d 1036 (5th Cir. 1977). *Id.* at 311. The test articulates four requisite inferences relating evidence of flight to guilt of the offense charged. *Id.* at 312. One of those inferences, specifically, is "from consciousness of guilt to consciousness of guilt *concerning the crime charged*." *Id.* (emphasis added). The Court of Appeals reasoned that the instruction put Thompson in a precarious position:

> Thompson thus was placed in a difficult situation where he must either not object to the highly prejudicial evidence concerning his possession of a significant amount of cocaine being introduced to the jury to explain his flight (or perhaps forced to make a Hobson's choice to introduce such evidence himself), or decline to explain his flight and risk that the jury would not infer an alternative explanation for his flight.

Id. at 314. Consequently, the Court determined that "[i]t is error . . . for the trial judge to give such an instruction in a case like the case *sub judice* where the defendant would be prejudiced by the revelation of the 'guilty' explanation for his flight." *Id.* at 315.

Thompson is differentiable in several ways. Here, no flight instruction was ever requested or provided; there was no prior evidentiary ruling that admission of evidence regarding the assault charges, and consequently the warrant, would explicitly contravene; and, Dorsey, before this appeal, never expressly asserted that there was a particular reason why he attempted to leave the scene. Nonetheless, when asked about preservation at oral argument, Dorsey's appellate counsel offered the following argument:

> Counsel: [The *Thompson* issue] was preserved, Your Honor, because the defense did argue below that the link between the flight and consciousness of guilt was too attenuated—it could not be confidently drawn. And that was the situation that *Thompson* dealt with.
>
> Court: But was the argument made that the—giving the explanation that it was the warrant that was the reason for the flight, was that preserved? That that would have been prejudicial, introducing that information about the

> warrant as the alternative reason.
>
> Counsel: That specific argument I don't believe was made. However, the issue was adequately preserved, Your Honor, simply by the fact that the defense below argued that the issue—that the link was too attenuated. Again, that's the situation precisely that *Thompson* dealt with.

Dorsey has seized on trial counsel's language indicating that the link between the theft and the assault was "too attenuated" to argue that trial counsel was raising the type of issue identified in *Thompson*. However, we note that in her memorandum in support of severance and at the motions hearing, trial counsel never cited *Thompson* for authority in her argument. Likewise, trial counsel never directly asserted that evidence of Dorsey's warrant itself was prejudicial. To the extent Dorsey now contends that *Thompson*'s *reasoning* specifically regarding the inferential links associated with consciousness of guilt evidence—which itself amounts to a restatement and application of the principles articulated in *Myers* and *Thomas*—was the basis for trial counsel's argument, we also find that contention unavailing. Trial counsel never argued a failure to establish the inferences necessary to support the admission of consciousness of guilt evidence. The authority that trial counsel did invoke—*Conyers v. State*—she used to differentiate the instant case and to highlight the absence of a direct connection between the crimes charged.[4]

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[4] Trial counsel made the following argument:

> In addition, Your Honor, the point of consciousness of guilt is different from consciousness of guilt in the *Conyers* case where that was—in the *Conyers* case two murder charges were joined for trial because the second murder provided the motive for the first murder because he killed his accomplice to be taped and identified in the first murder. And the first

At base, while both Dorsey's appellate and trial court arguments focus generally on whether evidence of the assault related charges could properly be considered as consciousness of guilt evidence in a trial on the theft, the distinction between them lies in the approach: trial counsel argued that there was a lack of association between the events; appellate counsel now argues the absence of a causal link to support inferences requisite for admissibility, and that the introduction of the evidence undermining that link would be unduly prejudicial. Those two arguments present different issues, and involve different analyses. As such, we hold that Dorsey's present argument was not raised before the trial court, and consequently was not preserved for our review. *See* Md. Rule 8-131.

With that said, however, notwithstanding the above discussion, Dorsey's appellate argument is unavailing. Our ruling is based on the above-noted factual distinctions between this case and *Thompson*, along with the distinction between the impact of a court's decision to issue a jury instruction as opposed to its decision to admit evidence.

To reiterate, *Thompson* involved a prior evidentiary determination by the court and a subsequent instruction by the court that itself prejudiced the defendant by forcing him into a no-win situation: either Thompson could allow an inference to which the court itself directed the jury's attention (by virtue of its instruction), or he could introduce prejudicial evidence against himself. The primary distinction between that case and the

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murder provided evidence and consciousness of guilt for the second because he killed the only witness to the first murder.

instant matter is that the prejudice in *Thompson* resulted from an affirmative instruction by the court. *See* Md. Rule 4-325;[5] *see also Hardison v. State*, 226 Md. 53, 62 (1960) ("[A] statement or instruction by the trial judge carries with it the imprimatur of a judge learned in the law, and therefore usually has more force and effect than if merely presented by counsel. It is proper for jurors to look to a judge who is clothed with the

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[5] The full text of Md. Rule 4-325 reads as follows:

(a) When Given. The court shall give instructions to the jury at the conclusion of all the evidence and before closing arguments and may supplement them at a later time when appropriate. In its discretion the court may also give opening and interim instructions.
(b) Written Requests. The parties may file written requests for instructions at or before the close of the evidence and shall do so at any time fixed by the court.
(c) How Given. The 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. The court may give its instructions orally or, with the consent of the parties, in writing instead of orally. The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.
(d) Reference to Evidence. In instructing the jury, the court may refer to or summarize the evidence in order to present clearly the issues to be decided. In that event, the court shall instruct the jury that it is the sole judge of the facts, the weight of the evidence, and the credibility of the witnesses.
(e) Objection. No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. Upon request of any party, the court shall receive objections out of the hearing of the jury. An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.
(f) Argument. Nothing in this Rule precludes any party from arguing that the law applicable to the case is different from the law described in the instructions of the court stated not to be binding.

presumption of impartiality to instruct them in an advisory manner as to what is the law of the State in relation to the case before them."). However, when considering the mere admissibility of evidence, the court remains mindful that a jury is not obligated to consider or draw any particular inference. *See Darling v. State*, 232 Md. App. 430, 465 (2017) ("[W]eighing 'the credibility of witnesses and resolving conflicts in the evidence are matters entrusted to the sound discretion of the trier of fact.'") As a result, while an instruction from the court may be impermissible where it foists prejudice upon the defendant, the mere fact that evidence may be introduced which raises the potential for a negative inference and undermines an alternative explanation for some behavior is not sufficient, on its own, to warrant exclusion, as there is no guarantee that a prejudicial inference will even be entertained by the jury. Indeed, "simply because there is a possibility that there exists some innocent, or alternate, explanation for the conduct does not mean that the proffered evidence is *per se* inadmissible." *Thomas v. State*, 397 Md. 557, 578 (2007).

B.

Dorsey's alternative argument with respect to the circuit court's denial of severance was that the two events were not part of the same criminal transaction: as a result, that evidence of the assault would not be admissible in a trial related to the theft but rather would be considered "other crimes" evidence which would be properly excluded. Though both parties briefed the point, upon review of the circuit court proceedings, we find scant discussion of the subject. While we acknowledge that the State briefly referenced the issue before the circuit court, it is unclear in our view what, if

any, impact it had on the circuit court in making its decision. Nonetheless, we note that an appellate court may affirm "where the record in a case adequately demonstrates that the decision of the trial court was correct, although on a ground not relied upon by the trial court and perhaps not even raised by the parties." *Robeson v. State*, 285 Md. 498, 502 (1979). Because a determination as to whether the events may be considered part of a single criminal transaction has bearing on the central question of mutual admissibility, we consider the issue. The pertinent category for admissibility under the circumstances of this case is the one spelled out by *Tichnell v. State*, 287 Md. 695, 712 (1980) (citations omitted), where the Court of Appeals explained:

> [Exceptions to the prohibition on other crimes evidence] have been recognized. One such exception permits the admission of evidence of other crimes when the several offenses are so connected or blended in point of time or circumstances that they form one transaction, and cannot be fully shown or explained without the others.

Looking to the evidence in the record, there are a number of connections between the theft and the assault charges. All of the charged crimes occurred within a confined geographic area—indeed, on the same street and within a short walk's distance of one another. Further, while there is no evidence to indicate precisely when the theft occurred, Dorsey approached Officer Frasier from a location near where the stolen items were located. Consequently, it could be reasonably inferred that the acts giving rise to the theft charge were still in progress immediately before Dorsey made contact with police. That contact, of course, precipitated the assault which followed shortly thereafter. Though Dorsey offered an explanation for his presence at the scene—that he was jogging, at 3 a.m., in a neighborhood where he did not reside—the evidence related to the theft could

establish a basis for his presence in the neighborhood and consequently at the Mooney's home where the assault took place. Because of the close proximity of time and geography between the events, as well as the fact that the first series of events precipitated the second more deadly event, we hold that all of the contested events merged into a single transaction and that evidence of the assault charges would not be barred, on the ground that it is "other crimes" evidence, from a being admitted in a separate trial with respect to the theft. *See, e.g.*, *Solomon v. State*, 101 Md. App. 331, 375 (1994) (holding that the episodes that were tried together formed one closely related totality so that one of the parts could not be "fully shown or explained without proving the others" (quoting *Tichnell*, 287 Md. at 712)).

C.

In light of the foregoing discussion, we hold that there was no error or abuse of discretion by the circuit court and affirm its judgment in denying Dorsey's motion for severance. Though the circuit court did not provide much in the way of elaboration on its reasoning, it did find: (1) that the evidence as to the assault-related charges and the theft would be mutually admissible; (2) that there would not be unfair prejudice in joining the counts; and (3) that though there were no especially compelling considerations in weighing prejudice against judicial economy, the mutual admissibility of the evidence was sufficient to warrant joinder of the counts. Finding that the circuit court made those determinations set out by controlling law and that those determinations were supported by both law and fact, we affirm the judgment of the circuit court in joining all counts.

II.

Dorsey's next challenge on appeal concerns *voir dire*. Arguing that "[i]t is likely that at least some prospective jurors associated tattoos with deviance or criminality," Dorsey maintains that by failing to ask a *voir dire* question specifically on the subject of biases regarding tattoos, the court abused its discretion. Likewise, Dorsey argues that the court's generalized inquiry into whether jurors had a particular bias against the defendant was insufficient. The State, in response, maintains that the circuit court acted appropriately within its discretion when declining to ask the requested question.

We begin by noting, as the parties acknowledge, that an appellate court reviews a trial court's decision not to ask a requested *voir dire* question on an abuse of discretion standard. *Pearson v. State*, 437 Md. 350, 356 (2014). Indeed,

> [i]t appears to be the universal rule that on appellate review, the exercise of discretion by trial judges with respect to the particular questions to ask and areas to cover in *voir dire* is entitled to considerable deference . . . unless they are the product of a *voir dire* that is cursory, rushed, and unduly limited.

Stewart v. State, 399 Md. 146, 160 (2007) (quotations omitted). The operable standard in determining whether an appellate court has properly discharged its discretion is whether the court has created, through the procedures employed, a reasonable assurance that prejudice would be discovered if present. *White v. State*, 374 Md. 232, 242 (2003).

As the Sixth Amendment and Article 21 of the Maryland Declaration of Rights state, criminal defendants are entitled to trial by an impartial jury. U.S. CONST. amend. VI; MD. DECL. OF RTS. art. 21. That right is effectuated and ensured in substantial part by the performance of *voir dire*, which assists courts in "determining the existence of cause for disqualification . . . ." *Stewart*, 399 Md. at 158. In Maryland, "the trial court

has broad discretion in the conduct of *voir dire*, most especially with regard to the scope and form of the questions propounded, and . . . it need not make any particular inquiry of the prospective jurors unless that inquiry is directed toward revealing cause for disqualification." *Dingle v. State*, 361 Md. 1, 13-14 (2017). As such, "the trial judge is not required . . . to ask specific questions requested by trial counsel" except where it involves a number of recognized exceptions, including: race, ethnicity, or cultural heritage; religious bias; capacity to convict on circumstantial evidence in capital cases; undue weight given to police officer credibility; violations of narcotics law; emotional feelings regarding sexual assault against a minor; and racial bias. *Stewart*, 399 Md. at 160-62, n.5; *Curtin v. State*, 393 Md. 593, 609-10 n.8 (2006). Questions "which are speculative, inquisitorial, catechizing or 'fishing' . . . may be refused in the discretion of the court, even though it would not be error to ask them." *Stewart*, 399 Md. at 162.

In the instant case, Dorsey asserts that he was entitled to a *voir dire* question concerning bias against individuals with tattoos and argues that the circuit court's failure to supply that accommodation amounts to an abuse of discretion and reversible error. However, as noted above, trial courts are not obligated to ask any specific questions requested by counsel except in those areas set out in the common law, and bias against those with tattoos is not among them. In support of his position, Dorsey does not cite binding authority, and his contention that it is "likely" that some jurors would associate tattoos with criminality is unsupported by any facts cited in the record. Rather, he cites one article in the *Journal of Social Psychiatry* and two local newspaper articles. These secondary cites are underwhelming. Reviewing the trial transcript, we take note of the

circuit court's observation that none of Dorsey's tattoos were visible, while he was clothed, and further that they would only be brought to the jury's attention through photos that Dorsey himself sought to offer into evidence.

In our review, we find no evidence elicited by Dorsey suggesting that the *voir dire* as conducted was cursory, rushed, or unduly limited, or that it was unnecessarily constrained or circumscribed. Given Dorsey's failure to cite any facts relevant to this specific case warranting suspicion that a juror held a particular bias against those with tattoos, the question offered was of a speculative and tangential variety that trial courts may, within their sound discretion, opt to refuse. *See Stewart v. State*, 399 Md. at 163 (2007) (noting that questions should not be argumentative, cumulative, or tangential). Thus, we affirm the judgment of the circuit court.

III.

The final issue raised on appeal concerns the omission of expert testimony. At trial, Dorsey sought to introduce the testimony of Dr. Hawes, a forensic pathologist. Dr. Hawes was expected to testify to the trajectory of the bullet fired at Dorsey, indicating that it moved from left to right and back to front upon striking him. Dorsey contends that the circuit court erred in opting not to admit Dr. Hawes's testimony, arguing that the evidence was relevant and served to impeach the credibility of the State's witnesses. The State maintains that the testimony would have been of limited value in assisting the trier of fact, and that the exclusion was properly within the discretion of the circuit court.

In reviewing the circuit court's decision, we note the well-settled understanding that "the admissibility of expert testimony is a matter largely within the discretion of the

trial court, and its action in admitting or excluding such testimony will seldom constitute a ground for reversal." *Bryant v. State*, 393 Md. 196, 203 (2006) (quoting *Clemons v. State*, 392 Md. 339, 359 (2006)). Further, "[i]n exercising the wide discretion vested in the trial courts concerning the admissibility of expert testimony, a critical test is 'whether the expert's opinion will aid the trier of fact.'" *I.W. Berman Properties v. Porter Brothers, Inc.*, 276 Md. 1, 14 (1975) (quoting *Consolidated Mech. Contrs., Inc. v. Ball*, 263 Md. 328, 338 (1971)).

The circuit court, in deciding to exclude the defense's expert, incorporated the arguments made by the State as its reasoning. Those arguments largely mirror those now asserted by the State on appeal. The State argued that the evidence was not relevant because the information regarding the bullet trajectory had no bearing on the offense charged. The State maintained that the offenses for which Dorsey was being tried and to which Dr. Hawes' testimony was being directed—assault in the first and second degree—had already been completed, or were already in the process of being completed, when the weapon was fired. Consequently, Dr. Hawes would add nothing to assist the trier of fact. Further, the State averred that the testimony could offer nothing to impeach the testimony of its witnesses because Dr. Hawes' testimony as to the bullet's trajectory was completely consistent with the version of events they had presented.

The State's, and consequently the circuit court's, reasoning is persuasive. Had there been other evidence introduced sufficient to raise a question as to Officer Frasier's positioning at the time that Dorsey began driving toward her, then perhaps the evidence would have been relevant and admissible to resolve that dispute. However, the witness

testimony provided at trial coalesced on the point that Officer Frasier was in front of the vehicle at the time that Dorsey began driving forward. What is more, in response to the defense's argument that Dr. Hawes' testimony helps to establish the parties' relative positioning, we would note, as did the State, that Dr. Hawes' testimony was limited to the trajectory of the bullet as it struck Dorsey. It could not, however, extend to *Dorsey*'s bodily position—the position of his head, neck, or torso relative to Officer Frasier—at the time when the shot was fired. In the absence of knowledge as to Dorsey's own bodily position, evidence regarding the angle of the bullet's trajectory does little to assist the jury in coming to a fixed understanding of the parties' relative positions. Finally, on the subject of impeachment, we agree with the circuit court that Dr. Hawes' testimony provides little assistance on that front. Officer Frasier testified that the vehicle began moving toward her, and she fired as she was moving out of the vehicle's path. Even accepting, *arguendo*, a version of events where Officer Frasier fired from a position to the side or slightly behind Dorsey, that version is not incompatible with her assertions or those of the tow truck driver, who provided a consistent account. In sum, the evidence did not go to a disputed fact and would not have undermined the testimony of the State's witnesses. Remaining mindful of the substantial deference due to trial courts in their determinations and that "excluding such testimony will seldom constitute a ground for reversal," *Bryant*, 393 Md. at 203, we affirm the judgment of the circuit court.

JUDGMENTS OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. COST TO BE PAID BY APPELLANT.

The correction notice for this opinion can be found at:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/2704s18cn.pdf