UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0854

September Term, 2015

SHERNELL RIGBY

v.

STATE OF MARYLAND

Arthur,
Reed,
Raker, Irma S.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: March 31, 2017

A jury in the Circuit Court for Baltimore City convicted Shernell Rigby, appellant, of second-degree assault following an altercation that occurred at the Renaissance Harbor Place Hotel ("the Hotel") in Baltimore in December 2014. The court sentenced her to a term of imprisonment of two years, with all but sixty days suspended, to be followed by a two-year period of probation. Appellant raises two issues on appeal, the first of which we have rephrased:[1]

> 1. Did the court abuse its discretion in refusing to ask appellant's requested *voir dire* questions?
>
> 2. Did the trial court abuse its discretion in denying appellant's motion for a mistrial?

For the reasons that follow, we answer both questions in the negative and affirm the judgments of the circuit court.

BACKGROUND

On December 28, 2014, Christopher Brown was working as a valet at the Hotel. Brown testified that there is a driveway in front of the Hotel that is separated from the main road, and his job was to direct traffic, assist arriving or departing guests in the driveway, and to valet park guests' vehicles. He stated that vehicles were not permitted to park in the driveway, but he conceded that taxis and other vehicles used the driveway to pick up and/or discharge guests.

[1] Appellant's first question presented reads:

> 1. Did the trial court abuse its discretion in refusing to ask questions on *voir dire* pertaining to the presumption of innocence, the State's burden of proof beyond a reasonable doubt, and a defendant's election not to testify?

At approximately 2:00 p.m., a vehicle pulled into the driveway of the Hotel and stopped close to the front door. Brown identified appellant as the driver of this vehicle and appellant's daughter, Keisha Rigby ("Keisha"), as the passenger.[2] A few minutes after stopping, after another vehicle had pulled through the driveway and navigated around appellant's car, Brown approached appellant's vehicle and tapped on the driver's window. What followed next is subject to conflicting versions of events.

Brown testified that appellant rolled the window halfway down, and he directed her to another location so that her vehicle did not block traffic. Appellant said something in response, but Brown could not hear her very well. Brown thought appellant asked him who he was and what he wanted. Appellant rolled her window up but did not move. Again, Brown tapped on the driver's window. In response, appellant opened her door, got out of the vehicle, and confronted Brown, pushing her chest into his and forcing him backwards, screaming "[D]on't touch my fucking car, who the fuck are you, get away from me[.]"

Brown politely asked appellant to calm down and to "please stop." He testified that he extended his arms to try and create some space between them, but appellant started "swinging" at him, landing several slaps and punches to his face, knocking his glasses off. When Brown attempted to grab appellant's arms to restrain her, appellant started punching his stomach and tried to grab his testicles. At this time, Keisha joined the scuffle, leaping

[2] Keisha disputed this identification. She maintained that she was a guest of the Hotel, and her mother was picking her up there that afternoon. She identified her sister, Essence Rigby ("Essence"), as the passenger.

onto Brown's back, putting her arms around his neck, and screaming to leave her mother alone.

Brown was able to maneuver appellant back to the vehicle, where he "laid her down in the driver's seat[] so the top half of my body and the top half of her body were in the car." He then pushed off, creating some space between them. Katherine Petrovia, who was working at the front desk, recalled hearing a "loud ruckus" in the driveway and heard "loud" and "angry" women's voices. She testified that Brown was calling for help, and when she went to investigate, she saw "arms swinging" and Brown attempting to protect himself. Petrovia intervened and escorted Brown into the Hotel. Brown observed that he was bleeding and had several scratches on his face.

Keisha disputed this account. She testified that when her mother rolled her window down to speak with Brown, he angrily asked her what she was doing in "my driveway." From the lobby of the Hotel, she observed her mother get out of the vehicle and ask if she could help Brown. Then, Brown threatened her mother and punched her, and her mother acted in self-defense. Keisha testified that while she attempted to calm the situation by stepping between appellant and Brown, her sister, Essence, jumped on Brown's back. Keisha stated that during the melee, Brown put appellant in a headlock, and her mother sustained an injury to her shoulder. Hotel employees intervened, and Brown went inside the Hotel.

Shortly afterwards, Brown came back outside and asked appellant why she attacked him. In response, appellant went to the trunk of her vehicle, retrieved a caulking gun, and waved it in the air at Brown, saying, "[Y]ou got the wrong one, I don't know what the fuck

you think this is." At this time, William Campbell, a security officer at the Hotel, was in the driveway. He was concerned appellant would attack Brown with the caulking gun. Campbell also observed that Brown's face was "marked up pretty bad." Brown went back inside and later pressed charges against appellant and Keisha.

The State charged both appellant and Keisha with second-degree assault and conspiracy to commit assault. At trial, the State played portions of the Hotel's surveillance footage, which showed the altercation from two different angles, for the jury. The jury acquitted appellant of conspiracy but convicted her of second-degree assault.[3]

DISCUSSION

I. *Voir Dire* Questions

Prior to trial, appellant requested that the court ask the following questions during *voir dire*:

> 8. The Defendant is presumed innocent. Unless you are satisfied beyond a reasonable doubt of the accused's guilt solely from evidence presented in this case, the presumption of innocence alone requires you to find the accused not guilty. Is there any member of the jury panel who is unable or unwilling to uphold or abide by this rule of law?
>
> 9. In every criminal case, the burden of proving the guilt of the Defendant rests solely and entirely on the State. A Defendant has no burden and does not have to prove his innocence. Is there any member of the jury panel who is unable or unwilling to uphold and abide by this rule of law?
>
> 10. Every person accused of a crime has an absolute constitutional right to remain silent and not testify. If a defendant chooses not to testify[,] the jury may not consider his/her silence in any way in determining whether he/she is guilty or not guilty. Is there any

[3] The jury acquitted Keisha of all charges.

> member of the jury who is unable or unwilling to uphold and abide by this rule of law?

The circuit court agreed with the State's characterization of these questions as jury instructions and declined to pose them to the jury pool. The court did, however, ask the *venire* if there were any jurors who would not be able to follow the jury instructions given by the court at the conclusion of the presentation of evidence.

a. The Contentions of the Parties

On appeal, appellant contends that the court abused its discretion in refusing to ask the questions noted above. Appellant recognizes that this Court and the Court of Appeals have held that a trial court does not abuse its discretion in refusing to ask *voir dire* questions that are better left to jury instructions. Appellant contends, however, that several of our sister state courts have found that trial courts abuse their discretion in refusing to ask questions of this type. Moreover, appellant argues that recent decisions from the Court of Appeals have rendered *Twining v. State*, 234 Md. 97 (1964), and its progeny irrelevant.

The State maintains that *Twining* and its line of cases is still good law and is still relevant. The State contends that no decision from this Court or the Court of Appeals has altered case law concerning this type of *voir dire* question. As such, the State urges us to reject appellant's argument as meritless.

b. Standard of Review

"*Voir dire* is 'the process by which prospective jurors are examined to determine whether cause for disqualification exists[,]'" and "'is critical to assure that the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration

of Rights guarantees to a fair and impartial jury will be honored.'" *Brice v. State*, 225 Md. App. 666, 676 (2015) (citations omitted), *cert. denied*, 447 Md. 298 (2016). "An appellate court reviews for abuse of discretion a trial court's decision as to whether to ask a *voir dire* question." *Pearson v. State*, 437 Md. 350, 356 (2014) (citing *Washington v. State*, 425 Md. 306, 314 (2012)).

A court abuses its discretion "'where no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles.'" *Nash v. State*, 439 Md. 53, 67 (2014) (quoting *Alexis v. State*, 437 Md. 457, 478 (2014)). Stated another way, "an abuse of discretion occurs when a decision is 'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Consol. Waste Indus., Inc. v. Standard Equipment Co.*, 421 Md. 210, 219 (2011) (quoting *King v. State*, 407 Md. 682, 711 (2009)).

c. Analysis

The Court of Appeals has held that "a trial court must ask a *voir dire* question if and only if the *voir dire* question is 'reasonably likely to reveal [specific] cause for disqualification[.]'" *Pearson*, 437 Md. at 357 (quoting *Moore v. State*, 412 Md. 635, 663 (2010)). The Court has recognized two categories of specific causes: "(1) a statute disqualifies a prospective juror; or (2) a 'collateral matter [is] reasonably liable to have undue influence over' a prospective juror." *Id.* (quoting *Washington*, 425 Md. at 313).

We agree with the State that this Court and the Court of Appeals have held that a court does not abuse its discretion in refusing to ask *voir dire* questions concerning areas of law that will be covered by jury instructions. *See Stewart v. State*, 399 Md. 146, 162-63

(2007) (holding that such *voir dire* questions are "disfavored"); *State v. Logan*, 394 Md. 378, 398-99 (2006); *Thompson v. State*, 229 Md. App. 385, 404–05 (2016); *Marquardt v. State*, 164 Md. App. 95, 144 (2005) ("We begin 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."); *Baker v. State*, 157 Md. App. 600, 616 (2004) ("'The rules of law stated in the proposed questions were fully and fairly covered in subsequent instructions to the jury. It is generally recognized that it is inappropriate to instruct on the law at this stage of the case [*voir dire*], or to question the jury as to whether or not they would be disposed to follow or apply stated rules of law.'" (Quoting *Twining*, 234 Md. at 100)). We, accordingly, find appellant's cited out-of-state cases unpersuasive.

Appellant does not contend that the circuit court failed to properly instruct the jury as to these legal matters. Rather, appellant argues that we should abandon *Twining* and its line of cases, citing: *Pearson*, *supra*; *Moore*, *supra*; and *State v. Shim*, 418 Md. 37 (2011), for this proposition. We note that the Court of Appeals did not overrule *Twining* in those cases; in fact, the Court did not even discuss *Twining*. Indeed, those cases did not address *voir dire* questions akin to the ones at issue in this case.[4] We decline to conclude that the

[4] In *Moore*, the Court held that the circuit court abused its discretion in refusing to ask the potential jurors whether they would view the testimony of a witness for the defense with more skepticism than a witness for the prosecution merely because the witness was a defense witness. 412 Md. at 663-64. *Shim* and *Pearson* both addressed "strong feelings" *voir dire* questions, that is, whether any potential jurors had strong feelings about a charged crime. *Pearson*, 437 Md. at 363; *Shim*, 418 Md. at 54-55, *abrogated by Pearson*, 437 Md. at 361 (noting that the phrasing of the question in *Shim* needed to be altered). *Pearson* also

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Court abrogated *Twining* and its line of cases when they are not so much as even mentioned in the cases cited for that proposition. Moreover, it is the province of the Court of Appeals, not this Court, to change the common law and overrule its own decisions. *See Evergreen Assocs., LLC v. Crawford*, 214 Md. App. 179, 191 (2013) (citing *Frey v. Frey*, 298 Md. 552, 557 (1984)); *Baker*, 157 Md. App. at 618 ("In any event, it is up to the Court of Appeals, not this Court, to decide . . . that the reasoning of *Twining* is 'now outmoded.'").

Accordingly, we do not perceive an abuse of discretion in the circuit court's refusal to ask the requested *voir dire* questions addressing rules of law covered by jury instructions.

II. Motion for Mistrial

After the jury had retired to deliberate, it sent a note to the court stating, "Jury is unable to reach verdict on second degree assault for S. Rigby, due to argument/split over self defense." The circuit court proposed instructing the jury to continue deliberating. Appellant moved for a mistrial, contending that the jury note revealed deadlock. The court denied the motion and instructed the jury to continue deliberating.

a. The Contentions of the Parties

Appellant argues that the court abused its discretion in denying this motion, reiterating trial counsel's argument as to deadlock. Appellant contends that the court's instruction "created the risk" of jury coercion, *i.e.*, that jurors would be pressured to change their votes solely for the sake of ending deliberations. The State maintains that appellant's

concerned whether a court abuses its discretion in refusing to ask potential jurors whether they have been the victim of a crime or members of a law enforcement agency. 437 Md. at 359, 367.

argument is based on speculation, and there was no evidence of coercion. Moreover, the State contends that consideration of the totality of the circumstances of the jury deliberations leads to the conclusion that the jury was not, in fact, deadlocked, and continued deliberations led to a valid, unanimous verdict.

b. Standard of Review

We review the circuit court's determination as to a mistrial motion for an abuse of discretion. *Nash*, 439 Md. at 66-67. The Court of Appeals has remarked that the trial judge's decision in this context is "afford[ed] generally a wide berth." *Id.* at 68. Indeed, "the determination to have a jury continue deliberating or to declare a mistrial is a matter largely within a trial judge's discretion." *Holmes v. State*, 209 Md. App. 427, 449 (2013). *See also Curtin v. State*, 165 Md. App. 60, 73 (2005) ("A trial judge's discretion when considering whether to declare a mistrial when the jury is deadlocked is broad, and the trial judge's decision will be accorded great deference by a reviewing court."), *aff'd*, 393 Md. 593 (2006). This Court has held that an analysis of a mistrial motion in a deadlock situation "depends on the circumstances of the particular case." *Browne v. State*, 215 Md. App. 51, 57 (2013) (citing *Mayfield v. State*, 302 Md. 624, 632 (1985)).

c. Analysis

This Court cited with approval a list of factors used in the District of Columbia Court of Appeals in considerations of jury coercion. *Browne*, 215 Md. App. at 73. These include

> the degree of isolation of a holdout juror; whether the court knows the numerical breakdown of the deadlock and, more specifically, whether the holdout juror is the sole holdout; whether the holdout juror has

> been identified to the court and knows that the court is aware of his or her identity; whether the holdout juror has been identified in a note only or in open court; whether the other jurors may feel they are bound to the positions they have taken; and whether a modified *Allen*[5] charge has been given.

Id. (footnote added). An appellate court may also consider the length of the jury's deliberations, "the length of the trial, the nature or complexity of the case, the volume and nature of the evidence, the presence of multiple counts or multiple defendants, and the jurors' statements to the court concerning the probability of agreement." *Thomas v. State*, 113 Md. App. 1, 11 (1996) (quoting WAYNE R. LAFAVE, 6 CRIMINAL PROCEDURE, § 24.6(d) at 1044 n.13 (2d ed. 1992)).

Mistrials can be declared in instances of "manifest necessity," and a "genuinely deadlocked jury is considered the prototypical example of a manifest necessity for a mistrial." *State v. Fennell*, 431 Md. 500, 516 (2013). The Court of Appeals has noted, however, that the "term 'genuinely deadlocked' suggests . . . 'more than an impasse; it invokes a moment where, if deliberations were to continue, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors.'" *Id.* (quoting *United States v. Razmilovic*, 507 F.3d 130, 137 (2d Cir. 2007)). Recognizing that "declaring a mistrial when a jury is not hopelessly deadlocked undermines judicial efficiency," this Court has stated that "it is **essential** that deadlocked jurors be allowed to continue deliberating when the deadlock may properly be

[5] An *Allen* charge refers to *Allen v. United States*, 164 U.S. 492, 501 (1896). In Maryland, a court may give a "modified" *Allen* charge to remind the jurors of their duty to deliberate. *See Nash*, 439 Md. at 90-91.

broken, but not when it is likely that the deadlock will be broken by coercion[.]" *Browne*, 215 Md. App. at 73 (emphasis added).

In this case, considering the totality of the circumstances of the jury deliberations, we are not persuaded that the court abused its discretion in ordering the jurors to continue deliberating in response to the second jury note. In a trial involving two defendants, the court received evidence over a span of a day and a half, which included the Hotel's surveillance footage and conflicting versions of events. Approximately one hour after beginning deliberations, the jury sent a note asking for clarification as to second-degree assault and self-defense. In response, without objection from the parties, the court reiterated the jury instructions as to these elements.

Approximately a half-hour later, the jury submitted the note prompting appellant's motion for mistrial. The note stated: "Jury is unable to reach verdict on second degree assault for S. Rigby, due to argument/split over self defense." The note does not reveal the breakdown of the split, nor does it identify the holdout juror(s). The court proposed instructing the jurors to continue deliberating and to not reveal a numerical split, should the jury remain deadlocked. In response, appellant's counsel argued: "I mean, it's not the *Allen* charge, but it's kind of in the spirit of the *Allen* charge, which is my concern that it's not going to be a – that the verdict will come out coerced one way or another, and I don't think anybody wants that." In denying appellant's motion for a mistrial, the court reasoned: "I don't think the jury's been deliberating appreciably long enough. It's just barely past 3:00 p.m. They got released, I think, it was after noon, so I'm going to deny your request at this time." In providing a written response to this note, the court instructed the jury to

continue deliberating "at this time," which the court suggested would alert the jury "that they won't be held there until kingdom come if they can't reach a conclusion."

The jury submitted a third note approximately a half-hour later, seeking clarification of the definition of "reasonable force" in the instruction for self-defense. Without objection from the parties, the court provided a written response instructing the jury that "reasonable force" depends on the circumstances of the case. The jury submitted another note a short time later, informing the court that a deadlock still persisted. Prior to any discussion with counsel or a response from the court, however, the jury advised the court that it had reached a unanimous verdict.

From this, we are not persuaded that the jury was "genuinely deadlocked" at the time it submitted the second jury note. Rather, the jury may have been grappling with appellant's self-defense claim and the facts of the case, as evidenced by the first and third jury notes seeking clarifications of the self-defense instruction and elements of second-degree assault. We, therefore, perceive no abuse of discretion in the court's decision to deny appellant's motion for mistrial and order the jurors to continue deliberating.

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