Circuit Court for Baltimore City
Case No. 120168052

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 179

September Term, 2022

EDWARD G. FOSTER

v.

STATE OF MARYLAND

Friedman,
Zic,
Wright, Alexander Jr.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: May 19, 2023

*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. R. 1-104.

**At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Edward G. Foster was convicted in the Circuit Court for Baltimore City of second-degree assault, illegal possession of a regulated firearm, wearing, carrying, and transporting a handgun, and reckless endangerment. Foster appeals on two grounds. *First*, he argues that the circuit court erred when it gave the jury a consciousness of guilt instruction based on phone calls Foster made while in detention awaiting trial. *Second*, he argues that his sentence for reckless endangerment is an illegal sentence because it arose from the same conduct as the conviction for second-degree assault. For the reasons that follow, we affirm in part and vacate the sentence for reckless endangerment.

BACKGROUND

The narrative account of the day on which Charles Brown was shot came primarily from statements by Eunique Nichols, the mother of Foster's children and a reluctant witness at trial. That day, Nichols was sitting in the front passenger seat of her Mercury Villager van while Foster drove. Foster stopped the van at a gas station parking lot. A group of men approached the van, and one of the men eventually entered the van. Foster drove the van away, and during the drive, Nichols heard "fussing and tussling" in the back of the van. Nichols heard statements suggesting a dispute between Foster and Brown over money. An unidentified man sat next to Brown in the van's middle seat, holding Brown at gunpoint. Both Foster and the unidentified man threatened to shoot Brown. While still driving, Foster pointed a gun toward the back seat and fired two shots. Nichols testified she was too frightened to turn around to see exactly what happened behind her. When the van stopped, Nichols jumped out and ran to her brother's house.

At Foster's trial, the circuit court ordered a body attachment to compel Nichols to testify. Nichols was the only eyewitness to the shooting to testify at trial.

After Nichols's testimony, the State played recordings of several calls that Foster made to Nichols while Foster was detained awaiting trial. These recordings included the following exchanges:

On May 7, 2020:

Foster: He ain't going to come to court.

Nichols: Oh, that's good…

* * *

Foster: You hear me? But I know one thing, if you hear anything—you better not show up either and say it again.

On June 25, 2020:

Foster: I'm waiting to get my motions and discovery packets to see who told on me and who said what to what. When I get that back, then I'll know what I'm up against for real, for real. But like I said, even if you had even said something and you ain't… tell me that you said it, I'm going to find out that you said it and the worst-case scenario, they're going to try to put a body attachment warrant on you to get you to come to court. You ain't even gotta do—you ain't even got to come to court. I'm not even going to say nothing if I find out who told on me.

Nichols: They're probably scared.

Foster: Like, I don't—I'm just telling you, they're going to try to put a body attachment warrant on you. A body attachment warrant is they're going to try to grab you up and hold you until I go to court that way you ain't jumping about. But when I get a court date and I tell you, you're going to have to go missing in action. You heard me?

Nichols: Yes, yo.

* * *

Foster: So if you or any people said something about me, they're going to—this is what they're going to do, even if you don't come to court the first time. Oh, they're going to do what they call a body attachment warrant. The body attachment warrant is what's going to come get you in custody and hold you until my court date. That's what that's going to be. So you're going to have to be missing in action on the court date not at your house.

On June 27, 2020:

Foster: I know somebody told on me, either you or Mika told on me, huh? Huh, huh? I know that for sure. I'm waiting to get my motion discovery. It's going to say the [person's] name in there.

Nichols: Uh-huh.

Foster: It's going to say the person's name in there who told on me. Whatever they said to the police, it's going to be inside of my motion because I got the right to face my accuser. So if a person is saying I did something, I got the right to face them. It's going to be in there. It's not going to be hidden and everything that you said to the police is going to be in there, left and right. Every single thing.

I'm telling you—this is what I'm telling you. Like you said, "Yo, I ain't say nothing like that." This is what I'm telling you. I'm not even worried about if you did. You get what I'm saying? I'm not worried about if you did or you didn't. I just know if you don't show up at trial—whatever you said to them, if you don't show up at court it's just going to get thrown out. That's all I'm saying. I don't even care if you did or you didn't, but I know you did because that's the only way it came back to me. Right?

Detective Anthony Forbes, who interviewed Nichols twice before speaking with Foster when he was arrested, verified the identities of each participant in the calls.

After the presentation of evidence, and over Foster's objection, the circuit court read the following instruction to the jury:

> You have heard that the Defendant intimidated a witness, Ms. Eunique Nichols, in this case. Intimidation is not enough by itself to establish guilt but may be considered as evidence of guilt. You must first decide whether the Defendant intimidated Ms. Nichols in this case and if you find that the Defendant did intimidate Ms. Nichols in this case, you must decide whether that conduct shows a consciousness of guilt.

Foster was convicted of second-degree assault, illegal possession of a regulated firearm, wearing, carrying, and transporting a handgun, and reckless endangerment, and was acquitted of the remaining charges. Foster was sentenced to fifteen years for the illegal possession conviction, a consecutive ten years for the second-degree assault conviction, a consecutive three years for the wearing, carrying, and transporting a handgun conviction, and a concurrent three years for the reckless endangerment conviction, for a total sentence of twenty-eight years. He then noted this timely appeal.

ANALYSIS

I. The Consciousness of Guilt Instruction

Foster first argues that the circuit court erred in instructing the jury on consciousness of guilt because the instruction is not applicable. For criminal trials, Maryland Rule 4-325(c) provides that "[t]he court may … instruct the jury as to the *applicable* law and the extent to which the instructions are binding." MD. R. 4-325(c) (emphasis added). A consciousness of guilt jury instruction is meant to assist the jury in deciding (1) whether a particular post-crime behavior occurred, and, if it occurred, (2) whether the post-crime behavior was motivated by consciousness of guilt. *Rainey v. State*, 480 Md. 230, 256 (2022). A consciousness of guilt instruction "is applicable if the evidence is sufficient to permit a jury to find its factual predicate." *Id.* at 255.

Maryland courts have adopted a four-prong test for determining whether there is sufficient evidence to support a consciousness of guilt jury instruction. *Id.* at 257. In the context of flight from police, the Supreme Court of Maryland (formerly the Court of Appeals)[1] held:

> [T]he following four inferences must reasonably be able to be drawn from the facts of the case as ultimately tried: that the behavior of the defendant suggests flight; that the flight suggests a consciousness of guilt; that the consciousness of guilt is related to the crime charged or a closely related crime; and that the consciousness of guilt of the crime charged suggests actual guilt of the crime charged or a closely related crime.

Thompson v. State, 393 Md. 291, 312 (2006). A wide range of post-crime conduct may be admissible as circumstantial evidence of consciousness of guilt. For example, in *Rainey v. State*, our Supreme Court adapted the same four-prong test to apply to the defendant's post-crime conduct of destruction of evidence by way of altering his appearance. 480 Md. at 257-60. Thus, admissible conduct might include the destruction or concealment of evidence, flight from police officers or from legal proceedings, or intimidation of witnesses. *Id.* at 257-59.

For a consciousness of guilt instruction to apply in the context of witness intimidation, adapting the test from *Thompson* and *Rainey*, there must be at least "some evidence" to support the following four inferences:

1. The behavior of the defendant suggests witness intimidation;

[1] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See also* MD. R. 1-101.1(a).

2. The witness intimidation suggests a consciousness of guilt;
3. The consciousness of guilt relates to the crime charged or a closely related crime; and
4. The consciousness of guilt suggests actual guilt of the crime or closely related crime.

Rainey, 480 Md. at 257-58. Whether there is "some evidence" sufficient to apply a jury instruction is a question of law that we review independently. *Id.* at 255.

Applying the four-prong test, we address whether there was some evidence to support each of the four inferences sufficient to apply the consciousness of guilt instruction. Foster's principal argument concerns the *first* prong, whether his behavior suggested witness intimidation. Foster argues that his behavior could not have constituted intimidation because he never made an express threat of what would happen if Nichols were to appear in court to testify against him, nor was there evidence that Nichols was put in fear. We disagree. Whether there is "some evidence" to support an inference that behavior suggests witness intimidation,[2] and thus to get the question to the jury, is a "low and minimum threshold." *Rainey*, 480 Md. at 258 (cleaned up). Here, Foster said to Nichols, "if you hear anything—you better not show up either and say it again," and later said "I'm not even going to say nothing if I find out who told on me." Foster's statements were sufficient for a jury to infer that Foster meant that Nichols would suffer negative consequences if she were to testify against him, or that he would retaliate against the person

[2] We decline Foster's invitation to define "witness intimidation" with more specificity. Were we to, we would risk creating paint-by-number directions for would-be intimidators. Instead, we leave it to the jury to determine whether the behavior described was intimidating.

who told on him. Therefore, we hold that there was sufficient evidence for a reasonable jury to infer that Foster's behavior suggested witness intimidation.[3]

We turn to the remaining prongs. As to the *second*, there is some evidence to support that Foster's statements suggest consciousness of guilt. He stated several times that he wanted to know "who told on me." This suggests a consciousness of guilt to satisfy the second prong. *Third*, there is some evidence to show that the consciousness of guilt relates to the crime charged. Foster implored Nichols not to show up at trial because "if you don't show up at court it's just going to get thrown out." This provides the linkage needed to satisfy the third prong. *Fourth*, there is some evidence to show that Foster's consciousness of guilt suggests actual guilt of the crime charged. That is, because Foster was concerned that no one testify against him to ensure his charges would be dismissed, a reasonable jury could infer that his consciousness of guilt suggested actual guilt. The fourth prong is thus satisfied. We hold, therefore, that there was sufficient evidence to apply the consciousness of guilt instruction based on Foster's phone calls to Nichols.

Because we hold that there was sufficient evidence to give the consciousness of guilt instruction, the only remaining question is whether the circuit court abused its discretion in doing so. We will not disturb the circuit court's decision to give a jury instruction unless

[3] Foster also argues that the fact that the consciousness of guilt instruction came from the circuit court unfairly gave weight to the notion that he in fact intimidated Nichols. Again, we disagree. The circuit court instructed the jury that it was to decide in the first place whether Foster's behavior actually suggested witness intimidation. *Id.* The instruction did not require the jury to find that Foster intimidated Nichols. *Rainey*, 480 Md. at 256.

it was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Appraicio v. State*, 431 Md. 42, 51 (2013). A circuit court may abuse its discretion in giving a consciousness of guilt instruction if, for example, a defendant has a reason for their post-crime conduct consistent with innocence of the crime charged, but cannot explain the reason without prejudicing the jury against them. *E.g.*, *Thompson v. State*, 393 Md. 291, 294-95, 315 (2006) (defendant charged with attempted first-degree murder could not be expected to explain that he fled from police because he was in possession of crack cocaine). Because Foster does not offer an alternative explanation for his post-crime conduct consistent with innocence, however, we hold that the circuit court did not abuse its discretion in that regard.

Here, we hold that the circuit court's decision to instruct the jury on consciousness of guilt based on witness intimidation was reasonable. Nichols was sitting beside Foster when the shooting occurred. Moreover, the fact that Nichols appeared in court subject to a body attachment warrant supports the circuit court's reasoning that she was in fact intimidated because she did not show up to court voluntarily. The circuit court, therefore, did not err in giving the consciousness of guilt instruction.

II. The Reckless Endangerment Sentence

Foster next argues that the circuit court erred by imposing sentences for both second-degree assault and reckless endangerment because both crimes arose out of the same conduct. The State, in its brief and at oral argument, agrees. "Offenses merge and separate sentences are prohibited when … a defendant is convicted of two offenses based on the same act or acts and one offense is a lesser-included offense of the other." *Nicolas*

v. State, 426 Md. 385, 401 (2012). Here, the convictions for both second-degree assault and reckless endangerment were based on Foster shooting Brown. Because reckless endangerment is a lesser-included offense of second-degree assault, the sentence for reckless endangerment must merge into that for second-degree assault. We, therefore, vacate the sentence imposed for reckless endangerment.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS AFFIRMED IN PART AND VACATED IN PART. COSTS TO BE DIVIDED EQUALLY BETWEEN THE PARTIES.