UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0582

September Term, 2014

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PHILIP J. SWEITZER

v.

STATE OF MARYLAND

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Eyler, Deborah S.,
Arthur,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

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Opinion by Arthur, J.

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Filed: May 26, 2015

This case concerns the conviction of Philip J. Sweitzer for theft of property in an amount greater than $10,000. Sweitzer, an attorney who was suspended by the Attorney Grievance Commission on September 22, 2014, because of the conviction at issue here, represented Dr. Allan Tsai as a plaintiff in a disability claim and as a defendant in a copyright infringement claim in 2011 and 2012. After Sweitzer stole the money that his client was to receive in the disability settlement and the money that his client had given him to settle the copyright claim, Sweitzer made excuses for months in an attempt to hide the crime.

Sweitzer was tried on October 7, 2013, in a bench trial in the Circuit Court for Howard County. The judge found Sweitzer guilty and sentenced him to five years in prison, suspending all but one year of the sentence. Sweitzer received credit for time served, and at the time of this appeal, he is free from prison.

## QUESTIONS PRESENTED

Sweitzer presents this court with six lengthy questions; we have consolidated those questions as follows:

1. Whether the evidence was insufficient to support Sweitzer's conviction for theft?

2. Whether Sweitzer was entitled to be present at a post-verdict discussion between the judge and counsel?

3. Whether the court abused its discretion by revoking Sweitzer's bond?

4. Whether the State imposed cruel and unusual punishment against Sweitzer while he was in custody?[1]

[1] We have reproduced Sweitzer's questions in the appendix to this opinion.

We answer in the negative to each question and affirm the conviction.

## FACTUAL AND PROCEDURAL HISTORY

Viewed in the light most favorable to the prosecution as the party that prevailed below (*Paz v. State*, 125 Md. App. 729, 736 (1999) (citing *Wiggins v. State*, 324 Md. 551, 567 (1991)), the facts elucidated during Sweitzer's theft trial are as follows:

In early 2011, Dr. Allan Tsai hired Sweitzer for assistance in an application for disability benefits from an insurer, Penn Mutual. Sweitzer agreed to represent Dr. Tsai for the flat fee of $4,000, which Dr. Tsai paid in February 2011.

Following an administrative hearing, the insurance company agreed to reopen the claim, which it had previously denied. Sweitzer requested an additional $6,000 as compensation for the additional work that would be required of him, and Dr. Tsai paid that sum in February 2012.

Dr. Tsai's disability claim relied on a letter from a Dr. Gerwin, stating that Dr. Tsai was totally disabled. However, at some point while Dr. Tsai's claim was pending, Dr. Gerwin reversed his medical opinion. Dr. Tsai testified that after Gerwin's reversal, he experienced "a lot of pressure" from Sweitzer to settle the case. Sweitzer informed Dr. Tsai that Dr. Gerwin's reversal gave rise to a claim that Dr. Tsai should consider pursuing.

During the Penn Mutual representation, Dr. Tsai hired Sweitzer for help with a copyright dispute with a film company, Nu Image, which had asserted a claim against Dr. Tsai for illegally downloading movies from the internet. For representation in that matter,

Sweitzer charged a flat fee of $1,000, which Dr. Tsai paid. In January 2012, Sweitzer informed Dr. Tsai that Nu Image was willing to settle its claim for $2,000; Dr. Tsai sent Sweitzer $2,000 to settle the case.

Soon thereafter, in early 2012, Sweitzer informed Dr. Tsai that Penn Mutual had offered to settle the disability claim for an amount ranging from $40,000 to $50,000. When Dr. Tsai said that he was consulting with others about the reasonableness of the offer, Sweitzer responded by questioning his loyalty, suggesting that the consultations might breach the attorney-client privilege, and implying that he would withdraw as Dr. Tsai's attorney. Dr. Tsai eventually agreed to settle for $54,000.

On May 21, 2012, Dr. Tsai executed the settlement agreement, which stated that Penn Mutual would make the check out to Sweitzer. According to Dr. Tsai, Sweitzer said that he had received the settlement check from Penn Mutual in early June 2012.

On June 17, 2012, Sweitzer sent Dr. Tsai a "distribution sheet," which stated that, after deducting expenses and attorneys' fees, Dr. Tsai would receive $54,881.93. Sweitzer did not, however, send the funds.

Email conversations admitted at trial, as well as Dr. Tsai's testimony, chronicle the doctor's repeated attempts to get his settlement proceeds from Sweitzer in the following months. This evidence also reflects Sweitzer's collection of excuses and the litany of impediments that allegedly prevented him from delivering Dr. Tsai's funds.

On June 19, 2012, Sweitzer sent an email in which he offered to wire Dr. Tsai the money that he was owed. Although Dr. Tsai accepted the offer and gave Sweitzer his banking information, Sweitzer did not send the funds.

Instead, on June 22, 2012, Sweitzer emailed Dr. Tsai that he would wire the settlement proceeds. Sweitzer said, however, that before he wired the entire amount, he would send a test transfer of $100 "to test that the electronic conduit is valid." In this same email, Sweitzer asked Dr. Tsai for permission to "temporarily" hold "about half [of the] funds in escrow to prefund a litigation war chest" for the case against Dr. Gerwin, because, "This is going to be an expensive case to litigate." Dr. Tsai agreed to the request to "temporarily" hold about half of the Penn Mutual settlement, but he testified that he never received the $100 transfer.

Dr. Tsai testified that within a couple of weeks he retracted his authorization for Sweitzer to retain half of the Penn Mutual settlement. The doctor told Sweitzer that if they proceeded with litigation against Dr. Gerwin, it would have to be on a contingent fee basis. According to Dr. Tsai, Sweitzer agreed.

During the month of July 2012, Sweitzer grew increasingly evasive. On July 6, 2012, Sweitzer sent Dr. Tsai an email stating that he had resolved problems with the electronic transfer and that the doctor would receive his money soon.

When the funds still did not arrive, Dr. Tsai tried to meet with Sweitzer. On July 17, 2012, Sweitzer told Dr. Tsai that he planned to bring the check to a meeting on that upcoming Saturday (July 21, 2012), only to cancel the meeting, blaming bad vision and an

inability to drive. On July 26, 2012, Sweitzer cancelled another meeting because of his eye condition and the unavailability of his driver. On July 27, 2012, Sweitzer and Dr. Tsai agreed to meet the next day in the early afternoon, but at the appointed time, Sweitzer emailed Dr. Tsai and pushed the meeting back another day. Dr. Tsai responded by offering to drive to meet Sweitzer to pick up the check, but Sweitzer told Dr. Tsai not to drive to his home because it was not a suitable location for a meeting.

Dr. Tsai testified that on July 30, 2012, Sweitzer came to his home for dinner, but did not deliver the check. Instead, Sweitzer informed Dr. Tsai that the Baltimore court system had frozen his escrow account. According to Dr. Tsai, Sweitzer explained that he had used $60,000 in settlement proceeds from another case to pay personal expenses before he had gotten a signed agreement allowing him to distribute the funds. Sweitzer said that he would make a partial payment of $20,000 within two weeks and would pay the balance by Labor Day. Dr. Tsai testified that he was willing to wait because he felt sorry for Sweitzer.

Sweitzer did not pay the $20,000 within two weeks. Nor did he pay the balance by Labor Day.

On September 7, 2012, Dr. Tsai and Sweitzer had a face-to-face meeting, at which Sweitzer gave his client a personal check for $20,000, but instructed him to refrain from depositing the check until September 14 or 15, 2012. On September 15, 2012, Dr. Tsai deposited the check, but it bounced. Dr. Tsai told Sweitzer about the bounced check, and Sweitzer explained that the bank had extended a hold until September 26, 2012. Sweitzer's

bank records, however, show that when he wrote the $20,000 check, the account from which the check was issued had a balance of only $1,500.

At trial, Dr. Tsai's wife, Kate Tsai, testified that she spoke with Sweitzer on September 21, 2012. Ms. Tsai said that she demanded that Sweitzer deliver the money by the upcoming Friday, September 22, 2012. According to Ms. Tsai, Sweitzer responded that on the next day he was going to have a "special meeting," at which he would "collect on a big amount of money," which would "change everything." Ms. Tsai said that she hung up on him.

When the money did not arrive on Friday, September 22, 2012, Dr. Tsai sent Sweitzer another email the following day; that email ended with a "personal plea" for payment by the following Friday. On September 24, 2012, Sweitzer responded with an apology, a representation that he would refund $5,000 more than he owed because he was "altruistic," and a statement that he would not have the funds by the following Friday. Sweitzer added an ambiguous statement about funds in Texas, the need to get five years of tax records "cleaned up," and "the mess" that he had "created with [his] accountants."

On September 25, 2012, Sweitzer sent Dr. Tsai a lengthy email, in which he railed against "endemic and systemic corruption" in the justice system, claimed to have suffered a traumatic brain injury in 2004, and speculated that he was experiencing "neuropsychiatric-driven mania." In the middle of the email, Sweitzer wrote: "I've had a couple of quiet

drinking binges recently. I've never been one to do that. And I didn't just go through $50,000 Allan, I went through $90,000 in three months."

Dr. Tsai requested that Sweitzer deliver the records related to the Penn Mutual claim and the Nu Image lawsuit, but Sweitzer did not comply. Dr. Tsai soon learned that Sweitzer had not settled the Nu Image copyright claim even though he had sent Sweitzer the $2,000 to fund the settlement many months earlier. Sweitzer admitted that he had never sent the money to Nu Image.

In October 2012, Dr. Tsai hired a new attorney for the Nu Image case; the new lawyer settled the claim for $2,000 in a few weeks. The new lawyer was, however, unable to obtain any of Dr. Tsai's money from Sweitzer.

The State introduced bank records showing the balance of Sweitzer's IOLTA ("Interest on Lawyer Trust Accounts") account from the time he deposited Dr. Tsai's $54,000 settlement check through October 2012. At the beginning of June, Sweitzer had $13.25 in the account. He made one deposit during the month of June – the $54,000 check from Penn Mutual. He withdrew nearly all of the $54,000 in June, leaving a balance of only $977.44 at the end of the month. Over the next three months, the account balance exceeded $2,500 only for three days in August 2012, when Sweitzer deposited (and then promptly withdrew) $7,550.

Sweitzer also testified at trial. He claimed that he was entitled to keep the Penn Mutual settlement money as an earned fee in the Nu Image matter, in which, he said, Dr. Tsai

faced the prospect of criminal prosecution. He also claimed that Dr. Tsai had consented to his use of the Penn Mutual settlement to fund litigation against Dr. Gerwin. Sweitzer admitted that he and his client had agreed to pursue the Gerwin litigation on a contingent-fee basis, but he claimed that Dr. Tsai had orally agreed to use the Penn Mutual settlement proceeds to compensate him for his time until he had drafted a complaint. Sweitzer admitted, however, that he had no documentation of either arrangement. He also admitted that he had spent only about 13 hours on the Gerwin matter.

Sweitzer's testimony conflicted with Dr. Tsai's regarding the $20,000 check that Sweitzer gave to the client in September. Sweitzer said that Dr. Tsai's wife had insisted that Dr. Tsai ask Sweitzer for the money, but that Dr. Tsai was "very specifically aware the money was gone." During his testimony, when Sweitzer was asked whether "there was ever a time when [he] intended to take money from Dr. Tsai," Sweitzer replied, "No."

At the end of the evidence, the court delivered an oral opinion, in which it found Sweitzer guilty of theft. In reaching its decision, the court found the Tsais "to be credible," but found that Schweitzer's testimony had "a great lack of credibility on the crucial points of his entitlement to the money and his reasons for not turning over the money." The court specifically found that Dr. Tsai was entitled to the money by mid-June 2012, "and certainly no later than September of 2012"; that Sweitzer, beyond a reasonable doubt, "willfully and knowingly" deprived Dr. Tsai of his money and intended to do so; and that Sweitzer had "no good faith claim of right to the property."

## DISCUSSION

### I. Sufficiency of the Evidence

Sweitzer challenges the validity of his conviction by arguing that the State proved neither the precise value of the theft nor that Sweitzer possessed the requisite *mens rea*, and that the Court relied on erroneous factual findings. While Sweitzer presents these arguments under separate headings, we address them together because they deal with the single issue of whether the State produced sufficient evidence to support his conviction of the crime of theft of property in an amount greater than $10,000.

#### A. Standard of Review

The standard for reviewing a sufficiency of the evidence claim in an action tried without a jury is well-established. The question before this Court is not whether the evidence should have or probably would have persuaded the majority of fact finders. *Breakfield v. State*, 195 Md. App. 377, 392-93 (2010). Rather, after viewing both the evidence and all inferences fairly deducible from the evidence in a light most favorable to the State, we ask whether "'*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Facon v. State*, 375 Md. 435, 454 (2003) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis from *Jackson*); *see also Donati v. State*, 215 Md. App. 686, 718, *cert. denied*, 438 Md. 143 (2014); *Alston v. State*, 177 Md. App. 1, 41 (2007). We conclude that the State presented sufficient evidence to support Sweitzer's conviction.

**B. The Charge**

Sweitzer was charged with and convicted of violating Maryland's consolidated theft statute for theft of property or services with a value greater than $10,000. Md. Code (2002, 2012 Repl. Vol.), § 7-104(g)(1)(ii) of the Criminal Law Article ("CL"). This consolidated statute creates a single statutory crime in place of the several offenses that, at common law, were distinguishable by subtleties. *See Jones v. State*, 303 Md. 323, 333 (1985) (detailing rationale behind Maryland's adoption of consolidated theft statute).

Although the statute abolishes the distinction between the common-law theft offenses, it still enumerates several means of committing a theft – *e.g.*, by obtaining or exerting unauthorized control over property, by obtaining control over property by deception, by possessing stolen property, by obtaining control over property known to have been lost, mislaid, or delivered by mistake, etc. *See* CL § 7-104(a)-(d). It is unclear from the indictment which specific means the State charged Sweitzer with employing. We are untroubled by this ambiguity, however, because the indictment need not identify the particular method of theft. *See Jones*, 303 Md. at 338-40. Based on our review of the evidence adduced at trial, we are satisfied that Sweitzer was convicted under § 7-104(a), which concerns "[u]nauthorized control over property."

Section 7-104(a) states the elements of the offense:

> A person may not willfully or knowingly obtain or exert unauthorized control over property, if the person:
>
> (1) intends to deprive the owner of the property;

(2) willfully or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; *or*

(3) uses, conceals, or abandons the property knowing the use, concealment, or abandonment probably will deprive the owner of the property.

Viewing the evidence in this case in the light most favorable to the State, a rational finder of fact could find, beyond a reasonable doubt, that Sweitzer willfully or knowingly exerted unauthorized control over Dr. Tsai's property (specifically, the Penn Mutual settlement and the funds to settle with Nu Image) and that he intended to deprive Dr. Tsai of that property.

**C. Evidence of Intent**

Sweitzer contends that the State failed to prove the element of intent because he says he had obtained authorization from Dr. Tsai "to retain and use" the settlement funds as payment for ongoing legal work. The State responds that Sweitzer's intent is evidenced by his stalling tactics, as well as his attempt to make a partial payment with a personal check (which bounced). The State adds that even if Sweitzer obtained authorization to use the Penn Mutual settlement funds to pay his own legal fees, that authorization extended to only half of the settlement funds (and to none of the Nu Image funds). Our review of the evidence confirms that it was sufficient to establish this element of the crime of theft.

As the State points out, Dr. Tsai, for a time, authorized Sweitzer to use half of the $54,000 in Penn Mutual settlement proceeds to fund the Gerwin litigation. According to the doctor, however, he did not authorize Sweitzer to use the entirety of the proceeds. Moreover,

Dr. Tsai testified that he retracted his authorization for Sweitzer to retain half of the Penn Mutual settlement and told Sweitzer that he would proceed only a contingent fee basis – to which, he said, Sweitzer agreed. Because the court was entitled to credit Dr. Tsai's testimony (as it did), there was sufficient evidence to reject Sweitzer's defense of good faith claim of right and to find that he intended to deprive his client of the property.

But even if the court were to have credited Sweitzer's claim to half the settlement proceeds, the State still adduced sufficient evidence of his criminal intent. Sweitzer's bank records reflect that, after pressuring the client to settle the case, he promptly withdrew more than $50,000 of his client's money from a trust account and used the funds for his own benefit. Over the next several months, Sweitzer repeatedly gave his client (and later, his client's wife) false assurances that the funds were forthcoming. During that time, Sweitzer presented his client with a personal check drawn on an account with insufficient funds to cover it. On the basis of the copious evidence that Sweitzer was lying to his client, stalling for time, and exploiting his client's friendship and sympathy, the court was entitled to find that he intended to deprive his client of the property.

**D. Evidence of Value**

Sweitzer argues, at length, that the State was required to prove the precise amount of money that Sweitzer stole as an element of his conviction for theft greater than $10,000. The State counters that the State's burden was merely to prove that the amount of stolen money was greater than $10,000 but less than $100,000. *See* CL § 7-104(g)(1)(ii). We agree with

the State and conclude that Sweitzer bases his argument on a significant misstatement of the law. Applying the proper interpretation of the law, there was sufficient evidence to prove that Sweitzer stole more than $10,000.

Sweitzer cites several cases that allegedly stand for the proposition that the State has the burden of proving the value of stolen property before a court can deliver a guilty verdict. Sweitzer goes so far as to argue that "[a]ny indefiniteness as to the value of the theft renders either the evidence insufficient as a matter of law, the factual finding erroneous, or both." In support of that argument, Sweitzer cites only *Champagne v. State*, 199 Md. App. 671 (2011).

*Champagne* does not support Sweitzer's position. That case concerns a stolen laptop computer, which had depreciated from the time it was purchased three years earlier. Although the State had put on evidence of the computer's value at the time it was purchased (about $1600 to $1,800), this Court noted "the difficulties in assessing the value of computer equipment at the time of theft because of the rapid decline in the value of such equipment." *Id.* at 676. Consequently, the Court held that, without proof of the computer's value at the time of theft, the evidence was insufficient to convict the defendant of theft of property with a value greater than $500. *Id.* at 677-78. Nowhere, however, does the *Champagne* Court say anything that resembles the statement Sweitzer has attributed to it – that a conviction fails if the evidence is indefinite in any way as to the value of the stolen property.

In fact, Sweitzer's contention is refuted by *Angulo-Gil v. State*, 198 Md. App. 124 (2011), in which this Court held that circumstantial evidence was sufficient to sustain a conviction for theft of property with a value of at least $1,000 even though the record contained no testimony about the specific value of the stolen item – a one-year-old Ford Focus in working condition. *Id.* at 152-53. "[W]e are convinced," the Court wrote, "that a jury reasonably may conclude that, in April 2007, a one year-old operable Ford Focus was worth more than $500." *Id.* at 153. In view of the Court's conclusion in *Angulo-Gil*, it is simply untenable to assert that in every theft case the State, upon pain of an acquittal, must prove the specific value of the stolen property beyond a reasonable doubt.

In any event, Sweitzer claims that the State failed to prove the specific value of the stolen property only because the circuit court recited two different values at two different times, putting the figure at $54,000 when it rendered its verdict, but at $57,000 when it set the appeal bond. Under either formulation, however, the value of the stolen property is at least $10,000. See CL § 7-103(a) (value means "the market value of the property or service at the time and place of the crime"). Moreover, the different values are fairly clearly attributable to the court's reference to the $54,000 Penn Mutual settlement alone in delivering the verdict and to its inclusion of the additional money for the Nu Image settlement in setting the bond.

In any event, because the court referred to the second, higher number only after it had rendered its verdict, that number could not conceivably have had any impact on the verdict.

*See Pugh v. State*, 271 Md. 701, 706-07 (1974). In rendering its decision, the court expressly found that Sweitzer had stolen property with a value of $54,000, *i.e.*, property with a value greater than $10,000. The evidence supports that finding. *See supra* § I(C). Therefore, the State adduced sufficient evidence of the value of the property that Sweitzer stole.[2]

**E. Credibility Determinations**

Sweitzer challenges the circuit court's finding that Dr. Tsai and his wife were credible. We review that finding for clear error, give "due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c); *see Wiggins v. State*, 324 Md. 551, 567 (1991). "[B]ecause the fact-finder possesses the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony, we do not re-weigh the credibility of witnesses[.]" *State v. Mayers*, 417 Md. 449, 466 (2010).

Citing an admission by Dr. Tsai that he illegally downloaded Nu Image's copyrighted materials, Sweitzer argues that the circuit court should not have found the doctor to be credible. We disagree.

[2] Even if Sweitzer had Dr. Tsai's authorization to use half of the Penn Mutual settlement, which the court found he did not, Sweitzer would still have withheld the other half, which totaled $27,000. Under Sweitzer's account, therefore, the evidence was sufficient to show that he stole more than $10,000.

The trial court's acceptance of the Tsais' testimony does not constitute a clear error. The court carefully considered the issue of witness credibility and provided his rationale on the record:

> [T]he court finds the testimony of Dr. Tsai and Mrs. Tsai to be credible and they're somewhat, I would say naive folks or perhaps they were shading the testimony one way or another in slight respects, but overall, I found their testimony credible and supported by the tenor of the e-mails that have been submitted here as well as other evidence.

Because of the great deference we accord to the trial court on the issue of witness credibility, because of the court's observation that the Tsais' testimony was corroborated by the objective, documentary evidence in the emails, and because of Sweitzer's failure to provide any compelling reason for us to conclude that the court committed clear error in evaluating the Tsais' testimony, we must conclude that the court properly found them to be credible.

**II. Presence at Post-Verdict Discussion**

Next, Sweitzer asks this Court to reverse his conviction because, he contends, the trial court judge conducted a hearing, off-the-record and outside of his presence, following the issuance of the guilty verdict. The State responds that the trial court did not err and that, in any event, any error would be harmless. We agree with the State.

Following the delivery of the verdict, the State moved to revoke Sweitzer's $5,000 bond pending sentencing. In response to the State's request, the following colloquy occurred:

THE COURT: I'm going to take just a brief recess. I think I'd like to see Counsel in chambers here for a minute, okay?

COUNSEL FOR THE STATE: Yes, Your Honor.

COUNSEL FOR SWEITZER: Yes, Your Honor.

THE COURT: Mr. Sweitzer, I want you to remain in the courtroom and Sheriff if you could –

MR. SWEITZER: Sure, Your Honor.

THE COURT: – if he needs to go to the restroom or something, that's fine.

MR. SWEITZER: No, I'm fine, Your Honor.

THE COURT: But stay with the Sheriff.

MR. SWEITZER: Sure.

After the judge returned, he set Sweitzer's bond at $57,000 and proceeded to schedule the sentencing hearing.

Sweitzer contends that he had a right to be present during the judge's discussion with counsel because it was a critical stage of trial proceedings. He premises his argument on *DeWolfe v. Richmond*, 434 Md. 444 (2013), which held that the due process component of Article 24 of the Maryland Declaration of Rights affords indigent defendants the right to counsel at bail hearings, as they are a critical stage of trial proceedings. *Id.* at 456. Because *Richmond* concerns the right to counsel, rather than the right to be present at every stage of trial, it has no bearing on Sweitzer's position.

A criminal defendant does, however, have the right to be present at every stage of trial. That right is a common-law right preserved by Article 5 of the Maryland Declaration of Rights and protected, in some measure, by the Sixth and Fourteenth Amendments to the United States Constitution. *See*, *e.g.*, *Bunch v. State*, 281 Md. 680, 683-84 (1978); *see also Reeves v. State*, 192 Md. App. 277, 288-89 (2010). Maryland Rule 4-231 also grants defendants the right to be present at all material stages of trial. *See State v. Yancey*, ___ Md. ___, 2015 WL 1798963, at *5 (Apr. 21, 2015). That right extends "from the time the jury is impaneled until it reaches a verdict or is discharged[.]" *Denicolis v. State*, 378 Md. 646, 656 (2003); *see also Reeves*, 192 Md. App. at 288-89.

Here, however, the discussion that Sweitzer is challenging took place *after* the delivery of the verdict. Therefore, the concerns about a defendant's presence and its relationship to that defendant's ability to put on a competent defense do not apply. *See Denicolis*, 378 Md. at 656 (quoting *Midgett v. State*, 216 Md. 26, 36-37 (1958)) (reciting proposition that defendant has right to be present "'when there shall be any communication whatsoever between the court and the jury[,] unless the record affirmatively shows that such communications were not prejudicial or had no tendency to influence the verdict of the jury'"); *accord Hughes v. State*, 288 Md. 216, 224 (1980) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934)) (defendant has constitutional right to be present "'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge'"). Because, in this case, the trial had already concluded with a guilty

verdict when the court and counsel retired to the court's chambers to discuss the appeal bond, the court did not violate Sweitzer's right to be present.

Despite the absence of any violation of his right to be present, Sweitzer argues that this Court is unable to determine whether he suffered an injury of constitutional magnitude because there is no transcript from the discussion in chambers. According to Sweitzer, we are compelled to reverse or vacate his conviction because the subject of the judge's off-record discussion "went to the very heart of the appeal." We decline to adopt Sweitzer's reasoning.

In *Wilson v. State*, 334 Md. 469 (1994), the Court of Appeals discussed how an appellate court should react when a portion of a proceeding is not recorded and transcribed:

> If the omission is not completely supplied, to be entitled to a new trial, the *petitioner* must establish that the missing material rendered his appeal meaningless, *i.e.*, that he was deprived of meaningful appellate review. To accomplish this, he has to show that the omission is not inconsequential, but is 'in some manner' relevant to the appeal.

*Id.* at 477 (emphasis added).

In other words, when a portion of a proceeding has not been recorded or transcribed, we do not presume that the missing material is meaningful or consequential. Rather, we require the appellant to show that the omission is "not inconsequential," but is in some "'in some manner' relevant to the appeal." *Id.* Because Sweitzer advances only conclusory and unsupported assertions about the importance of a post-verdict chambers conference to the issues on appeal, he has not satisfied his burden.

Finally, a criminal defendant may waive the right to be present even at bench conferences on legal issues that occur during the trial itself. *Henry v. State*, 324 Md. 204, 224 (1991). In addition, a defendant may waive the right to be present not just through his or her own actions, but through the actions or inaction of counsel. *Id.* at 223 (quoting *Williams v. State*, 292 Md. 201, 219-20 (1981)) ("[A]n effective waiver of the defendant's right to be present at every stage of the trial will not always require a personal waiver by the defendant . . . a defendant will ordinarily be bound by the action or inaction of his attorney"). The record before us shows that Sweitzer's counsel participated in the discussion with the judge and further shows that Sweitzer consented to remain in the courtroom during the discussion. Sweitzer, therefore, waived his right to be present, as neither he nor his counsel protested when the court instructed him to remain in the courtroom while the court conferred with counsel in chambers.

### III. Revocation of Sweitzer's Bond

Sweitzer argues that the trial court erred by revoking his bond and ordering a new, higher bond because the court did not hold a hearing and because (he says) the new bond amount was excessive as measured by the Eighth Amendment.[3] The State counters that the trial court properly exercised its discretion and that Sweitzer's arguments regarding his bail conditions are moot. We agree with the State.

[3] The Eighth Amendment provides, in part, that "[e]xcessive bail shall not be required." U.S. CONST. Amend. VIII.

Sweitzer was sentenced to five years' incarceration, with all but one year suspended. At the time of this appeal, Sweitzer has completed serving the executed portion of his sentence and is no longer incarcerated. This Court has held that a challenge to bail conditions, made after the challenging party has been released from confinement, is moot. *See Young v. Fauth*, 158 Md. App. 105, 111 (2004) (quoting *Droney v. Droney*, 102 Md. App. 672, 682 (1995)) (determining that, in case involving appellant who had been released from detention by time of appeal, "'there is no longer any effective remedy which the court can provide, . . . and the bail issue is thus moot'") (internal quotation marks omitted).

Furthermore, Sweitzer cannot appeal directly from the trial court's decision to impose bail in an allegedly excessive amount. *See Long v. State*, 16 Md. App. 371, 372-73 (1972) ("[A person granted bail] is not entitled to an appeal directly from the decision of the trial judge [] with regard to . . . the amount fixed for his admittance to bail"). Sweitzer could have initiated a collateral action by way of habeas corpus. *See Washburn v. Sheriff, Cecil Cnty.*, 16 Md. App. 611, 612 (1973) ("[H]abeas corpus is a means of seeking relief from the refusal of a judge to admit a person to bail or from the judge's determination requiring an allegedly excessive bail"). He did not do so.

Even if this issue were not moot and could be raised on a direct appeal, the court neither abused its discretion nor violated the Eighth Amendment proscription against excessive bail by setting Sweitzer's pre-sentencing bond at $57,000. We review a trial court's decision about whether to grant post-conviction, pre-sentence bail for abuse of

discretion. *See Whiteley v. Warden, Md. Penitentiary*, 258 Md. 634, 636 (1970) (applying abuse of discretion standard to reviewing court's decision not to grant any bail before sentencing and following conviction). The law in Maryland is clear: a defendant does not maintain a right to bail following a conviction. *See Gillis v. Comm'r, Dep't of Corr.*, 52 Md. App. 26, 27 (1982) (citing *Bigley v. Warden*, 16 Md. App. 1, 6 (1972)) ("[i]n this State, there is no right to bail after a conviction"). Here, because Sweitzer had been convicted, the court had no obligation to release him on bail pending his sentencing. *See Bigley*, 16 Md. App. at 14 ("[t]here is no mathematically precise formula or equation to determine the allowance vel non of bail after conviction").

Additionally, the bail was not excessive as measured by the Eighth Amendment. The Supreme Court has defined excessive bail as "bail set at a figure higher than an amount reasonably calculated to fulfill [its] purpose[.]" *Stack v. Boyle*, 342 U.S. 1, 5 (1951). Here, the judge set Sweitzer's bail to correspond to the amount of money that Sweitzer stole from Dr. Tsai; the judge intended for the money to serve as restitution. Given the explicit connection between the amount of the bail and its purpose, Sweitzer's pre-sentence bail was "reasonably calculated to fulfill [its] purpose" and was not unconstitutionally excessive.

**IV. Cruel and Unusual Punishment**

Sweitzer argues, briefly, that during his period of incarceration, his medical needs were not met, thus violating his Eighth Amendment right to be free from cruel and unusual punishment. *See generally Estelle v. Gamble*, 429 U.S. 97 (1976). He claims that the

remedy for this constitutional violation should be for this Court to reverse his conviction or vacate his sentence.

Sweitzer's Eighth Amendment challenge does not speak to the validity of his criminal conviction. Furthermore, it is not a matter that was raised in the court below and, therefore, is not a proper matter for this Court to review on appeal. Md. Rule 8-131(a) ("the appellate court will not decide [an] issue unless it plainly appears by the record to have been raised in or decided by the trial court"); *see also Conyers v. State*, 367 Md. 571, 593-94 (2002) ("[o]rdinarily, an argument not raised in the proceedings below is not preserved for appellate review"). Nor is there any record before us to assist our evaluation of this claim: we have no more than Sweitzer's largely inapplicable case citations, and nothing resembling evidence to verify Sweitzer's allegations.

Because Sweitzer does not draw our attention to any reason why we should veer from the general rule of appellate procedure whereby we decline to hear issues not raised below, we shall adhere to that rule. Accordingly, we do not decide Sweitzer's Eighth Amendment cruel and unusual punishment claim.

**JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT**.

## APPENDIX

Sweitzer presented the following questions:

1. Whether the State met its burden of showing the value of the purported theft as a predicate fact prior to the entry of any verdict of guilt beyond a reasonable doubt when the State conceded in a post-verdict/pre-sentence filing, that the value of the theft was still being deliberated by the trial court in an off-the-record, post-verdict chambers conference, and the value of the purported theft changed as an apparent consequence of that post-verdict consideration, of which there is also no available transcript?

2. Whether the trial court a) abused its discretion and b) violated the Appellant's procedural and substantive due process rights to a public hearing on the issue of revocation of release on bond, when it announced it was taking a recess, but - in fact - took a post-verdict hearing off the record into chambers, of which there is also no available transcript; and c) violated the Eighth Amendment's proscription against excessive bail when it ordered the payment of fifty-seven thousand dollars ($57,000.00) in cash or cash equivalent, when its factual findings as to the value of the "theft" in question was three thousand dollars less, and the payment was ordered effectively as preemptive restitution (punishment) nearly six months in advance of sentencing; and d) violated the Appellant's Sixth Amendment confrontation rights, and rights under Md. Rule 4-326 to be present at a critical stage of proceedings in which factual matters were deliberated, by ordering him to remain seated, alone, in the courtroom?

3. Whether the trial court's findings of fact, such as they exist, are clearly erroneous, inasmuch as a) they are internally inconsistent; and, b) do not account for the alleged victim's admission that he gave express written permission to hold and use at least half the subject funds and that Appellant continued to work for and give value to him during the entire period in contest; and c) whether the trial court erred in crediting the Complainants' testimony, and drew no adverse inference against the State's evidence, when he admitted the repeated commission of criminal acts of intellectual property theft to an agency of the United States government?

4. Whether this Court is precluded from conducting an independent constitutional review of the trial court's action in continuing to deliberate the value of the purported theft post-verdict, and deliberate revocation of Appellant's bond, post-verdict, when there is no dispute that a transcript of that portion of the proceedings does not exist; and, as a result, Appellant has effectively been denied appellate review on this "heart-of-the-appeal" issue for lack of a record?

5. Whether the evidence is insufficient as a matter of law to support a verdict of guilt beyond a reasonable doubt on the issue of *mens rea* to commit the crime of theft, a) when the State conceded and Complainant confirmed, that Appellant had asked, and received, the Complainant's express written permission to retain and use half the subject funds to support case-related expenses and b) it was undisputed that Appellant continued to represent the Complainant in a copyright infringement matter that evolved into a significant

controversy between twenty-five to fifty (25-50) times in scope greater than originally contemplated, and c) Complainant alleged no breach of contract?

6. Whether Howard County government and by imputation the State of Maryland violated the constitutional proscription under U.S. Const. Amend. VIII against cruel and unusual punishment, when, during the period of Appellant's unlawful incarceration, each demonstrated deliberate indifference to Appellant's emerging diabetes condition, failed to inquire, test, and treat Appellant for the said condition such that he required hospitalization on release?