NOTICE
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2019 IL App (5th) 180303-U

NO. 5-18-0303

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	St. Clair County.
	)	
v.	)	No. 16-CF-1224
	)	
SAMUEL JOHNSON,	)	Honorable
	)	Julia R. Gomric,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE BOIE delivered the judgment of the court.
Justices Welch and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: In a first degree murder trial, the circuit court did not abuse its discretion in barring the admission of pictures of graffiti that the defendant wrote on the wall of a holding cell which he wrote while the court was in recess during jury selection; the graffiti was irrelevant to the defendant's consciousness of guilt.

¶ 2 This is an interlocutory appeal brought by the State pursuant to Illinois Supreme Court Rule 604(a)(1) (eff. Mar. 8, 2016). The defendant, Samuel Johnson, was charged with three counts of first degree murder stemming from the stabbing deaths of Doris Fischer, Dorothy Bone, and Michael Cooney. The State appeals from a pretrial order

suppressing evidence of graffiti that the defendant wrote on a holding cell wall prior to the trial. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Prior to the defendant's trial, on October 3, 2017, the State filed a witness list which included, among others witnesses, Reedie Bean, Early Kidd, Chauncey Hilliard, Vincent Allen, and Jim Sims as witnesses for the State. The parties appeared in court on June 4, 2018, to begin jury selection. The court began its *voir dire* of prospective jurors and recessed for a 15-minute break at 11:30 a.m. The defendant was taken to a holding cell during the break. The bailiff who retrieved the defendant from the holding cell at the end of the break noticed the following graffiti written on the cell wall which was not present prior to placing the defendant in the cell:

> "Reedie Bean is a Rat Snitch Bitch
>
> And So is
>
> Early Kidd
>
> Chauncey Hilliard
>
> Vincent Allen
>
> Jim Sims
>
> there [*sic*] Here to testify on my case today 6-4-18"

¶ 5 When the parties returned from the break, outside the presence of the jury pool, the prosecutor told the circuit court as follows:

> "We were informed by a court personnel bailiff upon taking our break that there was some graffiti on the wall of one of the holding cells that he maintained he did

not see this morning. We have looked into and personally viewed that graffiti on the wall and have talked to the transport officers who have told us that defendant is the only person present in that cell this morning and this cell was locked at all times and he was not present in that cell.

Specifically in that graffiti, and I'll read it to the Court, we did have an investigator present to take pictures of that and we would plan on presenting to [*sic*] that evidence as evidence of consciousness of guilt. And I'm not sure that it would amount legally, although we would look into it as some sort of attempt to harass a witness."

¶ 6 The prosecutor further explained, "it would be our intention that we would seek to elicit testimony about this conduct as proof of consciousness of guilt. It goes to the fact that he's calling them a 'snitch' and goes to consciousness of guilt."

¶ 7 The court adjourned for lunch without ruling on the State's request. Over the lunch hour, the bailiff searched the defendant and found a marker on him. After lunch, the circuit court continued with its *voir dire* of prospective jurors. During the circuit court's *voir dire* after the lunch break, the court dismissed several prospective jurors for cause, but no prospective jurors were selected to serve on the jury and no jury was sworn. Before the court adjourned for the day, it gave the parties the opportunity to present further arguments on the issue of the admissibility of evidence of the graffiti.

¶ 8 At that point, the State informed the court about additional graffiti as follows: "after we spoke about this this morning, we were informed by the court personnel and the transport officers in particular that they found additional writing that, based on the

timeline that they've given of when they searched the cell, was written after the discussion that we had earlier today." The prosecutor told the court that the defendant wrote, "God know I'm innocent." The prosecutor explained to the court that the State was not seeking to introduce this graffiti and argued that the completeness doctrine did not require this new graffiti to be admitted.

¶ 9 The defendant's attorney objected to the admission of evidence of the graffiti, and the court sustained the objection. The court explained its ruling as follows:

> "You know, it's not relevant. I don't think it is any sort of admission or consciousness of guilt. Frankly, I can see that it's other things but would not come in for any purpose. I think it's prejudicial, it puts him in the cell, all things that this jury need not know. So, for that purpose, I will sustain the defense's objection to that."

¶ 10 On June 5, 2018, the parties returned to court to continue jury selection, and the State informed the court that it had filed a notice of appeal of the circuit court's ruling along with an affidavit stating that the court's ruling substantially impaired the State's ability to prosecute the case.[1] The circuit court, therefore, dismissed the prospective jurors. After allowing the parties additional argument on the issue, the court elaborated on its ruling as follows:

[1]The supreme court has directed the courts to rely solely on the good-faith evaluation of the prosecutor with respect to whether a suppression order substantially impairs the State's ability to prosecute its case. *People v. Young*, 82 Ill. 2d 234, 247-48 (1980) ("[W]e believe that the State's need to allocate its heavily taxed resources in the most productive manner will naturally limit appeals to those orders which substantially impair its ability to prosecute its case.").

"I'm just going to reiterate my ruling that I don't believe it's [an] admission or any consciousness of guilt. Regardless, the prejudice to Defendant substantially outweighs any probative value. I think it is prejudicial because it puts him in the cell but for other reasons as well.

And to be clear, I was not presented with any evidence that anyone other than Defendant, meaning no other witnesses on the witness list, has had access to that cell nor had they seen any of the writing on that cell wall. I was not presented with any evidence of that or any suggestion of that in making my ruling."

¶ 11 On June 5, 2018, the circuit court entered the following written order: "The State made an oral motion to introduce evidence regarding conduct that occurred during jury selection on 6/4/18. The defense objected to introduction of that evidence. The Court sustained the objection orally on June 4, 2018 as reflected in the transcript of proceedings dated June 4, 2018."

¶ 12 The State's interlocutory appeal of the circuit court's evidentiary ruling is now before this court.

¶ 13 ANALYSIS

¶ 14 Before turning to the merits of the State's appeal, we first address an argument raised by the defendant that we lack jurisdiction to address the merits of the State's interlocutory appeal. The determination of an appellate court's jurisdiction is an issue of law that we evaluate under the *de novo* standard of review. *People v. Brindley*, 2017 IL App (5th) 160189, ¶ 15.

¶ 15 As we explained, the present case is an interlocutory appeal by the State of an evidentiary ruling. In criminal trials, the supreme court has allowed the State a limited right to appeal from interlocutory orders that have the substantive effect of, among other things, the suppression of evidence. Ill. S. Ct. R. 604(a)(1) (eff. Mar. 8, 2016). "[T]he State may appeal a *pretrial* suppression order when it certifies to the trial court that the order substantially impairs the State's ability to prosecute the case." (Emphasis added.) *People v. Goodwin*, 207 Ill. App. 3d 282, 287 (1991). However, different rules apply when the State seeks an interlocutory appeal of suppression orders that are entered *midtrial*. The supreme court "has shown reluctance to grant midtrial appeals" under Rule 604(a)(1) because such interlocutory appeals have a disruptive effect on ongoing trials and places burdens on defendants. *Id.*; *People v. Phillips*, 2011 IL App (2d) 101142, ¶ 12.

¶ 16 In *People v. Flatt*, 82 Ill. 2d 250, 264 (1980), the court held that, once a trial has begun, the State may appeal and challenge only orders suppressing evidence based on a finding that the evidence was illegally obtained in violation of a constitutional or statutory right or, if the defendant's motion to suppress evidence did not allege that the evidence was illegally obtained, the State can seek review only of the trial court's authority to entertain the motion to suppress during the trial but not of the merits of the trial court's ruling. See also *Phillips*, 2011 IL App (2d) 101142, ¶ 12.

¶ 17 In the present case, the defendant argues that the circuit court suppressed evidence of the graffiti after the court began *voir dire* of prospective jurors. Therefore, the defendant argues, the order was a "midtrial" suppression order. The defendant concludes that we lack jurisdiction to consider the merits of the appeal because the State's appeal

does not fall within two categories of allowable appeals of midtrial orders defined by the supreme court in *Flatt.* We disagree with the defendant's argument.

¶ 18 The defendant's argument that the circuit court's suppression order was a "midtrial" order is incorrect. When the circuit court entered the order suppressing the evidence, the court was in the process of questioning prospective jurors. No jurors had been selected by the parties, and no jury had been empanelled and sworn. Until a jury is sworn, the circuit court's orders suppressing evidence are pretrial orders, not midtrial orders. See, *e.g.*, *Flatt*, 82 Ill. 2d at 265 ("The motion was filed and the order was entered after the jury was sworn. The trial had, therefore, commenced and jeopardy had attached.").

¶ 19 Here, because the order was entered before a jury was sworn, the State may appeal the pretrial suppression order upon its certification to the trial court that the order substantially impairs its ability to prosecute the case. The suppression order "need not be premised on evidence illegally obtained; rather, it may concern evidentiary rulings regarding *** relevancy." *People v. McQueen*, 115 Ill. App. 3d 833, 836 (1983) (citing *People v. Young*, 82 Ill. 2d 234 (1980)). Accordingly, we have jurisdiction to consider the merits of the State's interlocutory appeal which concerns the relevancy of the evidence suppressed.

¶ 20 Turning to the merits of the appeal, the State argues that the circuit court abused its discretion in suppressing the evidence of the defendant's graffiti. We disagree.

¶ 21 "Generally, a decision on an evidentiary motion *** is committed to the trial court's discretion and a reviewing court will not disturb that decision absent an abuse of

discretion." *People v. Nelson*, 235 Ill. 2d 386, 420 (2009). Also, the circuit court's evidentiary ruling in this case concerns the relevancy of the suppressed evidence. A trial court has broad discretion in ruling on the relevancy of evidence. *People v. Hayes*, 353 Ill. App. 3d 578, 583 (2004). An abuse of discretion occurs when the trial court's decision is "arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it." *People v. Rivera*, 2013 IL 112467, ¶ 37.

¶ 22 "Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *People v. Burgund*, 2016 IL App (5th) 130119, ¶ 199. "This definition *** encompasses the materiality of evidence as well as its probative value." *In re Elias*, 114 Ill. 2d 321, 334 (1986). Materiality "refers to the relationship a particular proposition bears to the ultimate determination of the action." *Spencer v. Wandolowski*, 264 Ill. App. 3d 611, 617 (1994). Probative value "refers to the tendency of the evidence to render a particular proposition more or less probable than it would be without the evidence, and is determined by testing the proffered fact against 'the light of logic, experience and accepted assumptions as to human behavior.' " *Id.* (quoting *Marut v. Costello*, 34 Ill. 2d 125, 128 (1965)). Relevancy of evidence is not an inherent characteristic but is a relationship between an item of evidence and a matter properly provable in the case. *People v. Monroe*, 66 Ill. 2d 317, 322 (1977).

¶ 23 Here, the circuit court found that evidence of the graffiti was irrelevant to the purpose for which the State sought to admit the evidence, *i.e.*, consciousness of guilt. The circuit court did not abuse its broad discretion in finding that the evidence was irrelevant.

¶ 24 The State argues that the evidence was relevant to the defendant's consciousness of guilt because the graffiti was an attempt to intimidate the State's witnesses. In rejecting the State's argument, the circuit court noted that it "was not presented with any evidence that anyone other than [d]efendant, meaning no other witnesses on the witness list, has had access to that cell nor had they seen any of the writing on that cell wall." The basis for the circuit court's finding of irrelevancy is far from arbitrary, fanciful, or so unreasonable that no reasonable person would agree with it. Instead, it is accurate. The record establishes that no one had access to the holding cell except the bailiffs and the defendant. In addition, nothing in the record suggests that the defendant would have any reason to believe that any of the witnesses would see the graffiti or be intimidated by it.

¶ 25 As noted above, the probative value of evidence refers to the tendency of the evidence to render a particular proposition more or less probable than it would be without the evidence. *Wandolowski*, 264 Ill. App. 3d at 617. Probability is "tested in the light of logic, experience, and accepted assumption as to human behavior." *People v. Patterson*, 192 Ill. 2d 93, 115 (2000). With no evidence that any of the witnesses would ever see the defendant's graffiti, the circuit court was well within its broad discretion to conclude that the picture of the graffiti was not sufficient evidence of an attempt at witness intimidation and that the picture had no probative value with respect to the defendant's consciousness of guilt. Neither logic, nor experience, nor accepted assumptions as to human behavior required the circuit court to reach a different conclusion.

¶ 26 The cases cited by the State in support if its argument that the circuit court abused its discretion are cases in which the defendant communicated with witnesses. For

example, in *People v. Ross*, 329 Ill. App. 3d 872, 884 (2002), a defendant sent a letter to a State witness which contained threats against the witness. The court held that the letter was properly admitted as evidence of consciousness of guilt. *Id.* Likewise, in *People v. Jones*, 82 Ill. App. 3d 386, 388-89 (1980), a defendant told the witness: " 'I will get you. If I can't get you, I will get your family. If I can't get your family, I will blow up your house.' " In *People v. Gambony*, 402 Ill. 74, 78 (1948), the defendant tried to bribe witnesses to drop the case or testify in his favor. These cases are distinguishable because, in the present case, the defendant did not communicate any threats to any of the State's witnesses and did not even have the ability to do so by writing graffiti on the holding cell wall.

¶ 27 In one of the cases cited by the parties, *People v. Spraggins*, 309 Ill. App. 3d 591, 592 (1999), the defendant made certain admissions to a person who shared the same cellblock, and the State called that person as a witness at the trial. During the State's direct examination of the witness, it elicited testimony that the defendant, at one point, sang a rap song in front of the witness in which he added lyrics that suggested his intent to kill witnesses who testified against him. *Id.* This evidence was admitted at the defendant's trial as evidence of his consciousness of guilt, but the *Spraggins* court concluded "that the circuit court erred when it allowed the prosecutor to bring this evidence before the jury and to address it in closing argument." *Id*. at 594. *Spraggins*, therefore, supports the circuit court's suppression order in this case.

¶ 28 Also, we note that the defendant's graffiti did not actually threaten any of the listed witnesses, but merely called them "Rat Snitch Bitch[es]." Nothing in the record

establishes that a defendant using such terms to describe the State's witnesses makes any fact of consequence more or less probable than it would be without the evidence. Again, neither logic nor experience nor accepted assumptions concerning human behavior required the circuit court to find any link between this name-calling of witnesses and the defendant's consciousness of guilt. The circuit court was well within its discretion in finding that the evidence was irrelevant for this purpose. Accordingly, we cannot reverse the circuit court's suppression order under the abuse of discretion standard.

¶ 29 CONCLUSION

¶ 30 For the foregoing reasons, we affirm the circuit court's suppression order and remand for further proceedings.

¶ 31 Affirmed; cause remanded.