UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

CONSOLIDATED CASES

September Term, 2014

No. 1173
TRAVONE WEST

v.

STATE OF MARYLAND

No. 1183
CHARLES WILLIAMS

v.

STATE OF MARYLAND

Graeff,
Friedman,
Moylan, Charles E. Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: August 25, 2016

Believing that "more is more," Williams and West bring a cornucopia of challenges to their convictions. None of these challenges are availing.

BACKGROUND

On May 18, 2011, late in the evening, Chantera Cook and Tyrail Beverly were eating in a car outside of the home of Beverly's grandmother. A man whom Cook knew as "Future" approached and said that he needed to "holler at" Beverly. Beverly got out of the car, had a conversation with Future on a nearby sidewalk, and returned to the car looking "agitated and disturbed." Future then drove away.

Cook testified that five minutes later, Future's car pulled up on the opposite side of the street. Future got out from the driver's side of his car and another man, who Cook knew as "Tracey," got out from the passenger side. The two men started to cross the road towards Cook's car. Beverly yelled for her to "pull off." As she began to do so, Tracey started shooting the "whole car up." Cook was shot five times. Cook later identified the man she knew as Tracey, her shooter, as appellant Travone West in a photo array. She also identified the man she knew as Future as appellant Charles Williams in a separate photo array.

The State charged Williams and West with multiple counts related to the shooting. A jury found Williams guilty of conspiracy to commit first degree murder, attempt to commit first degree murder, conspiracy to commit reckless endangerment, and reckless endangerment as to his actions against Cook. The jury also found Williams guilty of conspiracy to commit first degree murder, attempt to commit second degree murder,

conspiracy to commit first degree assault, first degree assault, conspiracy to commit reckless endangerment, and reckless endangerment as to his actions against Beverly.[1] The jury found West guilty of conspiracy to commit first degree murder, attempt to commit first degree murder, conspiracy to use a handgun in a crime of violence, use of a handgun in a crime of violence, and reckless endangerment as to his actions against Cook.

DISCUSSION

In this consolidated appeal, we are asked to determine whether the trial court erred during the conduct of voir dire, erred in certain of its rulings during the course of the trial, erred in its jury instructions, or erred in denying certain post-trial motions. We address each allegation of error in the order that it arose.

I. Voir Dire

Williams argues that the circuit court erred by refusing to ask in voir dire whether any prospective juror believed that he was guilty solely because he was charged with a crime.

We review a trial court's rulings regarding voir dire for an abuse of discretion, and determine if a proposed question is "reasonably sufficient to test the jury for bias, partiality, or prejudice" considering the record as a whole. *Washington v. State*, 425 Md. 306, 314 (2012). In this review, the trial judge's exercise of discretion during voir dire is entitled to considerable deference. *Id.*

[1] The jury found Williams not guilty of several handgun offenses and attempted murder in the first degree as to Beverly.

Voir dire is not the time for jury instructions. Maryland courts have held that it is not an abuse of discretion for a trial judge to refuse to ask proposed voir dire questions that are fairly covered by jury instructions, and that such questions "do not achieve the purpose for which voir dire was designed." *Wilson v. State*, 148 Md. App. 601, 660 (2002). In *Carter v. State*, this Court held that there was no abuse of discretion where the trial court declined to ask prospective jurors "whether [prospective jurors] had any problem with the proposition that the mere fact that a person has been charged with a crime is not evidence of guilt," on the grounds "that it is inappropriate to instruct on the law at the [voir dire] stage of the case, or to question the jury as to whether or not they would be disposed to follow or apply stated rules of law." 66 Md. App. 567, 576-77 (1986) (citing *Twining v. State*, 234 Md. 97, 100 (1964)).

Here, Williams contends that the circuit court erred when it refused to ask the following of the venire during voir dire: "if a member of the jury panel believes a defendant is guilty just because he's charged with a crime."[2] The trial judge stated on the record that he refused to ask the question because he found that it "will be fairly covered in jury instructions." The jury later received an instruction that the defendant was presumed innocent of the charges, and that the charging documents should be given no weight or consideration and must not create any inference of guilt by the jury. The trial

[2] Counsel for West requested the venire be asked the question during voir dire. Williams joined in the request, and then renewed it at the conclusion of the trial court's voir dire. Thus, this issue is preserved for our review.

court's refusal to ask the proposed voir dire question was therefore not an abuse of discretion.

II. AT TRIAL

A. Exclusion of member of the public from the courtroom

West argues that the trial court erred and violated his constitutional right to a public trial when it excluded a member of the public from the courtroom during the day of trial.

Constitutional issues are subject to *de novo* review by this Court. "When the question is whether a constitutional right … has been violated … the reviewing court makes its own independent constitutional appraisal, by reviewing the law and applying it to the peculiar facts of the particular case." *Longus v. State*, 416 Md. 433, 457 (2010) (*quoting Jones v. State*, 343 Md. 448, 457 (1996)). Additionally, the reviewing court should determine if the trial court abused its discretion by failing to follow proper legal standards and procedures for evaluating the constitutional issue. *Id.* at 463 (holding that the trial court abused its discretion by excluding members of the public from a trial based upon a proffer from the State without offering the defense an opportunity to respond or conducting an evidentiary hearing).

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a … public trial." U.S. Const. Amend. VI. Courts have held that the right to a public trial is not absolute, and that there are some circumstances where the court may close the courtroom, either fully or partially by excluding certain individuals,

"to maintain order, to preserve the dignity of the court, and to meet the State's interests in safeguarding witnesses and protecting confidentiality." *Markham v. State*, 189 Md. App. 140, 152 (2009) (quoting *Robinson v. State*, 410 Md. 91, 103 (2009)). The Court of Appeals, however, held in *Kelly v. State* that the circumstances in which it is appropriate to close a courtroom are rare, and that there are four factors that a trial court must consider before closing a courtroom:

> (1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced; (2) the closure must be no broader than necessary to protect that interest; (3) the trial court must consider reasonable alternatives to closing the proceeding; and (4) the trial court must make findings adequate to support the closure.

195 Md. App. 403, 418 (2010) (quoting *Presley v. Georgia*, 558 U.S. 209, 213-14 (2010) (internal quotations omitted)).

Here, outside the presence of the jury, the trial court ordered a spectator to leave the courtroom. Defense counsel requested a bench conference and objected on the basis of his client's right to a public trial. The trial court stated that he had been informed by the sheriffs that this spectator had touched in an offensive way another person in the courtroom on an earlier day of the trial, and that this was the first day the spectator had been back to the trial after the incident. The trial judge stated in part, "[h]e had no business touching that person. I spoke to the person and I heard his concerns and addressed the root cause for the touching. And the court is just not going to have any type of conduct of that nature here." *Id.* at 96-97.

The trial court properly applied the four factors in *Kelly*. The trial judge identified an overriding interest in excluding the spectator based upon safety concerns and preserving decorum in the court, and limited the closure of the courtroom to that individual only. Further, the trial court evaluated if any alternative less than excluding the spectator would serve by having the sheriff investigate the incident and by speaking to the person who was touched. Finally, the trial judge stated his findings for excluding the spectator on the record in the bench conference. West's constitutional rights, therefore, were not violated, and the trial court did not abuse its discretion.

B. Daily marijuana use

Williams and West both contend that the circuit court erred when it limited cross-examination as to Cook's alleged daily marijuana use and when it redacted medical records that allegedly indicated that Cook used marijuana daily.[3] Specifically, they argue that the trial court should have allowed questioning as to Cook's alleged daily marijuana use because it could have affected her memory of events during the shooting, or in the alternative to impeach her testimony that she did not use marijuana on the day of the shooting. They further argue that the redacted portions of the medical records should have been admitted pursuant to the rule of completeness.

In *Clark v. State*, the trial court refused to permit the defense to ask a witness about his "heavy" marijuana use for a period of several months before witnessing events

[3] The State disputes that the victim's medical records indicate daily marijuana use.

relevant to the trial. 140 Md. App. 540, 604 (2001). We held in *Clark* that when a party seeks to examine a witness regarding his or her drug use, a trial court must "balance the probative value of the inquiry against the potential for unfair prejudice to the witness." Md. App. 104 at 604. Thus, an inquiry as to whether an individual was under the influence of drugs at the time he or she witnessed the events is permissible under this balancing test, but a broader inquiry into drug use or impairment in months prior to the time he witnessed the events is not. *Id.* at 605.

In this case, relying upon *Clark*, the trial court restricted Cook's cross-examination solely to her marijuana use on the day in question. We find that *Clark* is controlling, that the trial court properly applied the rule in *Clark*, and that the trial court did not err in limiting cross-examination.

We also conclude that the trial court did not err in admitting Cook's medical records that redacted references allegedly showing that she used marijuana daily. Williams contends that the trial court was bound by the doctrine of completeness to admit Cook's medical records in their entirety, i.e., without the redactions. The doctrine of completeness allows a party to respond to the admission by an opposing party of a part of a writing by admitting the remainder of the writing, but it cannot be used by a party to admit evidence that the trial court has found inadmissible. *See Richardson v. State*, 324 Md. 611, 622-24 (1991). Here, the trial court found that references to Cook's alleged marijuana use outside the day of the shooting were inadmissible. As a result, the doctrine

of completeness cannot be used here. The trial court did not err in permitting introduction of the redacted medical records.

C. Out-of-court identification

West argues that the trial court erred in permitting a witness for the State, a police detective, to offer hearsay testimony based upon an identification of West made by a confidential informant who would not be called to testify, in violation of the Confrontation Clause of the Sixth Amendment.[4]

We will first look at whether the statement is hearsay and then, if necessary, turn to Confrontation. Maryland Rule 5-801(c) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." A "statement" is defined as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Maryland Rule 5-801(a). Hearsay is not admissible as evidence, except as otherwise provided by the Maryland Rules, statutes, or constitutional provisions. Maryland Rule 5-802.

A statement may be nonhearsay if it is offered for a purpose other than to establish the truth of the matter asserted. "[A] relevant extrajudicial statement is admissible as

[4] The Confrontation Clause provides that "in all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him." Const. Amend. VI. The Supreme Court has held that the Confrontation Clause requires the exclusion of "testimonial" evidence from a witness who is not present in court to testify against a criminal defendant, unless the witness is unavailable and the defense had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 63 (2004).

nonhearsay when it is offered for the purpose of showing that a person relied on and acted upon the statement and is not introduced for the purpose of showing that the facts asserted in the statement are true." *Graves v. State*, 334 Md. 30, 38 (1994); *see also Parker v. State*, 408 Md. 428, 438-42 (2009) (discussing when extrajudicial statements about police officer motivation are admissible, and when they are non-admissible hearsay). A trial court's legal rulings as whether certain evidence is hearsay is an issue of law reviewed *de novo*. *Bernadyn v. State*, 390 Md. 1, 8 (2005).

During the direct examination of the detective, after a bench conference regarding his testimony,[5] the following occurred:

THE STATE:	Detective …, I'd like to draw your attention to the month of March of 2012. At that time were you able to—did you receive further information from anyone that allowed you to further your investigation?
	* * *
THE WITNESS:	Yes.
THE STATE:	Based upon the information that you received from that person, did you on March 24, 2012 present a photograph display that included the photograph of Travone West?

[5] During the bench conference, counsel for West objected to any testimony from the detective that was based upon an identification coming from a confidential informant who would not be called to testify. West's counsel further specifically argued that admitting such testimony would violate the Confrontation Clause under the rule in *Crawford*. Thus, this issue is preserved for our review.

DEFENSE COUNSEL: Objection.

THE COURT: Overruled. You may answer.

THE WITNESS: Yes.

Here, the detective did not testify as to a "statement" made by the informant. Rather, he testified only as his own receipt of certain information from an individual, and his own action in presenting a photograph display based upon the information he received. Further, even if the mere reference to the receipt of information from another person could be considered a "statement," it was offered to explain what the detective did next in the investigation—create a photo array containing West's photograph. Because the "statement" was offered only to show how the detective relied and acted upon it, it was, as the trial court found, admissible nonhearsay. *See Graves*, 334 Md. at 38; *Parke*r, 408 Md. at 438-42.

We therefore conclude that the trial court did not err in admitting the evidence on hearsay grounds. Further, because we find that the evidence was nonhearsay, we do not need to reach the issue of whether it was a violation of the Confrontation Clause of the Sixth Amendment. *See Crawford*, 541 U.S. at 59 n.9 ("The [Confrontation] Clause…does not bar the the use of testimonial statements for purposes other than establishing the truth of the matter asserted").

III. JURY INSTRUCTIONS

A. Jury instruction as to accomplice liability

Williams contends that the trial court erred in issuing a jury instruction supplementing Maryland Pattern Jury Instruction – Criminal 6:00 (Accomplice Liability).[6] Specifically, Williams argues that the supplemental instruction was an inaccurate statement of the law because it contradicts the knowledge requirement in the

[6] MPJI-Cr. 6:00 provides:

> The defendant may be guilty of (crime) as an accomplice, even though the defendant did not personally commit the acts that constitute that crime. In order to convict the defendant of (crime) as an accomplice, the State must prove that the (crime) occurred and that the defendant, with the intent to make the crime happen, knowingly aided, counseled, commanded, or encouraged the commission of the crime, or communicated to [the] [a] primary actor in the crime that [he] [she] was ready, willing, and able to lend support, if needed.
>
> [A person need not be physically present at the time and place of the commission of the crime in order to act as an accomplice.]
>
> [[The mere presence of the defendant at the time and place of the commission of the crime is not enough to prove that the defendant is an accomplice. If presence at the scene of the crime is proven, that fact may be considered, along with all of the surrounding circumstances, in determining whether the defendant intended to and was willing to aid [the] [a] primary actor, for example, by standing by as a lookout to warn the primary actor of danger, and whether the defendant communicated that willingness to [the] [a] primary actor.]]

(2nd. Ed., 2013 Supp.).

pattern jury instruction, does not define "aided and abetted," and can be read to suggest that Williams may be his own accomplice. He further objects to the supplemental instruction on the grounds that it was fairly covered in the pattern instruction, and that it was not applicable to the facts of his case.

This Court reviews jury instructions for an abuse of discretion. *Stabb v. State*, 423 Md. 454, 465 (2011). A trial court must issue a jury instruction requested by a party when it is: (1) a correct statement of the law; (2) that is applicable to the facts of the case; and (3) not fairly covered elsewhere in the instructions actually given in the case. *Carroll v. State*, 428 Md. 679, 689 (2012). A jury instruction is applicable to the facts of the case as long as there is "some evidence" to generate it. *See, e.g., Dishman v. State*, 352 Md. 279, 292-93 (1998); *Dykes v. State*, 319 Md. 206, 216-17 (1990).

Relevant to this case, this Court in *Diggs & Allen v. State*, determined that the following jury instruction was a correct statement of the law:

> It is not necessary to know his co-defendant was going to commit other crimes. Furthermore, the defendant need not have participated in any fashion in the other crimes. In order for the State to establish accomplice liability, the State must prove that the defendant actually committed the planned offense, or the defendant aided and abetted in the plan of criminal offenses. And the criminal offense not within the original plan w[as] done in furtherance of the commission of the planned criminal offense or the escape therefrom.

213 Md. App. 28, 83 (2013), *aff'd on other grounds*, 440 Md. 643 (2014). This Court agreed with the trial court's finding that the language in the supplemental jury instruction was "merely a summary of the principles set forth in *Sheppard*, rephrased in more

commonly understood language." *Id.* at 86 (citing *Shephard v. State*, 312 Md. 118 (1988)).[7]

Here, in addition to issuing the pattern jury instruction on accomplice liability, the trial court gave a supplemental instruction to the jury virtually identical to the one upheld in *Diggs & Allen*:

> It is not necessary to know [that] [Williams's] co-defendant was going to commit other crimes. Further, the defendant need not have participated in any fashion in the other crimes.

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[7] In *Sheppard v. State*, the Court of Appeals explained that:

> An accomplice is a person who, as a result of his or her status as a party to an offense, is criminally responsible for a crime committed by another. This responsibility, known as accomplice liability, takes two forms: (1) responsibility for the planned, or principal offense (or offenses), and (2) responsibility for other criminal acts incidental to the commission of the principal offense. In order to establish complicity for the principal offense, the State must prove that the accused participated in the offense either as a principal in the second degree (aider and abettor) or as an accessory before the fact (inciter). In order to establish complicity for other crimes committed during the course of the criminal episode, the State must prove that the accused participated in the principal offense either as a principal in the first degree (perpetrator), a principal in the second degree (aider and abettor) or as an accessory before the fact (inciter) and, in addition, the State must establish that the charged offense was done in furtherance of the commission of the principal offense or the escape therefrom.

312 Md. at 122-23.

> In order for the [S]tate to establish accomplice liability, the [S]tate must prove that [t]he defendant actually committed the planned offense or the defendant aided and abetted in the plan of criminal offenses and the offense within the original plan was done in furtherance of the commission of the planned criminal offense or escape therefrom.

Based upon the binding precedent of *Diggs & Allen*, we therefore hold that the supplemental instruction, and in particular its second paragraph, is an accurate statement of the law.

Further, we conclude that the instruction was properly generated by the facts of the case. Cook testified that on the night of the shooting she saw Beverly talking to a man she later identified as Williams; that Beverly returned to the car looking agitated and disturbed; that Williams returned to his car and drove off, before returning a few minutes later; that Williams and a man she later identified as West exited the car and shot up the car in which she was sitting along with Beverly. Her testimony was, at a minimum, "some evidence" from which the jury could have inferred that Williams aided and abetted in a planned shooting of the two victims. Specifically Cook's testimony was sufficient for the jury to infer that Williams engaged in a verbal altercation or confrontation with Beverly, that Williams then left the scene to pick up West where the two men developed a plan to injure or frighten the occupants of the car, and that the two men returned to the scene and attempted to murder the victims in furtherance of that plan by firing shots into their car.

As the supplemental jury instruction was an accurate statement of the law not covered in the pattern jury instruction and was generated by the facts of the case, and not

covered elsewhere in the pattern instruction, we hold that there was no abuse of discretion.

B. Jury Instructions as to Prior Inconsistent Statements made by a victim

West contends that the trial court erred in instructing the jury that two prior inconsistent statements of the victim, Cook, were admitted for impeachment purposes only. West argues that the jury should have been instructed that the statements were also admitted as substantive evidence under the rule from *Nance v. State*, 331 Md. 549 (1993), as codified in Maryland Rule 5-802.1(a), which provides that:

> The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:
>
> (a) A statement that is inconsistent with the declarant's testimony, if the statement was (1) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (2) reduced to writing and was signed by the declarant; or (3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement[.]

In the alternative, he contends that if the statements were not already admitted as substantive evidence, the trial court erred in refusing to allow the defense to reopen its case and to admit the statements as substantive evidence.

This Court reviews instructions delivered to the jury, as well as a trial court's decision whether to reopen a case, for an abuse of discretion. *Stabb*, 423 Md.at 456.

Defense counsel sought to introduce several allegedly prior inconsistent statements during the cross examination of Cook, both to impeach her testimony and as

substantive evidence.[8] After a lengthy discussion, the trial court ruled that the defense counsel could ask questions as to her testimony in direct examination that related to the prior statements, and if her answer remained inconsistent with the prior statements, the defense could play a recording of the prior statements. The trial court explicitly ruled that it would permit the defense to play a recording under those circumstances for impeachment pursuant to Maryland Rule 5-613(b).[9] Defense counsel played testimony from the witness from a pre-trial hearing and from her testimony before a grand jury.

The next day, during a conference on jury instructions, defense counsel requested that the trial court read both Maryland Pattern Jury Instruction – Criminal 3:19B,[10]

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[8] Defense counsel initially stated that she sought to introduce one of the prior statements for impeachment and not as substantive evidence pursuant to the rule in *Nance* and Md. Rule 5-802.1. However, in a lengthy discussion before the trial court as to the admissibility of the evidence, she also argued that the statement was admissible under Md. Rule 5-802.1. We find the issue to have been adequately preserved.

[9] Md. Rule 5-613(b):

> (b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Unless the interests of justice otherwise require, extrinsic evidence of a prior inconsistent statement by a witness is not admissible under this Rule (1) until the requirements of section (a) have been met and the witness has failed to admit having made the statement and (2) unless the statement concerns a non-collateral matter.

[10] Maryland Pattern Jury Instruction – Criminal 3:19B:

> PRIOR STATEMENT OF WITNESS: TO IMPEACH
>
> You have heard testimony that (_____) made a statement [before trial] [at another hearing] [out of your presence]. Testimony

(continued…)

regarding prior statements offered for impeachment, and 3:19A, [11] regarding prior statements offered as substantive evidence. The trial court declined to read 3:19A, noting that the statements were not offered as substantive evidence. After a weekend interval, West's counsel sought to reopen the case to admit the prior inconsistent statements as substantive evidence. The trial court denied her request.

We see nothing improper in the way that the trial court exercised its discretion in admitting Cook's prior inconsistent statements for impeachment purposes only and instructing the jury on that limitation. At the time that defense counsel sought to introduce the prior inconsistent statements, the trial court heard arguments for admitting the statements, and ruled that they were admissible solely for impeachment. Defense counsel did not object to that ruling at that time, and did not seek to introduce the

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concerning that statement was permitted only to help you decide whether to believe the testimony that the witness gave during this trial.

It is for you to decide whether to believe the trial testimony of (_____) in whole or in part, and you may not use the earlier statement for any purpose other than to assist you in making that decision.

[11] Maryland Pattern Jury Instruction – Criminal 3:19A:

PRIOR STATEMENT OF WITNESS: AS SUBSTANTIVE EVIDENCE

You will recall that (_____) testified in the [State's case] [defense case] during the trial. You will also recall that it was brought out that before this trial [he] [she] made statements concerning the subject matter of this trial. Even though these statements were not made in this courtroom, you may consider these statements as if they were made at this trial and rely on them as much, or as little, as you think proper.

evidence under Md. Rule 5-802.1 at that time or any time prior to the discussion regarding jury instructions.

Because the trial court was within its discretion to instruct the jury to consider the statements for impeachment only, there was obviously no need for a jury instruction to tell the jury to consider the statements as substantive evidence. Moreover, the trial court was free to refuse to permit defense counsel to reopen her case and introduce the statements as substantive evidence because they were not in a form prepared for the jury. A trial court has wide discretion in regulating the conduct of a trial, including decisions regarding whether to allow re-opening of a defense case. *Hunt v. State*, 321 Md. 387, 405 (1990).

IV. MOTIONS

A. Motion for judgment of acquittal

Williams contends that there was insufficient evidence for the circuit court to sustain his convictions on the counts of the attempted first degree murder and conspiracy to commit first degree murder of Cook and the attempted second degree murder of Beverly, and that the trial court erred in denying his motion for judgment of acquittal as to those counts. Specifically, he argues that the evidence failed to establish that he had the requisite *mens rea* intent to commit those crimes.[12]

[12] Williams's argument is properly preserved for our review. An issue of the sufficiency of the evidence is not preserved when an appellant's motion for judgement of acquittal before the trial court is based upon a ground different than that set forth on (continued…)

This Court reviews a trial court's denial of a motion for judgment of acquittal to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Smith v. State*, 415 Md. 174, 184 (2010) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). We must "give due regard to the [fact finder's] findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses." *State v. Smith*, 374 Md. 527, 534 (2003) (internal citations omitted). When there are "competing rational inferences available," we must "defer to the jury's inferences and determine whether they are supported by the evidence." *Smith*, 415 Md. at 183-85. This standard of review "applies to all criminal cases, regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone." *Id.* at 185.

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appeal. *Anthony v. State*, 117 Md. App. 119, 126 (1997). On the other hand, this Court favors reaching the merits of a claim for sufficiency of the evidence so long as the underlying motion for judgment of acquittal reasonably encompasses or relates to a ground raised on appeal. *See e.g.*, *Anthony*, 117 Md. at 126 (interpreting appellant's argument at trial that the State was required to produce cocaine she was alleged to have distributed to encompass her argument on appeal that the State needed to prove the substance was cocaine, to reach the merits of the sufficiency of evidence issue); *Pinkney v. State*, 151 Md. App. 311, 325 (2003) ("we shall resolve the uncertainty as to preservation in favor of appellant and reach the merits"). Here, Williams moved for judgment of acquittal on all counts based upon his alleged lack of knowledge as to the actions that West was to take in shooting at the victims. We think that his argument below that he lacked knowledge that West intended to shoot at the victims reasonably relates to his argument raised on appeal that there was insufficient evidence that he formed the requisite intent to attempt or conspire to kill. Thus, we think the issue was sufficiently preserved.

Notably, however, "[a]lthough circumstantial evidence alone is sufficient to sustain a conviction, the inferences made from circumstantial evidence must rest upon more than mere speculation or conjecture." *Id.*[13]

Williams has only raised a sufficiency issue as to the *mens rea* intent element for his convictions on the counts of the attempted first degree murder and conspiracy to commit first degree murder of Cook and the attempted second degree murder of Beverly. Accordingly, this Court must evaluate whether any rational factfinder could have found the essential intent element for each of the convictions.

Attempt and conspiracy are both specific intent crimes in Maryland. The specific intent for attempting or conspiring to commit murder is the same as for actually committing a murder. *State v. Earp*, 319 Md. 156, 163 (1990) ("[t]he specific intent required to prove an attempt is the intent to commit a particular crime"). For first degree

[13] Williams argues that the correct legal standard on appellate review for a conviction that rests solely upon circumstantial evidence is that the conviction must not be sustained unless the circumstances, taken together, are inconsistent with any reasonable hypothesis of innocence, citing to *Wilson v. State*. 319 Md. 530, 536-37 (1990). The Court of Appeals addressed a similar argument in *Smith v. State*. 415 Md. 174, 181-83 (2010). In *Smith*, the Court held that the 'inconsistent with any reasonable hypothesis of innocence' standard advocated by the appellant in that case was "not the focus of the standard to be applied when reviewing the sufficiency of the evidence in criminal cases," and that it is the role of the factfinder and not the appellate court to "choose among different inferences that might possibly be made from a factual situation." *Id.* at 183 (internal citations omitted).

murder, the defendant must intend to kill willfully, deliberately, and premeditatedly.[14] Md. Code Ann. Crim. Law ("CR") § 2-201; *see also* Charles Moylan, Jr., CRIMINAL HOMICIDE LAW 45-46 (2002). This Court has defined each of the intent elements necessary to support a first degree murder conviction, stating that first degree murder "requires that the defendant possess the intent to kill (willful), that the defendant have conscious knowledge of the intent to kill (deliberate), and that there be enough time for the defendant to deliberate, i.e., time enough to have thought about that intent (premeditate)." *Wood v. State*, 209 Md. App. 246, 317 (2012) (internal quotations omitted); *see also* Moylan, *supra*, at 45-46. For second degree murder, the defendant must have intended to engage in deadly conduct either with the intent to kill the victim or with the intent to inflict such serious bodily harm that death would be the likely result. *Thornton v. State*, 397 Md. 704, 722 (2007); *see also* Moylan, *supra*, at 43. For both first and second degree murder, as with other specific intent crimes, an accomplice is equally culpable along with a principal actor in the commission of a crime. *Owens v. State*, 161 Md. App. 91, 99-100 (2005) ("[a]n accomplice who knowingly, voluntarily, and with common interest with the principal offender, participates in the commission of a crime is a guilty participant, and in the eye of the law is equally culpable with the one who does the act") (internal citations omitted).

[14] The requisite intent for a first degree murder may be different under a felony-murder theory. As the State did not proceed under a felony-murder theory in this case, we do not discuss the intent necessary for felony-murder.

Here, viewed in the light most favorable to the prosecution, there was sufficient evidence for a rational factfinder to find all the requisite intent elements were met. Evidence was presented to the jury that Beverly left the car and spoke to Williams before returning to the car "agitated and disturbed;" that Williams drove away and returned shortly thereafter and parked across the street from the victims' car; that Williams and West then exited the car and stood on the other side of the street trying to cross towards the victims' car; that Beverly yelled for Cook, the car's driver, to "pull off," and that once the driver was able to do so, West started shooting "the whole car up;" and that Cook was struck by bullets five times. Although the evidence is circumstantial in nature, it supports the following rational inferences: (1) Beverly returned to the car "agitated and disturbed" after speaking to Williams because of a confrontation with Williams; (2) that Williams left the scene to pick up West with the conscious and deliberate intent that West would shoot Beverly in response to this confrontation; (3) that the testimony that Williams returned to the scene several minutes later left sufficient time for premeditation; (4) that testimony from Cook that she saw Williams return to park across the street and then West *and* Williams exit their car and walk towards her car indicates that Williams was a knowing and voluntary participant in the shooting along with the shooter, West. Therefore, we hold that the evidence was legally sufficient as to the requisite element of intent to convict Williams of the counts of the attempted first degree murder and conspiracy to commit first degree murder of one victim and the attempted second degree murder of a second victim.

B. Motion for Mistrial

Williams argues that the circuit court erred in denying his motion for mistrial based upon references to the defense's ability to subpoena witnesses made by the State during its closing argument, which he contends contained impermissible burden shifting.[15] In its brief to this Court, the State acknowledges that it may have been misleading for the prosecutor to call the jury's attention to the failure of a defendant to call witnesses. St.'s Br. at 49. The State argues, however, that in this case the statement was permissible under the "opened door" doctrine—as a response to defense counsel's argument that the State failed to produce Beverly as a witness at trial. Further, the State contends that even if the statement was improper, it did not mislead the jury because the trial court later reinstructed the jury as to the burden of proof after closing arguments.

[15] In his brief, Williams also complains of several additional statements made by the State during closing argument, including: (1) the State's argument as to what Tyrail Beverly knew; (2) the State's argument that "Snitches get stitches. Everybody knows that"; (3) The State's argument that "[t]he facts bridge that gap. The law bridges that gap. The law says [Williams] didn't have to know."; and, (4) the State's argument as to the burden of proof. These statements were not raised in his motion for mistrial before the circuit court, and as a result Williams has waived his right to raise those statements in this appeal. *See* Maryland Rule 8-131(a).

Williams did raise in his motion for mistrial an allegation that the State misstated the law of accomplice liability during its closing argument. Although this allegation is properly preserved on appeal, the statement to which Williams objects—that Williams did not have to know that his accomplice was going to commit other crimes to be found guilty—is identical to the supplemental jury instruction issued by the trial court, which we earlier found to be an accurate description of the law of accomplice liability. *See infra* Part V. The statement by the State's Attorney in closing argument is therefore not a misstatement of the law, and there was no error by the trial court in denying the motion for mistrial on that basis.

When reviewing a trial court's denial of a motion for mistrial, this Court applies an abuse of discretion standard of review. *Cooley v. State*, 385 Md. 165, 173 (2005) (citing *Wilhelm v. State*, 272 Md. 404, 429 (1974)); *see also infra* Part VII. In the specific context of statements made during closing arguments, a reviewing court must also consider the important role of closing arguments in clarifying issues for the trier of fact and the greater leeway generally afforded to attorneys to raise any argument "that is warranted by the evidence or inferences reasonably drawn therefrom." *Whack v. State*, 433 Md. 728, 742 (quoting *Spain v. State*, 386 Md. 145, 152 (2005)). An appellate court should hold that the trial court abused its discretion only if it finds that "the jury was actually or likely misled or otherwise influenced to the prejudice of the accused by the State's comments." *Id.* (internal citations omitted).

As the State admits, a prosecutor "may not routinely draw the jury's attention to the failure of the defendant to call witnesses, because the argument shifts the burden of proof." *Wise v. State*, 132 Md. App. 127, 148 (2000). However, courts have recognized an exception when a comment by the defense during opening or closing arguments "opens the door" to a narrowly tailored response by the State. In *Mitchell v. State*, defense counsel drew the jury's attention to the prosecutor's failure to call certain witnesses, prompting the prosecutor to respond by calling attention to the defense's power to subpoena those same witnesses. 408 Md. 368, 375-79 (2009). The Court of Appeals held that, under the circumstances, defense counsel had "opened the door" to the

prosecutor's "narrow and isolated remarks" as to the defense's subpoena power, and that those remarks did not shift the burden of proof. *Id.* at 372.

Here, defense counsel made several statements in his closing argument referring to the State's failure to produce Beverly as a witness. In its rebuttal closing argument, the State made the following statement:

> [Defense] counsel points to the fact that Tyrail Beverly is not here. The State has the entire burden to prove these defendants guilty beyond a reasonable doubt, the entire burden. But just like the State has the ability to subpoena people, so does the defense.

We agree with the State that the rebuttal statement was a narrowly tailored response to an issue raised by defense counsel—here, the absence of Beverly—just as in *Mitchell*. Further, because the prosecutor was careful to reiterate that the State retained the burden of proof to prove the defendant's guilt beyond a reasonable doubt, the statement did not mislead the jury as to the burden of proof. Moreover, the trial court reinstructed the jury on burdens, sufficiently curing any potential prejudice to Williams.

As Williams has not shown an abuse of discretion in the trial court's denial of the arguments made in his motion for mistrial, we hold that the trial court did not err in denying the motion for mistrial.

C. Motion for Mistrial, Part 2

West argues that the trial court erred in denying his motion for mistrial, which Williams joined, after a juror wrote a note stating that during a lunch break she had encountered spectators to the trial and felt threatened by them. This Court reviews a

lower court's decision as to motion for mistrial for an abuse of discretion. *Cooley*, 385 Md. at 173 (citing *Wilhelm*, 272 Md. at 429). "A trial judge shall declare a mistrial only under extraordinary circumstances and where there is a manifest necessity to do so. The record must compellingly demonstrate clear and egregious prejudice to the defendant to warrant such a drastic measure." *Benjamin v. State*, 131 Md. App. 527, 541 (2000) (citing *Allen v. State*, 89 Md. App. 25, 42-43, (1992) (internal citations omitted)).

In this case, Juror 10 sent a note to the trial court in which she wrote that something was said to her by spectators during the trial, and that she felt unsafe. The trial court questioned her about the note. When asked if she could make a fair judgment and be fair to all sides, she answered yes. Juror 10 also indicated that she had spoken to some other jurors about the incident. The trial court then brought in the other jurors and asked them each individually at the bench if anything that occurred during the break would affect their ability to be fair. All eleven other jurors either answered the question in the negative, or informed the trial court that they were aware that the incident had occurred, but that it would not affect their ability to be fair. After the trial court had spoken to each juror, counsel for West renewed his motion for mistrial, joined by counsel for Williams. The trial court denied the motion.

Given that the trial court had the opportunity to speak to each juror regarding the incident, and each juror affirmed that the incident had not affected his or her ability to be fair, we hold that the trial court did not abuse its discretion by denying the motion for mistrial.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT TRAVONE WEST IN CASE NO. 1173. COSTS TO BE PAID BY APPELLANT CHARLES WILLIAMS IN CASE NO. 1183.