Circuit Court for Baltimore City
Case No. 122273001

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 984

September Term, 2024

MICHAEL HARVEY

v.

STATE OF MARYLAND

Wells, C.J.,
Arthur,
Beachley, Donald E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wells, C.J.

Filed: May 6, 2026

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for persuasive value only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

Appellant Michael Harvey appeals from a jury instruction the Circuit Court for Baltimore City gave at the end of his trial as well as an answer the court provided in response to a jury question during deliberations. Over Harvey's objection, the court instructed the jury on Maryland Pattern Jury Instruction 3:25 ("MPJI-Cr 3:25"), Presence of Defendant, and included language from that instruction in its instructions for three of Harvey's charges. During deliberations, the jury sent a note asking whether one of the victims had to be the specifically intended target in order to convict Harvey of first-degree murder. In response, over Harvey's objection, the court wrote "no" on the jury's note. The jury ultimately convicted Harvey and now he asserts two questions on appeal, which we slightly rephrase and re-order:

I. Whether the court erred in responding "no" to the jury's question as to whether Harvey must have specifically intended to kill Aaron Adams to convict him for first-degree murder; and

II. Whether the court erred in instructing the jury on MPJI-Cr 3:25, Presence of Defendant.

For the reasons that follow, we answer the first question in the affirmative and therefore reverse the decision of the circuit court. Because we are reversing and anticipate Harvey's presence would again be at issue should the State retry the case for a third time, we address the second question as well and conclude the court did not err in instructing the jury on MPJI-Cr 3:25.

FACTUAL AND PROCEDURAL BACKGROUND

After his first trial ended in a hung jury, Harvey was convicted at a second trial of first-degree murder and conspiracy to murder Aaron Adams; attempted first-degree murder

and conspiracy to murder Michael Williams; attempted first-degree murder and conspiracy to murder Damion Allen; conspiracy to use a firearm in the commission of a crime of violence; and false statement to a police officer. Harvey was sentenced to life plus thirty-five years.

The main issue at trial was the identity of the perpetrator(s). The State's evidence showed that on the date of the offense, unidentified individuals drove a white van—registered to Harvey—to Laurens and Fremont Streets. The individuals exited the van, fired gunshots into a crowd of people, drove the van to a different street, and swapped cars with a red Hyundai—also registered to Harvey—which had arrived just two minutes before the shooting. Police recovered twenty-four cartridge casings, one projectile, and one live round from the scene, as well as a shell casing on the roof of the white van. No weapon was recovered. Harvey was arrested based on his connection to the two cars involved.

The mother of Harvey's children, Amira Muhammad, testified for the State. Muhammad testified that Harvey had previously loaned her the white van to drive to work, but on the morning of the offense, Harvey told Muhammad he needed the van back. Immediately after the time of the shooting, Harvey called Muhammad "really, really frantic[,] screaming" to call the police because someone had stolen the van. Muhammad

falsely reported to the police that the van had been stolen from her driveway after she left the keys inside.[1]

Agent Michael Fowler from the Federal Bureau of Investigations testified about Harvey's cell phone location data on the date of the offense. Agent Fowler testified that around the time of the shooting and when the white van and red Hyundai were driving to their respective locations, Harvey's phone used cell towers in the same area. Harvey did not put on defense case.

When discussing the proposed jury instructions, the following colloquy occurred regarding MPJI-Cr 3:25, Presence of Defendant[2] (the "mere presence" instruction):

> [DEFENSE COUNSEL]: And then [MPJI-Cr 3:25].
>
> THE COURT: There's an allegation that he was present.
>
> [DEFENSE COUNSEL]: There's an allegation that his phone was present.
>
> THE COURT: No, there's an allegation that he was present and therefore there's an assumption the jury -- a reasonable assumption the jury can make that he was present. You can argue whatever you want to argue. It's going to remain in.
>
> [DEFENSE COUNSEL]: Just note my objection, Your Honor.

[1] Muhammad denied any suggestion that she and Harvey had discussed what to tell the police prior to her making the report.

[2] MPJI-Cr 3:25, Presence of Defendant, states:

> A person's presence at the time and place of a crime, without more, is not enough to prove that the person committed the crime. The fact that a person witnessed a crime, made no objection, or did not notify the police does not make that person guilty of the crime. However, a person's presence at the time and place of the crime is a fact in determining whether the defendant is guilty or not guilty.

THE COURT: Your objection is noted.

While instructing the jury, the court gave the general "mere presence" instruction and included language from it in the instructions for three of Harvey's charges (conspiracy, first-degree murder by conspiracy resulting in death, and accomplice liability).

During deliberations, the jury sent the following note:

> Does Aaron Adams need to be the specific intended target in order to convict for 1st degree murder?
>
> For example: if the shooting is willful, deliberate and premeditated[,] AND the intention is to kill, (generally) would that qualify for murder in the 1st degree?

While discussing how the court would address the jury's note, defense counsel requested the court "simply respond back, please rely on the law that's been provided to you." The court responded that it did not think the jury instructions would help them answer the question asked because the instructions "don't address this particular issue." The court took a short recess to research the matter.

Upon returning, the court cited to *Harrison v. State*, 382 Md. 477 (2004), for its explanation of concurrent intent in which a shooter creates a "kill zone" and "ha[s] the specific intent to kill everyone inside the zone." Based on *Harrison*, the court stated it would be writing "no" in response to the jury's question. Defense counsel objected:

> [DEFENSE COUNSEL]: So, Your Honor, I'm going to object to that answer. So the case you just read at hand I believe Harrison v. State. So the State's theory in this case is accomplice liability. It's not [that] the defendant was shooting at anyone creating a kill zone. It is that -- and they're not deciding this based on conspiracy, they're deciding this on first degree murder. So under th[is] set of facts, I don't believe that your answer is appropriate and I'm objecting to it, Your Honor.

. . .

> THE COURT: I do understand what you're saying, but by the same token, if you're dealing with accomplice liability in this matter, they're put in the same shoes as the individuals who actually shot the firearm. The Court notes your objection.

The court wrote "no" on the jury's note and returned it to them.

After about a day of deliberations, the jury convicted Harvey of first-degree murder and conspiracy to murder Aaron Adams; attempted first-degree murder and conspiracy to murder Michael Williams; attempted first-degree murder and conspiracy to murder Damion Allen; conspiracy to use a firearm in the commission of a crime of violence; and false statement to a police officer. Additional facts are provided below as needed.

STANDARD OF REVIEW

"The trial court is required to give a specific instruction to the jury when three conditions are met: (1) it is a correct statement of the law; (2) it is applicable under the facts of the case; and (3) its contents were not fairly covered elsewhere in the jury instruction[s] actually given." *Joiner v. State*, 265 Md. App. 546, 565 (2025) (quoting *Jarvis v. State*, 487 Md. 548, 564 (2024)) (cleaned up). The threshold determination of whether there is "some evidence" sufficient to generate a jury instruction is a legal question reviewed by this Court de novo. *Hollins v. State*, 489 Md. 296, 309 (2024) (internal citations omitted). However, "[t]he decision whether to give a particular jury instruction is reviewed for abuse of discretion." *Joiner*, 265 Md. App. at 566 (citing *Wright v. State*, 474 Md. 467, 482 (2021)). That is, the court's decision to give an instruction will not be reversed absent a clear showing that it was "manifestly unreasonable, or exercised on

untenable grounds, or for untenable reasons." *Joiner*, 265 Md. App. at 566 (quoting *State v. Sayles*, 472 Md. 207, 230 (2021)) (additional citation omitted).

Likewise, a court's decision to give a supplemental instruction is reviewed for abuse of discretion. *State v. Bircher*, 446 Md. 458, 463 (2016) (quoting *Sidbury v. State*, 414 Md. 180, 186 (2010). "Supplemental instructions can include an instruction given in response to a jury question. When the jury asks such a question, 'courts must respond with a clarifying instruction when presented with a question involving an issue central to the case.' Trial courts must avoid giving answers that are 'ambiguous, misleading, or confusing.'" *Bircher*, 446 Md. at 462 (quoting *Appraicio v. State*, 431 Md. 42, 51 (2013)) (original citations omitted). The same standard applies to the court's response to a jury question that does not rise to the level of a supplemental instruction.

DISCUSSION

I. The Court Erred in Responding "No" to the Jury's Question About Specific Intent.

A. Parties' Contentions

Harvey argues the court erred in responding "no" to the jury's question because the State's "only theory at trial was that Aaron Adams was the intended target of the shooting." Harvey contends the court's response "injected principles of transferred intent and concurrent intent into the case, despite the fact that the jury was never instructed on the law of either legal theory." Harvey asserts that because of the indictment's language, evidence at trial, and jury instructions, he was "on notice" that he was being tried for first-degree murder with the specific intent to kill Adams (either as a principal or as an accomplice to

the principal actor). Conversely, Harvey maintains the jury never heard evidence or argument that Adams was not an intended target. Harvey argues that the court's interjection about specific intent during the State's closing argument further shows the State only presented a theory of specific intent. Harvey argues in the alternative that even if giving the answer itself was not erroneous, it was erroneous for the court to give a supplemental jury instruction without allowing the defense to respond.

The State first asserts the theory of concurrent intent was generated by the evidence, which showed that an unkown individual exited the vehicle and began shooting into a crowd of people in a courtyard. The police recovered twenty-four cartridge casings, one projectile, and one live round from the scene. The State also contends the prosecutor argued concurrent intent in the closing argument, although without using the specific terminology. The State further argues it was within the court's discretion to instruct the jury on concurrent intent when it was in direct response to the jury's question and it was a correct statement of the law.

B. Analysis

At the outset, we disagree with the parties' characterization of the court's one-word response to the jury's question as a "supplemental instruction." As noted, "courts must respond with a clarifying instruction when presented with a question involving an issue central to the case." *Appraicio*, 431 Md. at 51 (quoting *Cruz v. State*, 407 Md. 202, 211 (2009)). The following case law indicates the court's response of "no" hardly qualifies as a "clarifying instruction," although it was not a refusal to answer either. Because the jury's

question involved an issue central to the case—namely, the intent required to convict Harvey of first-degree murder—and the court neither instructed the jury nor correctly answered the question under the evidence presented, we conclude it was an abuse of discretion for the court to answer "No."

As our Supreme Court has recognized, "[t]rial judges walk a fine line when answering questions posed by jurors during the course of their deliberations. Any answer given must accurately state the law and be responsive to jurors' questions without invading the province of the jury to decide the case." *Appraicio*, 431 Md. at 44. As Justice Frankfurter wrote in *Bollenbach v. United States*, "[p]articularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge." 326 U.S. 607, 612 (1946). Therefore, "[w]hen a jury makes explicit its difficulties[,] a trial judge should clear them away with concrete accuracy." *Id.* at 613.

Answering jury questions fully and accurately is patently important when the questions concern a central issue in the case. *See Lovell v. State*, 347 Md. 623, 659 (1997) (holding a trial court must provide a clarifying response to a jury's question when the question involves a central issue in the case). In *Lovell*, the Supreme Court of Maryland vacated the petitioner's death sentence because the lower court refused to tender a supplemental jury instruction clarifying a central question in the death penalty determination. *Id.* at 660–66. There, the jury sent a question during deliberations asking whether the court could provide "further definition" or "guidance" for the mitigating factor

of the offender's "youthful age" listed in the death penalty statute. *Id.* at 654. The jurors were brought back into the courtroom and the court told them: "There is no further definition to the term and there is no further guidance that the Court can give the jury relative to the term." *Id.* at 655.

On appeal, our highest court held that giving the jurors no further guidance was reversible error, stating: "Absent clarification from the trial court, there was a very real risk that the jurors may have erroneously concluded" multiple inferences about the youthful age factor, leading to an improper application of it. *Id.* at 659. The Court concluded the error was not harmless because at least one juror was "sufficiently concerned" about the statutorily required factor that they asked for guidance—meaning there was a real possibility the jury may not have been able to unanimously impose the death penalty if clarification had been provided. *Id.* at 660.

Our Supreme Court faced the same issue in *State v. Baby*, 404 Md. 220 (2008). The Court applied its holding in *Lovell* to require the following preliminary inquiry when a trial court is faced with a jury question during deliberations: "whether the jury's questions made explicit its difficulty with an issue central to the case such that the trial court was required to respond to the questions in a manner that directly addressed the difficulty." *Id.* at 263. There, in a rape trial, the jury twice asked about the withdrawal of consent during intercourse. *Id.* at 233–35. Both times, the court directed the jury's attention to the previously provided jury instructions without giving additional information. *Id.* at 235, 262. Applying *Lovell*, the Supreme Court held:

> The jury's questions relating to the timing of withdrawal of consent certainly touched upon an issue central to its ability to determine whether Baby had committed the crime of first degree rape. Referring the jury to the legal definition of rape that the court had previously provided was not sufficient to address either of the jury's questions as the definition makes no reference to the issue of post-penetration withdrawal of consent which was central to the jury's questions.

Id. at 263–64. The Court concluded the error was not harmless because it could not determine it was "beyond any reasonable doubt" that the jury would have reached the same result had they been instructed on post-penetration withdrawal of consent. *Id.* at 265.

Lovell and *Baby* stand for the proposition that a court's non-response or referral back to previously given instructions may be reversible error when the jury asks a question revealing its confusion about a central issue to the case. On the other hand, cases such as *Brogden v. State*, 384 Md. 631 (2005), and *State v. Bircher*, 446 Md. 458 (2016), dealt with actual supplemental instructions given in response to a jury's questions.

In *Brogden*, our Supreme Court held the trial court erred in giving a supplemental instruction in response to two jury questions during deliberation: "first, whether it was a crime to have a handgun, and secondly, whether the State had the burden of proving that petitioner did not have a license to carry a handgun." 384 Md. at 635. The defendant was being tried for, *inter alia*, wearing, carrying, or transporting a handgun. *Id.* at 632. The trial court erroneously instructed the jury in response that "[i]t's the burden of the Defendant to prove the existence of the license, if one exists, not the State." *Id.* at 639. The Supreme Court held the instruction was reversible error because the defendant had presented no defense at trial—especially not an affirmative defense that he indeed was carrying a

handgun but that he had a license to do so. *Id.* at 644. At that point, "the entire burden of proving the commission of that particular crime rested with the State." *Id.* Therefore, the erroneous instruction imposed an inappropriate burden on the defendant. *Id.*

Conversely, in *Bircher*, the Supreme Court affirmed the trial court's decision to give a supplemental instruction on transferred intent because it was invoked by the evidence, did not prejudice the defendant, and was a correct statement of the law. 446 Md. at 482. There, Bircher was on trial for shooting two victims where one survived and the other died. *Id.* at 473. At trial, "[t]here was no dispute that Bircher was the shooter. In closing, Bircher's counsel argued that Bircher did not intend to shoot [the deceased victim][,] that Bircher acted in self-defense, and that Bircher did not intend to hit anyone[.]" *Id.* There was evidence at trial that Bircher had gotten into a dispute with the surviving victim that night, and the State argued Bircher's intent was to kill everyone in the area. *Id.* at 474, 478. During deliberations, the jury sent a note, stating: "We are confused on the term 'intent.' Does it mean to kill a person or the specific person. Can you please clarify? Thank you." *Id.* at 474. The court gave a supplemental instruction on transferred intent and allowed defense counsel to present a supplemental closing argument addressing intent. *Id.* at 476.

Our Supreme Court held the transferred intent instruction was supported by the evidence because the evidence showed Bircher could have felt threatened by the surviving victim, Bircher may have intended to protect himself by shooting that victim, and the bullets accidentally killed the deceased victim standing nearby. *Id.* at 478. In other words, the evidence supported that Bircher may have intended to shoot the one victim, but his

intent transferred to the man he actually shot. The Court also held the instruction did not prejudice Bircher or his defense because he was given a day to prepare a supplemental closing argument to address the transferred intent instruction and he had not previously conceded any intent to shoot the surviving victim. *Id.* at 479. For that reason, Bircher's arguments advanced at trial—that he did not intend to shoot anyone at all and that he acted in self-defense—still held water after the court instructed the jury on transferred intent. *Id.*

Harvey's appeal falls somewhere in the middle of the preceding case law. While the judge did not refuse to supplementally instruct the jury or refer them back to previous instructions, as in cases such as *Lovell* and *Baby*, the judge also did not provide the jury with supplemental instruction to clarify the issue, as in cases such as *Brogden* and *Bircher*. Regardless, the jury's question here expressed their confusion on an issue central to the case: the type of intent required to convict Harvey of the first-degree murder of Adams. The initial inquiry under *Baby* is "whether the jury's question[] made explicit its difficulty with an issue central to the case such that the trial court was required to respond to the question[] in a manner that directly addressed the difficulty." 404 Md. at 263. There is no doubt here that the jury's question required a response directly addressing the difficulty. The State's case against Harvey relied entirely on circumstantial evidence and its primary theory was accomplice liability—there were no eyewitnesses, no weapon was recovered, and no other physical evidence proving Harvey committed the offenses. The State's first trial against Harvey ended in a mistrial. These factors, combined with the jury's question itself directly asking about a requirement to convict on one of the charges, support the

conclusion that clarification was necessary. *See id.* (jury's question required clarification since it "certainly touched upon an issue central to its ability to determine whether [the defendant] had committed the crime").

The court writing "no" on the jury's note was insufficient to clarify the jury's confusion and was not an answer generated by the evidence. Compared to *Baby*, where referencing the prior given instructions was insufficient to answer the jury's question since the instructions did not reference post-penetration withdrawal of consent, the prior given instructions in this case directly answered the jury's question on the intent required for the first-degree murder of Adams. During jury instructions, the court gave the following instruction on first-degree murder:

> First degree murder i[s] the intentional killing of another person with willful, deliberate, [I'm] sorry, deliberation and pre-meditation. In order to convict the defendant of first degree murder the State must prove that the defendant caused the death of, I'm sorry, just a minute, please, the death of Aaron Adams and that the killing was willful, deliberate and pre-meditated.
>
> Willful means that the defendant **actually intended to kill Aaron Adams**. . . .

(emphasis supplied). Because the emphasized portion of that instruction directly addressed the jury's question—"Does Aaron Adams need to be the specific intended target in order to convict for 1st degree murder?"—redirecting the jury's attention to this instruction may have cleared up their confusion. However, as we are reviewing the court's decision under an abuse of discretion standard, *Bircher*, 446 Md. at 478, it is not our duty to speculate what could have been a better decision.

But we get to decide whether the court's response of "no" was an erroneous answer on a central question under the evidence and argument of the case. *See Bollenbach*, 326 U.S. at 613 ("When a jury makes explicit its difficulties[,] a trial judge should clear them away with concrete accuracy."). Not only did the court previously instruct the jury that Harvey must have intended to kill Adams, but, as Harvey points out in his brief, the State's argument at trial was that Harvey (or his cohorts) intended to shoot and kill Adams. During closing argument, the State drew an objection from defense counsel when it made the following statement: "But it is not necessary that Mr. Harvey knew that his cohorts were going to shoot at Mr. Adams, Mr. Williams, and Mr. Allen[.]" After discussing it with counsel at the bench, the court instructed the jury:

> [T]he State just mentioned that the defendant did not know what his cohorts intended to do. As I indicated to counsel, sometimes that is the case, but that's not the case in this particular matter. **In this particular matter, because of the circumstances, the defendant needed to know exactly what they intended to do, which is commit this murder.**

(emphasis supplied). When the State continued its closing argument, it stated that under the first-degree murder charge, "Mr. Harvey and his cohorts actually intended to kill Mr. Adams." Indeed, in its brief on appeal, the State concedes that concurrent intent was not its theory of the case. *See* Appellee's Brief at 32 ("Concurrent intent admittedly was not the State's theory of the case. The State did not ask for a concurrent intent instruction at the close of evidence, and instead argued that Mr. Harvey acted as an accomplice in the intentional killing of Mr. Adams.").

When posed with the jury's question about whether Adams needed to be the specific intended target to convict for first-degree murder, the proper answer—apparent from the court's instruction and the State's summation of its arguments—would have been "yes." Therefore, the court's answer of "no" was a misstatement of the law as applied to the evidence and theories presented at trial.

We conclude this error was not harmless because we cannot say beyond a reasonable doubt that the jury still would have unanimously convicted on first-degree murder had the judge either referred them back to the previous instruction on first-degree murder or supplementally instructed them on specific intent. We agree with Justice Frankfurter's sentiment that "the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge." *Bollenbach*, 326 U.S. at 612. Because we cannot be sure **"beyond a reasonable doubt[]** that the error in no way influenced the verdict, such error cannot be deemed 'harmless' and a reversal is mandated." *Dorsey v. State*, 276 Md. 638, 659 (1976) (emphasis supplied).

For those reasons, we reverse the judgment of the circuit court.

II. The Court Did Not Err in Giving a "Mere Presence" Jury Instruction.

Because Harvey's presence at the scene of the offense would undoubtedly be at issue in any subsequent retrial, we address Harvey's claim of error to the "mere presence" instruction to provide guidance to the court below despite reversing on the other issue.

A. Parties' Contentions

Harvey asserts the court erred in instructing the jury on Maryland Pattern Jury Instruction 3:25, Presence of Defendant. He argues the evidence at trial was not sufficient to generate the instruction since nobody identified him as being involved in the crime and his entire defense theory was that he was not involved. Harvey contends that the evidence connecting him to the offense—his cell site location data and his connection to the vehicles used in the offense—is only circumstantial and does not actually place him at the scene of the crime. Harvey argues that even if there was some evidence he was present during the offense, the court still abused its discretion in propounding the instruction since his presence was disputed. Harvey analogizes this case to a flight instruction given in *Wright v. State*, 474 Md. 467 (2021), which the Supreme Court of Maryland explained would not have aided in the jury's understanding of the case had the solely contested issue been the identification of the offender. Finally, Harvey contends this error was not harmless because the instruction presumed Harvey's presence without additional limiting language telling the jury it must first decide whether Harvey was present at all before deciding what weight to ascribe to his presence.

The State first contends Harvey's claim is unpreserved, listing three reasons: (1) Harvey did not renew his objection after the court instructed the jury; (2) Harvey did not object on the same grounds as he does on appeal; and (3) Harvey did not additionally object to the "mere presence" language in the instructions for the conspiracy, first-degree murder by conspiracy resulting in death, and accomplice liability charges. The State asserts that if

Harvey's claim is preserved, the evidence at trial generated the "mere presence" instruction because "circumstantial evidence that he was present is still evidence that he was present." The State contends the jury was free to believe or disbelieve any of the testimony, making it free to believe Harvey was present during the shooting. The State further argues that even if the court erred in giving the instruction, the error was harmless because of the other instructions given, including that the accomplice liability instruction indicated Harvey's presence had to be proven.

Harvey responds to the State's preservation argument by asserting he substantially complied with Maryland Rule 4-325 because he objected to the "mere presence" instruction not being supported by the evidence. Harvey argues any further objection would have been futile since his objection was noted on the record and the court informed Harvey the instruction would remain in.

B. Analysis

1. The issue was properly preserved.

As an initial matter, we conclude Harvey preserved his objection to the "mere presence" instruction. Since we are reversing on the other issue, we address preservation in brief. Under Maryland Rule 4-325(f), a party preserves its objection to a jury instruction if "the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." Under *Gore v. State*, 309 Md. 203 (1987), the Supreme Court of Maryland has articulated "limited circumstances" in which substantial compliance with Rule 4-325(f) suffices to preserve

review of an objection to jury instructions. Citing to *Bennett v. State*, 230 Md. 562, 568 (1963), the *Gore* Court recounted that the purpose of Rule 4-325(f)'s temporal requirement for objecting to jury instructions is "to give the trial court an opportunity to correct its charge if it deems correction necessary." 309 Md. at 209. However, that purpose was not defeated in *Bennett* where counsel "fail[ed] to renew the objection after the jury was instructed." *Id.* (citing *Bennett*, 230 Md. at 568). The Supreme Court articulated "[s]everal conditions for the establishment of substantial compliance with Rule 4-325([f])[3]" in the absence of a renewal objection after the actual jury instruction is given:

> there must be an objection to the instruction; the objection must appear on the record; the objection must be accompanied by a definite statement of the ground for objection unless the ground for objection is apparent from the record[,] and the circumstances must be such that a renewal of the objection after the court instructs the jury would be futile or useless.

309 Md. at 209.

Applying those parameters to the facts of *Gore*, the Supreme Court found Gore had substantially complied with the rule when he objected to the court's proposed jury instruction on sufficiency of the evidence in response to an argument Gore made during his closing statement. The following colloquy occurred at the bench:

> THE COURT: Let me tell you something. I am going to tell you right now. You [defense counsel] told them it was insufficient for them to find that that was a handgun. I'm sorry, Tony, but I'm going to tell them when it's all over, when it gets ready to go to the jury, if there was insufficient evidence on any count, the law requires me to stop it and not send it to them. There is

[3] *Bennett* and *Gore* cite to subsection (e) of Rule 4-325, which was the equivalent of today's subsection (f).

> sufficient evidence if they believe beyond a reasonable doubt to make the finding. You told them there was insufficient evidence.
>
> [DEFENSE COUNSEL]: Perhaps I can clarify.
>
> THE COURT: I'm going to do it. I can assure you, I'm going to do it.
>
> [DEFENSE COUNSEL]: I would object to that, Your Honor.
>
> THE COURT: You can object all you want, but I'm going to do it. Go on.

Id. at 205–06. Defense counsel did not renew his objection after the court subsequently instructed the jury, and the Supreme Court later found his objection at the bench sufficient for substantial compliance. *Id.* at 206, 209.

Here, we are presented with a very similar circumstance. While discussing jury instructions, Harvey's counsel objected to the "mere presence" instruction on the record, while the court stated decidedly that it was going to give the instruction over his objection:

> [DEFENSE COUNSEL]: And then [MPJI-Cr 3:25].
>
> THE COURT: There's an allegation that he was present.
>
> [DEFENSE COUNSEL]: There's an allegation that his phone was present.
>
> THE COURT: No, there's an allegation that he was present and therefore there's an assumption the jury -- a reasonable assumption the jury can make that he was present. You can argue whatever you want to argue. It's going to remain in.
>
> [DEFENSE COUNSEL]: Just note my objection, Your Honor.
>
> THE COURT: Your objection is noted.

Even though Harvey did not renew his objection after the court actually instructed the jury, Harvey satisfied the *Gore* conditions for substantial compliance. He objected on the record; the grounds for his objection are apparent from the record (*i.e.*, that Harvey was

not actually present during the offense); and renewal of the objection would have been futile since the court made clear its intention to instruct the jury as such. *See Watts v. State*, 457 Md. 419, 428 (2018) ("[I]f the trial court recognizes that an effective objection has been made, the issue has been preserved for appellate review."). Therefore, the issue was preserved.

2. The instruction was generated by the evidence.

The court did not abuse its discretion in giving the "mere presence" instruction because it was supported by the evidence. "The main purpose of jury instructions 'is to aid the jury in clearly understanding the case, to provide guidance for the jury's deliberations, and to help the jury arrive at a correct verdict. Jury instructions direct the jury's attention to the legal principles that apply to the facts of the case.'" *Dickey v. State*, 404 Md. 187, 197 (2008) (quoting *General v. State*, 367 Md. 475, 485 (2002)). A jury instruction is generated when a party produces "some evidence" to support it. *Arthur v. State*, 420 Md. 512, 525 (2011); *Joiner*, 265 Md. App. at 566. "[O]n appellate review, this Court must independently determine whether the requesting party . . . 'produced [the] minimum threshold of evidence necessary to establish a *prima facie* case that would allow a jury to rationally conclude that the evidence supports the application of the legal theory desired.'" *Rainey*, 480 Md. at 255 (quoting *Bazzle v. State*, 426 Md. 541, 550 (2012)). "[T]his standard is a fairly low hurdle[.]" *Arthur*, 420 Md. at 526. *See also Rainey v. State*, 480 Md. 230, 258 (2022) ("This is a low and 'minimum' threshold.") (citations omitted). "As long as the relied-upon evidence, if believed by a rational juror, supports the proponent's

claim, the proponent has met the burden of showing that the requested jury instruction applies to the facts of the case." *Joiner*, 265 Md. App. at 567 (quoting *Hollins v. State*, 489 Md. 296, 312 (2024)).

In deciding whether there is "some evidence" to support giving a jury instruction, the court may consider all the evidence before it—direct or circumstantial. Circumstantial evidence does not lack probative value just by nature of being circumstantial. *See, e.g.*, *Creighton v. State*, 70 Md. App. 124, 130–31 (1987) ("Circumstantial evidence can be sufficient to support a conviction."). For comparison, the Supreme Court of Maryland has provided a clear example of circumstantial evidence's probative value for generating a jury instruction on the defendant's consciousness of guilt. In *Rainey v. State*, the Court explained that "[a] wide range of post-crime conduct may be admissible as *circumstantial evidence* of consciousness of guilt, including the destruction or concealment of evidence." 480 Md. 230, 256 (emphasis supplied). A consciousness of guilt instruction inherently relies upon circumstantial evidence since an individual proceeding to trial on a not guilty plea has not, typically, proclaimed his guilt. *See id.* at 256 ("Post-crime behavior, including destruction or concealment of evidence, is admissible as evidence of consciousness of guilt 'because the particular behavior provides clues to the person's state of mind.'") (citing *Thomas v. State*, 372 Md. 342, 352 (2002) ("*Thomas I*")).

The Court cited *Thomas v. State*, 397 Md. 557, 576–77 (2007) ("*Thomas II*"), for the finding that "refusal to submit to blood testing" qualifies as circumstantial evidence which can be probative of the defendant's consciousness of guilt. *Rainey*, 480 Md. at 259.

The Court explained in *Thomas II*: "To be relevant, it is not necessary that evidence of this nature conclusively establish guilt. The proper inquiry is whether the evidence *could* support an inference that the defendant's conduct demonstrates a consciousness of guilt." 397 Md. at 577 (quoting *Thomas I*, 372 Md. at 712). As applied to *Rainey*, the Court explained that the defendant cutting his hair after the offense occurred supplied the inferences necessary to generate a consciousness of guilt instruction because cutting one's hair can be probative—circumstantially—of concealing evidence. 480 Md. at 260.

The same general principles apply here. In this case, the proponent of the "mere presence" instruction was the State to support its theory of Harvey as an accomplice to the shooting. As Harvey agrees, the State presented circumstantial evidence about Harvey's presence near the shooting. There were two vehicles involved in the crime, the white van and red Hyundai. Both vehicles were registered to Harvey. The mother of Harvey's child, Muhammad, testified to Harvey inexplicably needing the white van on the day of the shooting, then directing her to report the van as stolen immediately after the shooting. CCTV footage showed Harvey's two vehicles working together to effectuate the crime and aid in the escape of the perpetrator(s). Further, Harvey's cell phone pinged multiple times to cell towers in the same area and around the same time as the shooting.

Applying the "fairly low hurdle" of whether the State produced some evidence to generate the "mere presence" instruction, we conclude it did. The evidence just listed, "if believed by a rational juror," indeed supports the State's theory that Harvey was at least an

accomplice to the shooting. Simply because there were other inferences to be drawn from the evidence does not undermine the principle that there was "some evidence" to indicate Harvey was present during the offense. The fact that the evidence was circumstantial is of no moment to the "some evidence" analysis.

Additionally, the cases Harvey cites are inapposite. First, Harvey cites *Fleming v. State*, 373 Md. 426, 433 (2003), for the apparent proposition that the "mere presence" instruction is typically reserved for cases with testimony that the defendant was, in fact, present at the scene. This is a baseless assumption. As explained above, the nature of the evidence being circumstantial does not take away from the fact that the evidence is probative of Harvey's presence at the scene. Although the evidence may certainly be *less* probative than, say, eyewitness testimony placing him at the scene, the State need only present "some evidence" to allow a jury finding that Harvey was there. Therefore, that *Fleming* involved witness testimony on the defendant's presence at the scene does not mean the evidence presented here was non-probative of Harvey's presence at the scene.[4]

Next, Harvey cites *Brogden v. State*, 384 Md. 631 (2005), for the proposition that the instruction undermined Harvey's "right to chart his own defense." We agree with the

[4] We additionally note (as Harvey does in his brief) that the Court in *Fleming*, in discussing the development of the "mere presence" instruction, specifically indicated the instruction originated "in the context of accomplice liability." 373 Md. at 433. This fact cuts against Harvey's argument even more, as the State's primary theory in his case was accomplice liability. The "mere presence" instruction's historical connection to accomplice liability further supports the conclusion that the evidence at trial indeed generated the instruction for the jury's consideration.

State that although *Brogden* applies to the court's answer to the jury's question during deliberations, *see supra*, *Brogden* is inapplicable to this issue. *Brogden* dealt with a supplemental instruction, the instruction was different than the one at issue here, and the court there imposed an undue evidentiary burden on the defendant by giving the supplemental instruction. The issue before us presents entirely different circumstances; therefore, *Brogden* in inapposite.

Lastly, we decline to address the out-of-state cases Havey cites as they are not persuasive in this jurisdiction.

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS REVERSED AND REMANDED. MAYOR AND CITY COUNCIL OF BALTIMORE TO PAY THE COSTS.