UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1416

September Term, 2013

MICHAEL DOUGLAS NEALY

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: October 9, 2015

Following a five-day jury trial in the Circuit Court for Prince George's County, Michael Douglas Nealy, appellant, was convicted of the second degree murder of Jakari Rashaad Butler. The court sentenced appellant to thirty years incarceration. In his timely filed appeal, appellant presents four questions for our consideration, which we have reworded as follows:

1. Did the trial court abuse its discretion when it refused to grant appellant's motion for mistrial following the State's alleged discovery violation?

2. Did the trial court abuse its discretion when it refused to instruct the jury on hot-blooded response to legally adequate provocation?

3. Did the trial court abuse its discretion in regulating the State's closing argument?

4. Was the evidence legally sufficient to sustain the jury's verdict?

We will affirm the judgment of the circuit court.[1]

FACTUAL AND PROCEDURAL BACKGROUND

Where, on appeal, a party challenges the sufficiency of the evidence to support a conviction, we consider the facts in the light most favorable to the party that prevailed at trial, in this case, the State. *See, e.g.*, *Allen v. State*, 158 Md. App. 194, 248 (2004).

[1]Appellant's case was initially set for oral argument in April of 2015. At appellant's request, this Court postponed oral argument to June of 2015. On June 22, 2015, appellant's attorney filed a motion to withdraw his appearance. This Court granted counsel's motion to withdraw and on its own initiative postponed oral argument to allow appellant time to retain new counsel, re-scheduling argument for September of 2015. Appellant has not retained another attorney and has requested that we decide this case based upon the brief submitted by counsel prior to his withdrawal. We shall now consider the matter before us as submitted on brief.

The facts presented at appellant's trial indicate that on the evening of November 18, 2011, appellant engaged in a physical altercation with Jakari Rashaad Butler just outside the entrance of an apartment building in the Colonial Village apartment complex in Oxon Hill, Maryland. Two witnesses, John Middletown and Reginald Cox, saw appellant walk into the apartment building carrying his two-year-old son and go to an apartment on the Terrace level. Appellant and his son were visiting the apartment of appellant's friend, Susan Decicco, and her husband. Appellant's girlfriend, Tasha Wright, was also at the apartment that evening. After engaging in an argument with his girlfriend, appellant stormed out of the apartment.

The witnesses observed appellant as he walked out of the apartment building and approached Butler, asking "what the f[--]k you doing in my building." Butler "threw his hands up, like, I don't want no trouble." At some point during the confrontation, appellant asked Butler if he was "strapped," *i.e.* carrying a handgun, and Butler said no. The men moved out into the parking lot, sizing each other up. Appellant hit Butler in the face. The men exchanged blows. Then the witnesses heard Butler exclaim, "he stabbed me, he stabbed me[,]" and saw appellant leaving the scene. Butler fell, clutching his neck, from which blood was spurting. The witnesses called 911. Butler was immediately transported to United Medical Center by ambulance, but died from blood loss as a result of a single stab wound to his left upper chest that punctured his left lung and pericardium, and severed his pulmonary artery.

During the altercation, appellant's girlfriend, who had followed him out of the apartment building, pleaded with appellant to stop. After the fight, appellant's girlfriend returned to Decicco's apartment and quickly retrieved her bag and appellant's young son and left. The witnesses subsequently identified appellant as one of the two individuals who was involved in the fight, but neither witness actually observed appellant stab Butler.

ANALYSIS

I. The Alleged Discovery Violation

At appellant's trial, the State called Reginald Cox as part of its case-in-chief. Cox testified that he saw appellant and Butler preparing to fight in the parking lot of the Colonial Village apartment complex on November 18, 2011. On cross-examination, defense counsel inquired as to whether Cox had seen appellant or photographs of appellant prior to trial. Cox testified that he saw photographs of appellant when Detective Spencer Harris spoke with him about the crime. Defense counsel requested a bench conference and argued that the State had committed a discovery violation by failing to provide the defense with any information about a pre-trial identification of appellant by Cox. The prosecutor asserted that he was unaware of any pre-trial identification, and that Detective Harris's notes did not contain any suggestion that he had presented a photo array or a confirmation photo to Cox. After hearing additional argument on the matter, the court concluded that there was no discovery violation "because the State didn't know."

Defense counsel then moved for a mistrial based on newly discovered evidence. Before ruling on the motion, the court conducted a brief hearing on the identification issue, outside the presence of the jury. The court heard testimony from Detective Harris and Cox. Detective Harris testified that he neither presented Cox with a photo array nor a confirmatory photo. Cox testified to seeing photographs of appellant on several occasions. Cox testified that he saw photographs of appellant during a pre-trial interview with the prosecutor and Detective Harris, and that he was shown a photograph of appellant soon after the incident, in 2011. With regard to the 2011 photograph, Cox testified that he could not remember who showed him the photograph.

After hearing testimony from Detective Harris and Cox, and argument from counsel, the court denied the defense's motion for a mistrial. The trial court stated:

> I don't think he's indicated credibly that it was an officer. Mr. Cox has been uncertain, when questioned, about this photograph here. At first, when the jury was here, he said it was Detective Harris.
>
> When [the prosecutor] asked him if it was Detective Harris, he said no, he saw the photograph last night, and it was on the desk and no one showed it to him. So then he seemed to suggest he didn't see a photo until last night, and it was on the desk and that it was a six-photo array and that he couldn't really see [appellant] in the photo.
>
> And then when [the prosecutor] questioned him again, after [defense counsel] finished questioning him, he said that it was an officer who showed him the photo.
>
> He went back and said it was a long time, and he wasn't really sure it was an officer. It was a single photo.

> So I think Mr. Cox is all over the place about this. I'm not sure what he saw, if anything, when it comes to this photograph. It certainly isn't clear from his testimony that Detective Harris presented a photograph for him and pointed out anything.
>
> He said certainly, at least last night, no one pointed anything out to him. And even still, he said seeing the photograph didn't influence his identification here in court one way or the other.
>
> It's just not clear what Mr. Cox – not clear enough for the Court to declare a mistrial on the basis of seeing a photograph. I'm not certain what Mr. Cox saw, if anything.
>
> So I deny your motion for a mistrial. I think that it is a credibility issue, and you need to have Mr. Cox examined thoroughly on this issue before the jury.
>
> * * *
>
> But it seems like a credibility issue. I really don't know what to believe at this point. I'm certainly not persuaded that he's credible on the issue of seeing a photograph shown to him by a police officer.

Md. Rule 4-263(d)(7)(B) requires the State to disclose to the defendant "all relevant material or information" regarding any pre-trial identifications of the defendant by a State's witness. Appellant contends that the prosecution violated the rule by failing to disclose, prior to his trial, that Cox had identified him in a photograph or a photographic array. Appellant asserts that the trial court "failed to make any 'specific findings as a matter of law that the State did [or did not] violate the discovery rule, nor did the trial court mak[e] any findings on the record that the appellant would not be prejudiced by the admission of said out-of court identification.'" Appellant further asserts that the trial court abused its discretion by denying

appellant's motion for mistrial based on the State's failure to disclose any pretrial identification of appellant by Cox.

As this Court explained in *Raynor v. State*, 201 Md. App. 209 (2011), *aff'd*, 440 Md. 71 (2014):

> The remedy for a violation of the discovery rules "is, in the first instance, within the sound discretion of the trial judge." *Williams v. State,* 364 Md. 160, 178 (2001) (citing *Evans v. State,* 304 Md. 487, 500 (1985)). Rule 4–263(n) provides a list of potential sanctions, including: ordering discovery of the undisclosed matter, granting a continuance, excluding evidence as to the undisclosed matter, granting a mistrial, or entering any other appropriate order. The rule "does not require the court to take any action; it merely authorizes the court to act." *Thomas v. State,* 397 Md. 557, 570 (2007). Thus, the circuit court "has the discretion to select an appropriate sanction, but also has the discretion to decide whether any sanction is at all necessary." *Id.* (citing *Evans,* 304 Md. at 500).
>
> But, in exercising its discretion regarding sanctions for discovery violations, "a trial court should consider: (1) the reasons why the disclosure was not made; (2) the existence and amount of any prejudice to the opposing party; (3) the feasibility of curing any prejudice with a continuance; and (4) any other relevant circumstances." *Id*. at 570–71 (citations and footnotes omitted). Although "the prosecutor's intent alone does not determine the appropriate sanction, bad faith on the part of the State can justify exclusion of evidence or serve as a factor in granting a harsher sanction." *Id*. at 571 n. 8. And, if the discovery violation irreparably prejudices the defendant, a mistrial may be required even for an unintentional violation. *Id*. (citing *Evans*, 304 Md. at 501).
>
> The declaration of a mistrial, however, "is an extraordinary act which should only be granted if necessary to serve the ends of justice." *Barrios v. State*, 118 Md. App. 384, 396–97 (1997) (quoting *Hunt v. State*, 321 Md. 387, 422 (1990)). "The most accepted view of discovery sanctions is that in fashioning a sanction, the court should impose the least severe sanction that is consistent with the purpose of the discovery rules." *Thomas*, 397 Md. at 571 (citations omitted). We have said that the purpose of the discovery rules "is to give a defendant the necessary time to prepare a full and adequate defense."

> *Ross v. State*, 78 Md. App. 275, 286 (1989). And the Court of Appeals has warned that, if a defendant declines a limited remedy that would serve the purpose of the discovery rules and instead seeks the greater windfall of an excessive sanction, "the 'double or nothing' gamble almost always yields 'nothing.' " *Thomas*, 397 Md. at 575 (quoting *Jones v. State*, 132 Md. App. 657, 678 (2000)).

Id. at 227-28 (parallel citations omitted).

In this case, during the bench conference following defense counsel's objection, the trial court found that "[t]here's no discovery violation because the State didn't know [about any pretrial identification by Cox]." Defense counsel then moved for a mistrial. After conducting an *in camera* hearing of Detective Harris and the witness, Cox, the trial court concluded that Cox's accounts of seeing a photograph or being shown a photographic array by Detective Harris were inconsistent and not credible. Having determined both that the State did not knowingly violate the requirements of the discovery rule, and that the witness did not credibly testify that a non-disclosed pre-trial identification had actually occurred, the court denied appellant's motion for a mistrial.

Discerning no basis in the record upon which we could find clear error, we shall defer to the trial court's findings of fact and assessment of the witnesses' credibility. *See* Md. Rule 8-131(c) (In assessing a trial court's factual findings, an appellate court must "give due regard to the opportunity of the trial court to judge the credibility of the witnesses."). Appellant's insistence that there must have been an out-of-court identification that the State failed to disclose in a timely manner, without any evidence in the record to support his assertion, is not compelling. It is clear that a trial court's failure to address a discovery

violation by the prosecution can be grounds for reversal of a criminal conviction if the error is not harmless. *Williams*, 364 Md. at 180–81. But where there is no discovery violation, there is no error for the appellate court to address. The trial court's finding that there was no credible evidence that a discovery violation occurred was not clearly erroneous. Accordingly, the trial court did not abuse its discretion by denying appellant's motion for a mistrial.

II. The Jury Instruction

At appellant's trial, defense counsel requested that the trial court give Maryland Pattern Jury Instruction 4:17.4: First Degree Murder, Second Degree Murder, Voluntary Manslaughter, Hot-Blooded Response. The State objected, arguing that the evidence demonstrated that appellant had been the aggressor in the encounter and that there was no evidence that appellant had been provoked to a state of rage by his fight with the victim. In response, defense counsel pointed out that the autopsy report indicated that the stab wound suffered by the victim was five inches deep; counsel asserted that this was evidence that appellant reacted to the mutual affray with excessive force born of rage. After hearing the arguments of the parties and reading the cases upon which they relied, the trial court decided not to give the requested instruction, explaining:

> Well, I'm going to tell you that I don't think there is enough facts generated from the State's case to meet the requirements under the Sims case [319 Md. 540 (1990)] and the Wilson case [422 Md. 533 (2010)] that was made reference to. There has to be enough evidence to generate a finding that there was a heat of passion or there was rage, and you relied on the autopsy report. That, in and of itself, just shows that it was a deep wound. Strength perhaps, but it doesn't indicate rage. I don't see how it would.

* * *

> And you also relied on the – no, that's not the only thing you relied on, but you did make reference to the autopsy report, but you also made reference to the fight and the fact that Mr. Nealy had suffered three punches, I believe, before the cutting actually took place.
>
> But there isn't any evidence to show what Mr. Nealy's body language was, whether he was losing the fight or no one even saw him do the cutting. I mean there's just not enough, based on the evidence presented, to generate a finding of rage. So I'm going to have to not give that instruction. . .

Appellant contends that the trial court abused its discretion by refusing to give the pattern jury instruction on hot-blooded response to legally adequate provocation.

A trial court is required to "instruct the jury as to the applicable law and extent to which the instructions are binding." Md. Rule 4–325(c). This court reviews a trial court's decision not to provide a requested jury instruction for abuse of discretion. *Arthur v. State*, 420 Md. 512, 525 (2011) (quoting *Thompson v. State*, 393 Md. 291, 311 (2006)). "[T]o merit an instruction, the issue as to which the request is made must have been generated by the evidence adduced." *State v. Martin*, 329 Md. 351, 357 (1993). For an instruction to be factually generated, the defendant must produce "some evidence" sufficient to raise the jury issue. *See id*. at 359–61 (upholding trial court's refusal to instruct the jury on imperfect self defense because the defendant did not satisfy the "some evidence" standard).

> Some evidence is not strictured by the test of a specific standard. It calls for no more than what it says—"some," as that word is understood in common, everyday usage. It need not rise to the level of "beyond reasonable doubt" or "clear and convincing" or "preponderance." The source of the evidence is immaterial; it may emanate solely from the defendant. It is of no matter that the self-defense claim is overwhelmed by evidence to the contrary. If there is

> any evidence relied on by the defendant which, if believed, would support [defense], the defendant has met his burden. Then the baton is passed to the State. It must shoulder the burden of proving beyond a reasonable doubt to the satisfaction of the jury that the [defense does not apply.]

Id. at 359 (quoting *Dykes v. State*, 319 Md. 206, 216 (1990)). While only "some evidence" is required, there must be "some evidence" "to support each element of the defense's legal theory before the requested instruction is warranted." *Marquardt v. State*, 164 Md. App. 95, 131 (2005). The evidence is evaluated in the light most favorable to the accused. *Brogden v. State*, 384 Md. 631, 650 (2005).

The jury instruction requested by appellant, MPJI-Cr 4:17.4, reads in pertinent part:

> VOLUNTARY MANSLAUGHTER (HOT BLOODED RESPONSE TO LEGALLY ADEQUATE PROVOCATION)
>
> Voluntary manslaughter is an intentional killing, which would be murder, but is not murder because the defendant acted in hot blooded response to legally adequate provocation. This does not result in a verdict of not guilty, but rather reduces the level of guilt from murder to manslaughter.
>
> You have heard evidence that the defendant killed (name) in hot blooded response to legally adequate provocation. In order to convict the defendant of murder, the State must prove that the defendant did not act in hot blooded response to legally adequate provocation. If the defendant did act in hot blooded response to legally adequate provocation, the verdict should be guilty of voluntary manslaughter and not guilty of murder.
>
> Killing in hot blooded response to legally adequate provocation is a mitigating circumstance. In order for this mitigating circumstance to exist in this case, the following five factors must be present:
>
> (1) the defendant reacted to something in a hot blooded rage, that is, the defendant actually became enraged;

(2) the rage was caused by something the law recognizes as legally adequate provocation, that is, something that would cause a reasonable person to become enraged enough to kill or inflict serious bodily harm. The only act that you can find to be adequate provocation under the evidence in this case is [a battery by the victim upon the defendant] [a fight between the victim and the defendant] . . . ;

(3) the defendant was still enraged when [he] [she] killed the victim, that is, the defendant's rage had not cooled by the time of the killing;

(4) there was not enough time between the provocation and the killing for a reasonable person's rage to cool; and

(5) the victim was the person who provoked the rage.

In order to convict the defendant of murder, the State must prove that the mitigating circumstance of hot blooded provocation was not present in this case. This means that the State must persuade you, beyond a reasonable doubt, that at least one of the five factors was absent. If the State has failed to persuade you that at least one of the five factors was absent, you cannot find the defendant guilty of murder, but may find the defendant guilty of voluntary manslaughter.

In order to convict the defendant of murder, the State must prove that the defendant did not act in hot blooded response to legally adequate provocation. If the defendant did act in hot blooded response to legally adequate provocation, the verdict should be guilty of voluntary manslaughter and not guilty of murder.

MARYLAND CRIMINAL PATTERN JURY INSTRUCTIONS 4:17.4(C) (2nd ed. with 2013 Supplement 2013).[2] As in the instant case, a mutual affray may form the basis for an

[2]This Court has alternately stated:

(1) There must have been adequate provocation; (2) The killing must have been in the heat of passion; (3) It must have been a sudden heat of passion –

individual's invocation of a provocation defense. *Wood*, 436 Md. at 294 & n. 6. A mutual affray is:

> . . . when persons enter into angry and unlawful combat with a mutual intent to fight and, as a result of the effect of the combat, the passion of one of the participants is suddenly elevated to the point where he resorts to the use of deadly force to kill the other solely because of an impulsive response to the passion and without time to consider the consequences of his actions . . . .

Id. at 294 (quoting *Sims v. State*, 319 Md. 540, 552 (1990)).

The burden is on the defendant to produce evidence supporting a *prima facie* case as to each element of the claimed defense.[3] *Wilson,* 195 Md. App. at 681. As this Court has previously noted:

> Although the burden of production is on the appellant, the appellant himself need not testify in order to satisfy that burden of production. Any evidence in this case, whether emanating from the appellant or the appellant's witnesses

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> that is, the killing must have followed the provocation before there had been a reasonable opportunity for the passion to cool; (4) There must have been a causal connection between the provocation, the passion, and the fatal act.

Wood v. State, 436 Md. 276, 294 (2013) (internal citations and quotation marks omitted). *Accord Wilson v. State,* 195 Md. App. 647, 680-81 (2010), *rev'd on other grounds*, 422 Md. 533 (2011) (quoting *Whitehead v. State*, 9 Md. App. 7, 10 (1970)). Though the elements are expressed differently in the pattern jury instruction than they are in the case law, the evidence required to prove a *prima facie* case under either test is the same.

[3]Although the Court of Appeals ultimately vacated this Court's decision in *Wilson*, on the issue of whether the trial court erred by declining to provide an instruction as to hot blooded response to legally adequate provocation, the Court of Appeals expressly agreed with this Court, stating: "From our review of Petitioner's statement and testimony, we agree with the Court of Special Appeals that the evidence was insufficient to generate the issue of whether, at the moment he shot the victim, Petitioner 'was acting in hot-blooded rage brought on by the act of [the victim] in pulling a gun from his pocket and smiling.'" *Wilson v. State*, 422 Md. 533, 544 (2011) (quoting *Wilson*, 195 Md. App. at 682).

> or the State's witnesses or from any source, can satisfy the burden of production.

Id.

Whether a defendant was acting under the heat of passion—or "hot-blooded rage"—is a subjective determination. Therefore, "[i]t must be affirmatively established that the defendant himself was actually acting in hot blood." *Id*. at 682-83. In his brief, appellant directs us to the testimony of Reginald Cox, John Middleton, and Susan Decicco as providing the evidence from which a jury could infer that he acted in hot-blooded rage.

The record reveals that appellant was agitated even before he entered Decicco's apartment with his son, prior to the affray. Appellant then engaged in a loud argument with his girlfriend before storming out of the apartment. He immediately started a fight with the much smaller Butler, who happened to be passing by, yelling at him, "[w]hat the f[--]k you doing in my building?"[4] Even though Butler put his hands up, indicating that he did not want any trouble, appellant continued to act aggressively, punching Butler once in the face. Butler again tried to stop the fight, telling appellant, "[y]ou don't want this[.]" At some point appellant asked Bulter whether he was "strapped," *i.e.* carrying a handgun, and Butler said "no." The combatants moved out to the parking lot, sizing each other up. Appellant hit Butler twice more, before Butler hit back with a three punch combination. Butler was then heard to exclaim that he had been stabbed. Appellant directed his girlfriend, who had been

[4]Butler was approximately 5'6" tall and weighed about 160 pounds. At the time of the fight, appellant was about 5'6" and weighed about 195 pounds.

standing nearby pleading with him to stop the fight, to collect his son and her belongings from Decicco's apartment and meet him across the road, and then left the scene. Butler collapsed, bleeding from a wound on his chest, and died.

Appellant asserts that the evidence presented at his trial was sufficient to support an inference that he was so angered by Butler's actions that he acted in a blind rage, stabbing Butler once in the upper chest with a knife and causing his death. Appellant did not, however, testify at his trial, so there was no first-hand evidence presented regarding his state of mind at the time he stabbed Butler. *See e.g. Wilson*, 195 Md. App. at 682 (noting that appellant did not testify that he felt a "sense of hot-blooded rage" or attribute any feelings of rage to the victim's actions at the crime scene); *Sims*, 319 Md. at 553 (stating that the defendant's testimony that he was not present when the shooting occurred shed no light on his state of mind at the time of the shooting). Nor did the testimony of any of the other witnesses provide any circumstantial evidence as to appellant's state of mind during the affray. None of the witnesses testified that appellant looked or acted like he was uncontrollably enraged at any time before, during, or after his fight with Butler. *See, e.g.*, *Sims*, 319 Md. at (pointing out that none of the other witnesses saw the defendant's facial expressions or heard his speech at the critical time, so as to potentially establish that the defendant was enraged by the victim's actions).

Witness Decicco described appellant as "agitated" when he entered her apartment, but her testimony provided no insight into appellant's state of mind during the ensuing affray

with Butler. Witnesses Cox and Middleton testified to seeing appellant and Butler preparing to fight and exchanging blows in the parking lot, but neither witness provided any testimony regarding appellant's demeanor or appearance that suggested that appellant was enraged. The fact that appellant failed to heed the pleas of his girlfriend to stop fighting does not necessarily indicate that he was enraged by Butler's actions. Further, though appellant's initial comment to Butler, "[w]hat the f[--]k you doing in my building?" was certainly confrontational, it does not indicate uncontrolled rage. Finally, and most persuasively, any suggestion that appellant was enraged is substantially weakened by the fact that, in the midst of the encounter, appellant had the presence of mind to ask Butler whether he was armed, and after the fight, before leaving the vicinity, clearly told his girlfriend what to do and where to meet him.

Under all the circumstances, we are not persuaded that the evidence presented at appellant's trial was sufficient to prove that appellant became enraged in the midst of the fist fight that he had provoked, or that he was still enraged at the moment he stabbed Butler. Because there was no evidence presented that appellant was actually enraged by Butler's actions, appellant did not prove a *prima facie* case of each element of the defense of provocation. Failure to produce sufficient evidence as to any element eliminates provocation as a defense available to the defendant. *See Wilson,* 195 Md. App. at 681. ("Should any one of the four [elements] be lacking, mitigation based on the Rule of Provocation will not be an issue for the jury to consider."); *Scott v. State*, 64 Md. App. 311, 323, *cert. denied*, 304 Md.

300 (1985) ("Failure to prove any one of the necessary four elements is fatal to establishing a theory of hot-blooded provocation."); *Tripp v. State*, 36 Md. App. 459, 477 (1977) ("Each of the four elements is a *sine qua non* for a defense of mitigation based upon hot-blooded response to legally adequate provocation.").

The trial court denied appellant's request that it provide the provocation instruction, reasoning that there was no evidence from which a jury could conclude that appellant stabbed the victim in the heat of passion, or, in the wording of the pattern instruction, "in a hot blooded rage." The trial court did not abuse its discretion when it declined to give the requested instruction.

III. The State's Closing Argument

During the State's rebuttal closing argument, the prosecutor made the following comments (emphasis added):

> [PROSECUTOR]: When you became jurors, yes, I know you were bound to follow the law, and you're supposed to follow the law, but when you walk through the courthouse doors and those courtroom doors, nobody said don't use your common sense.
>
> Use your common sense. That's why you're so important, because all of you have had your own experiences. All of you have had your own stories, and that's what you bring when you're back there and deliberating.
>
> You all know what happened here. This is not a difficult scenario. [Appellant] was a bully, picked a fight with the wrong guy, realized that this might not be as easy as he thought, sized this kid up, made sure he didn't have a gun and stabbed him in the chest and then ran off because maybe he's not a very good bully or maybe that's just what bullies do. Tasha, get the kid, meet me wherever. That's what happened.

> *You know, there are moments in life that we're always going to remember, and they define us as people and they define our futures, how we think of each other and ourselves, and they're important moments. They're moments like when you graduate high school. You're never going to forget that. Or you graduate college or you get married or have a child or the death of a parent. Those moments are the most important things in life.*
>
> *And you can feel it now because this is one of those moments. This is the moment you're going to do justice for the family of Jakari Butler –*
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: – *and you're going to do justice for Mr. Nealy.* Because you've got to decide what happened here, and we all know what happened here, and you've got to hold him accountable for what he did.
>
> Thank you.

Appellant contends that the trial court abused its discretion by, over defense counsel's objection, allowing the prosecutor to make an improper "golden rule" argument during the State's rebuttal closing argument.

We consider the prosecutor's comments in the context of the closing argument and the trial as a whole. *See Washington v. State*, 191 Md. App. 48, 109 (2010) ("Comments made in closing argument must be weighed in their context."). This Court reviews the propriety of the trial court's determinations as to statements made by the prosecution in the course of closing argument for abuse of discretion. *Lawson v. State*, 389 Md. 570, 592 (2005) (quoting *Spain v. State*, 386 Md. 145, 158-59 (2005)). Reversal is appropriate only where the trial court abused its discretion and the error was prejudicial to the accused. *Id*.

Where error is found, the effect of the error is determined through an assessment of the following factors: "'the severity of the remarks, the measures taken to cure any potential prejudice, and the weight of the evidence against the accused.'" *Id*. (quoting *Spain*, 386 Md. at 158-59).

Prosecutors are given considerable latitude in making closing arguments. *Id*. at 591. In explaining the limitations, or lack thereof, imposed on counsel in closing argument, the Court of Appeals has often repeated the following:

> While arguments of counsel are required to be confined to the issues in the cases on trial, the evidence and fair and reasonable deductions therefrom, and to arguments of opposing counsel, generally speaking, liberal freedom of speech should be allowed. There are no hard-and-fast limitations within which the argument of earnest counsel must be confined–no well-defined bounds beyond which the eloquence of an advocate shall not soar. He may discuss the facts proved or admitted in the pleadings, assess the conduct of the parties, and attack the credibility of witnesses. He may indulge in oratorical conceit or flourish and in illustrations and metaphorical allusions.

Lee v. State, 405 Md. 148, 163 (2008) (quoting *Degren v. State*, 352 Md. 400, 429-30 (1999)). *See also Lawson*, 389 Md. at 591.

"A 'golden rule' argument is one in which a litigant asks the jury to place themselves in the shoes of the victim or in which an attorney appeals to the jury's own interests." *Lee*, 405 Md. at 171 (internal citations omitted). Such arguments are prohibited because they appeal to jurors' interests and bias, and thus threaten their ability to consider the evidence before them. *See id*. at 171 & n. 7 *Lawson*, 389 Md. at 594.

The Court of Appeals considered a "golden rule" argument in *Lee v. State*. 405 Md. at 170-73. *Lee* involved a shooting in Baltimore City, and in the course of rebuttal closing argument the prosecutor appealed to the jury to "protect their community and clean up the streets." *Id*. at 170. In concluding that the argument was improper, the Court reasoned that "the State was calling for the jury to indulge itself in a form of *vigilante justice* rather than engaging in a deliberative process of evaluating the evidence." *Id*. at 173. The Court opined that even if the prosecutor's statements had been directed at Lee, rather than the entire community, they would nonetheless have been improper – in either case the prosecutor "asked the jury to view the evidence . . . not objectively, but consonant with the juror's personal interests." *Id*. at 173.

In the instant case, we are not persuaded that the prosecutor's statement constituted a prohibited "golden rule" argument. The prosecutor neither asked the jurors to place themselves in the shoes of the victim nor appealed to any juror's own personal interest in the security of his or her home and community. While the prosecutor certainly reiterated the significance of the decision before the jurors and encouraged them to use their "common sense," his statement did not implore the jurors to consider matters beyond the evidence with which they were presented or otherwise contradict the instructions provided by the trial court in any way. The prosecutor made it clear that he was asking the jurors to do justice for the victim's family and for appellant himself. An even-handed adjuration to jurors to do justice for both the victim and the accused is not improper. *See, e.g.*, *Lee v. State*, 405 Md. 148, 183

n.4 (2008) (noting that "straightforward exhortation to the jury to uphold the rule of law" is permissible in Maryland). The trial court did not abuse its discretion in permitting the State to continue with its closing argument.

IV. Sufficiency of the Evidence

After the prosecution rested its case, defense counsel moved for judgment of acquittal. In support of the motion, defense counsel made three arguments: 1) that the State failed to establish that the court had jurisdiction in the matter because there was no testimony as to the date of Butler's death; 2) that the State failed to establish deliberation; and 3) that the State failed to establish premeditation. The trial court denied appellant's motion. At the conclusion of the case, defense counsel renewed his motion for judgment of acquittal, relying on his prior arguments. Again, the court denied the motion.

Appellant now contends that the evidence presented at his trial was insufficient to demonstrate that he was the individual who stabbed Butler, causing his death. Appellant suggests that the evidence could just as easily be interpreted to show that appellant's girlfriend was the individual who stabbed Butler. Appellant further asserts that the testimony of State's witness John Middleton was not credible because he was intoxicated at the time of the affray and he was an informant for the Prince George's County Police Narcotics Enforcement Division.

Preliminarily, we must consider whether appellant's sufficiency argument was properly preserved for appellate review. As noted above, in support of appellant's motion

for judgment of acquittal at the close of the State's case, defense counsel did not argue that the State failed to prove that it was appellant who stabbed Butler, as he now does or appeal.

Maryland Rule 4-324(a) provides in pertinent part:

> A defendant may move for judgment of acquittal on one or more counts . . . at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. The defendant shall state with particularity all reasons why the motion should be granted.

See also State v. Rich, 415 Md. 567, 574 (2010) ("It is well settled that appellate review of the sufficiency of the evidence in a criminal case tried by a jury is predicated on the refusal of the trial court to grant a motion for judgment of acquittal." (quoting *Starr v. State*, 405 Md. 293, 302 (2008))). An appellant's failure to "'argue precisely the ways in which the evidence should be found wanting and the particular elements of the crime as to which the evidence is deficient[,]'" renders a motion inadequate to preserve a sufficiency challenge for appellate review. *See Arthur v. State*, 420 Md. 512, 522 (2011) (*quoting Starr*, 405 Md. at 303). Further, "[t]he issue of sufficiency of evidence is not preserved when appellant's motion for judgment of acquittal is on a ground different than that set forth on appeal." *Anthony v. State*, 117 Md. App. 119, 126, *cert. denied*, 348 Md. 205 (1997).

Because defense counsel did not raise the arguments upon which he now relies in support of his motion for judgment of acquittal, appellant's current sufficiency argument was not properly preserved for appellate review. Appellant cannot raise this contention for the first time on appeal. This Court need not, therefore, address it any further. Md. Rule

4-324(a); Md. Rule 8-131(a). Even if appellant's argument were properly preserved, we would conclude that it had no merit.

In reviewing an appellant's challenge to the sufficiency of the evidence, this Court does not "undertake a review of the record that would amount to, in essence, a retrial of the case." *State v. Albrecht*, 336 Md. 475, 478 (1994). Rather, an appellate court reviews the evidence in the light most favorable to the prevailing party below, in this case, the State. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). As long as we find that "any rational trier of fact could have found the elements of the crime beyond a reasonable doubt, the appellant's conviction must be upheld." *Cooper v. State*, 128 Md. App. 257, 266 (1999) (citing *Jackson*, 443 U.S. at 319).

Based on the evidence presented during appellant's trial, the jury could have reasonably inferred that appellant got into an argument with his girlfriend in the Decicco apartment, and, as he was leaving, encountered Butler. The jury could have further concluded that appellant decided to take out his frustrations upon the victim, who was physically smaller than appellant, after first ascertaining that Butler was not carrying a firearm. The jury could also have concluded that appellant threw the first punch, but that Butler proved to be a more formidable opponent that appellant had anticipated. While no witness actually saw appellant stab Butler, because no one other than appellant was in a fight with Butler at the time, the jury could reasonably infer from Butler's dying declaration that appellant was the individual who dealt the fatal wound.

Under all of the circumstances, we are persuaded that the evidence presented at appellant's trial was more than sufficient to support the jury's verdict, that appellant was guilty of second degree murder, beyond a reasonable doubt. We conclude, therefore, that the trial court did not err by denying appellant's motion for judgment of acquittal.

Insofar as appellant argues that other inferences were possible based upon the evidence presented, we note that appellant was afforded the opportunity to examine all of the witnesses presented by the State as to any inconsistencies in their testimony, and to argue his competing theories to the jury. In Maryland, it is the fact finder, not the appellate court, that resolves conflicting evidentiary inferences. *See Neal v. State*, 191 Md. App. 297, 315 (2010) ("The primary appellate function in respect to evidentiary inferences is to determine whether the trial court made reasonable, i.e., rational, inferences from extant facts. Generally, if there are evidentiary facts sufficiently supporting the inference made by the trial court, the appellate court defers to the fact-finder . . . ." (quoting *State v. Smith*, 374 Md. 527, 547 (2003))); *State v. Suddith*, 379 Md. 425, 447 (2004) ("Where it is reasonable for a trier of fact to make an inference, we must let them do so, as the question is not whether the [trier of fact] could have made other inferences from the evidence or even refused to draw an inference, but whether the inference [it] did make was supported by the evidence."). "Although the jury could have drawn an inference more favorable to appellant, it was not required to do so." *McDonald v. State*, 141 Md. App. 371, 380 (2001). A verdict should not be overturned simply because there are competing inferences, one or more of which would support an

acquittal. *See*, *e.g.*, *Suddith*, 379 Md. at 430-31 (holding that "this Court must give deference to all reasonable inferences the fact-finder draws, regardless of whether we would have chosen a different reasonable inference").

THE JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY IS AFFIRMED. APPELLANT TO PAY COSTS.