Circuit Court for Baltimore City
Case No. 115180008

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1477

September Term, 2017

RAESHAWN RIVERS

v.

STATE OF MARYLAND

Leahy,
Shaw Geter,
Salmon, James P.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Shaw Geter, J.

Filed: February 25, 2019

On June 7, 2015, the body of sixteen-year-old Arnesha Bowers was found in her burning house. The State charged three individuals, including fourteen-year-old appellant Raeshawn Rivers, with first-degree murder, burglary, robbery and related offenses. After hearing conflicting accounts of appellant's role in those crimes, a jury in the Circuit Court for Baltimore City convicted appellant solely of robbery, for which he was sentenced to fifteen years, with all but five years suspended, plus five years of supervised probation.[1]

Challenging that conviction, appellant presents the following issues:

> 1. Did the trial court err in not declaring a mistrial for the State's discovery violation?
>
> 2. Did the trial court err in its supplemental response to a jury question on accomplice liability?
>
> 3. Did the State's . . . closing arguments preclude a fair trial?

Concluding there are no grounds for appellate relief, we shall affirm appellant's conviction for reasons that follow.

BACKGROUND

[1] This was appellant's second trial. His first, which lasted eleven days, resulted in acquittals on charges of premeditated first-degree murder, use of a deadly weapon, first-degree arson, conspiracy to commit arson, first-degree rape, conspiracy to commit rape, second-degree rape, first-degree burglary, conspiracy to commit burglary, kidnapping, conspiracy to commit kidnapping, false imprisonment, conspiracy to commit false imprisonment, armed robbery, and conspiracy to commit armed robbery. That trial also resulted in a mistrial on the following charges, which were tried in this proceeding: first-degree felony murder, second-degree murder, first-degree burglary, third-degree burglary, fourth-degree burglary, conspiracy to commit first-degree burglary, conspiracy to commit third-degree burglary, conspiracy to commit fourth-degree burglary, robbery, and conspiracy to commit robbery.

Shortly after 5:00 a.m. on June 7, 2015, firefighters responding to 6117 Eastern Parkway in Baltimore discovered the naked and partially burned body of Arnesha Bowers. Police arrested appellant, nineteen-year-old Adonay Dixon,[2] and twenty-year-old John Childs on murder, burglary, robbery, rape, arson, and related charges. During the investigation and ensuing trial, the primary issue was whether and to what extent appellant participated in the events that resulted in Bowers' death. Our summary of the trial record provides background for our discussion of the issues raised by appellant, rather than a comprehensive review of the evidence presented.

The Crimes and Investigation

On June 6, 2015, appellant and John Childs, whose nickname is Tiny, were living with a friend, Sierra Paine, in a small apartment building located on Harford Road in Baltimore. That evening, there was a casual gathering of residents and their friends, including Adonay Dixon, who met Childs and appellant two months earlier, and Arnesha Bowers, who had been visiting frequently for weeks in order to see appellant. Bowers was accompanied by her friend Erica Collins. The two girls left around 10:30 p.m., when Bowers's grandmother picked them up. The grandmother took Erica home, returned with Arnesha to their house, then left to work a hospital night shift.

[22] In some parts of the record, Mr. Dixon's first name is spelled "Andonay." We shall use the more commonly appearing "Adonay," which matches the spelling in Baltimore Police Department records initialed by him.

Shortly after 5 a.m. the next morning, firefighters responding to 911 reports of a burning residence found Bowers' naked and partially burned body in the basement. She had a black electrical cord wrapped around her neck. A broom had been positioned and set afire between her legs, causing damage to her groin and thigh area. Forensic testing established the vaginal presence of sperm matching DNA from both appellant (minor contributor) and Childs (major contributor). Before her death, she suffered three blunt force head wounds. Her cause of death was asphyxiation by strangulation.

Over the ensuing two weeks, investigators interviewed and arrested appellant, Childs, and Dixon. After initially denying any role, Dixon eventually implicated all three of them. He explained that his desire to have Bowers' iPhone inspired a plot to steal it, which then spiraled into burglary, robbery, murder, and arson. Appellant contradicted that account, telling investigators that he did not agree to steal from Bowers, that Dixon and Childs broke into the house while he was with Bowers, and that Dixon held a gun to his head while Childs assaulted and killed Bowers in order to satisfy a requirement for joining a gang.

The State's Case

The State's prosecution theory was that appellant conspired with Dixon and Childs to steal an iPhone and other valuables from Bowers. When their first plan for a covert theft failed, appellant stood by as Childs assaulted her, then worked with Dixon to take valuables and set fires to cover up their crimes, while Childs took Bowers to the basement, where he strangled her to death. The State relied on the trial testimony of Dixon, who testified

pursuant to a guilty plea agreement under which he was sentenced to life with all but fifty years suspended, as well as a series of recorded statements that appellant made to police in which appellant lied about his involvement.[3]

Dixon testified that, after meeting Childs and appellant about two months before Bowers' murder, he always saw them together because they lived together and were very close, like family. Appellant received frequent visits and attention from Bowers, whom he referred to as his "little stalker bitch."

During the evening of June 6, 2015, Dixon was with appellant, Childs, Bowers, and her friend at the Harford Road apartment building. Dixon borrowed and used Bowers' iPhone, which was the latest model. Before leaving that evening, Bowers had invited appellant to come "chill" at her house. According to Dixon, appellant asked him and Childs to accompany him there.

As the three walked the twenty minutes to Bowers' house, they made plans to steal her phone and any other valuables in the home. They agreed that appellant would "distract" Bowers by engaging in some intimate "alone time," while Dixon and Childs pocketed valuables around the house.

When she arrived home, Bowers was surprised to see that appellant was not waiting for her alone. Dixon asked if he could come in to rest his injured leg, so she invited them all into the living room, which was located only steps away from the kitchen and both

[3] We shall summarize appellant's statement below, in our review of the defense case.

bedrooms. After sharing some food and conversation, Dixon concluded that the plan for appellant to distract Bowers while they stole whatever they could find was "dead" because the configuration of the house made privacy difficult, preventing appellant getting "alone time" with Bowers while Dixon and Childs were there. When appellant and Bowers indicated that they wanted Childs and Dixon to leave, the two men did so but stayed outside for about twenty minutes, discussing other options until they decided to go back into the house covertly.

Although appellant had left the side door unlocked for Childs and Dixon, it made too much noise, so they broke in through a basement window. Hearing appellant and Bowers engaged in sexual activity in Bowers' bedroom, Dixon and Childs went upstairs and to the adjacent bedroom of Bowers' grandmother, looking for valuables.

During this time, Dixon and Childs communicated with appellant via Bowers' iPhone. At 1:43 a.m., appellant called to say he was ready for them to pick him up. By that time, however, Dixon and Childs were already in the house. When appellant called, Dixon had to speak softly, but he did not tell him they were in the house.

When Bowers announced to appellant that she heard suspicious noises and saw "something like a shadow[,]" appellant responded that she was "geeking" and had not seen or heard anything. Bowers went into her grandmother's bedroom, where she discovered Dixon and Childs hiding in the dark. According to Dixon, she was "thrown off" and "confused" about how they got into the house, but not scared or worried because she trusted

them. According to Dixon, appellant, who was still in Bowers' bed, looked "like how did you all get here?"

After the group briefly returned to her bedroom, they moved back into the living room. Thirsty, Dixon got a drink of water in the kitchen, where he saw a meat tenderizer laying on the counter. He picked it up, carried it into the living room, played with it briefly, then tossed it to Childs, saying, "do something with it." Both appellant and Childs were "giving looks" that indicated to Dixon they were "starting to get like[,] what is they about to do[?]"

A short time later, Dixon grabbed Bowers from behind in a "bearhug," as he had done on other occasions to tease her. He claimed to be surprised when Childs stood up and struck her in the head with the meat tenderizer.

Bowers was hurt and bleeding from that blow, when Childs struck again, causing her to drop to her knees and plead for her life. Dixon testified that she promised not to tell anyone and begged, "please don't kill me." When Childs struck a third head blow, she lost consciousness, causing Dixon to think she was dead.

Taking charge of the situation, Dixon made plans to move Bowers. He first tried to start the car outside with keys he found in the house, but they did not fit. Next, Dixon said "that whatever we was going to get we got to get and this house got to get burnt down." He instructed Childs to take Bowers to the basement after making "sure she was dead." Holding her in a chokehold, Childs strangled Bowers until her bladder and bowels released.

Before, during, and after the attacks on Bowers, appellant did nothing and said nothing. While Childs dragged her body to the basement, Dixon and appellant cleaned up and "ransacked" the house for valuables, which they placed into trash bags and a laundry hamper. Childs came upstairs briefly to help, but then returned to the basement.

In an effort to conceal evidence, they tried to burn the house down. Dixon and appellant poured flammable liquids throughout the house, setting fire to Bowers' bed after she and appellant had just had sex there. When it got difficult to breathe, Dixon and appellant went into the basement to get Childs. They surprised Childs, who was standing over Bowers' body, which had been stripped naked and laid out on her back, with her legs spread and a "cable cord" around her neck.

The trio left the burning house, walking back to Childs' and appellant's apartment with a stolen laptop, phones, a small radio, coins from a collection, and about $60 in bills from a portable safe Childs broke open. After splitting the cash evenly, they divided up the other items. Dixon got Bowers' iPhone, which he was able to access because appellant's fingerprint unlocked the device. About the same time first responders were discovering Bowers' body, Dixon, hoping to confuse police, sent a text message to Erica Collins, stating, "I'm over my new ni***r s**t. Out the County."

The Defense Case

Appellant, relying on his statements to others and evidence from the crime scene, maintained that he never agreed to Dixon's theft plan, that he had no idea that Dixon and Childs would break-in the house or attack Bowers, that Childs killed Bowers to prove

himself "worthy" of gang membership, and that Dixon held him at gunpoint and would have killed him if Childs had not intervened. Although much of that evidence was presented during the State's case, it provided the basis for appellant's defense.

Before talking to police, appellant told his mother that he was present when Dixon and Childs "killed her," that Dixon and Childs were in a gang, that Dixon was going to kill him, and that he was scared. According to appellant, he only participated in the robbery because he was held at gunpoint.

In his first interview on June 15, appellant denied having sex with Bower at her house. Appellant said that he went alone to her house, where they were watching television in her bedroom, when Dixon burst in, pointed a gun at him, and told him to get out. Dixon threatened to kill him if he told anybody, then put him outside of the door and locked it. Childs "kept trying to ask . . . do you want to be in a gang with us[.]"

After investigators challenged this account, appellant told the officers that he, Childs, and Dixon went together to the house, where Childs and Dixon were planning to steal things. Appellant insisted, however, that he did not know they wanted to use force to harm Bowers.

According to appellant, Dixon had talked to Childs about getting into a gang, explaining that the only way was to kill someone. Dixon told Childs "to take her downstairs" and "off her." Appellant heard Bowers screaming and saying she would not tell anybody. Later, when appellant went downstairs, she had "a black cord wrapped around her neck and she was laying there naked."

At the request of investigators, appellant returned to the police station the following day. When detectives urged him to tell the truth, pointing to discrepancies between his account, the crime scene, cell phone records, and statements by Dixon and Childs, appellant said that he and Bowers had sex while still at the Harford Road apartments. After she left, appellant walked alone to her house. While they were watching television, appellant "heard a crack" followed by Dixon and Childs coming in and telling him to get out. Childs choked Bowers, and Dixon went through the drawers, while appellant just stood watching. Childs dragged Bowers to the basement. According to appellant, Dixon "had a gun to [his] head" while searching through the drawers, which is why appellant did not do anything to protect Bowers or himself.

When Dixon later took appellant down to the basement, they saw Bowers naked on the ground with a black cord around her neck. Childs "hopped up real quick" and began "fingering" Bowers.

Appellant again claimed that Childs "was talking to" Dixon about "the way you get into a gang" is "to kill somebody to prove yourself." Appellant denied that he was trying to be part of a gang, too. At the end of the interview, appellant was arrested.

Police found articles of clothing with Bowers' DNA, laying near her body. Contradicting Dixon's account, defense counsel elicited evidence that the clothing did not have urine or feces stains.

The jury acquitted appellant on all charges except robbery.

We will add pertinent facts in our discussion of the issues raised by appellant.

DISCUSSION

I. Mistrial for Discovery Violation

Appellant contends the trial court erred in denying his request for a mistrial, which was made ten days into his second trial during cross-examination of a lead detective, when six police progress notes were disclosed for the first time. Because one of those notes revealed new and potentially exculpatory information about a "positive" photo identification of a sixteen-year-old named "Desean Harris," by a "suspect" identified only as "An," defense counsel moved for a mistrial, as a sanction for the State's admitted violation of its discovery obligation.

In the circumstances presented here, we are not persuaded that appellant was so prejudiced by the discovery violation that a mistrial was required. After reviewing the relevant law and record, we shall explain our reasoning.

A. Standards Governing Discovery Obligations, Violations, and Sanctions

Under Maryland Rule 4-263(d)(5)–(6), the State is required to disclose to defense counsel all exculpatory information concerning a criminal defendant and all impeachment information concerning a prosecution witness. This rule is designed to "assist defendants in preparing their defenses and to protect them from unfair surprise." *Williams v. State*, 364 Md. 160, 172 (2001). The State is obligated to produce such information within 30 days after defense counsel notes an appearance and remains "under a continuing obligation to produce discoverable material and information[.]" *See* Md. Rule 4-263(h), (j).

The rule authorizes sanctions, including a mistrial, for discovery violations:

> If at any time during the proceedings the court finds that a party has failed to comply with this Rule or an order issued pursuant to this Rule, the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, *grant a mistrial*, or enter any other order appropriate under the circumstances.

Md. Rule 4-263(n) (emphasis added).

When fashioning a sanction for a discovery violation, trial courts consider the following factors:

> (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.

Thomas v. State, 397 Md. 557, 570–71 (2007) (citations and footnote omitted). *See Taliaferro v. State*, 295 Md. 376, 391 (1983). Because this list is neither exhaustive nor rigid, the court also may consider "whether the disclosure violation was technical or substantial, the timing of the ultimate disclosure, [and] . . . the overall desirability of a continuance." *Taliaferro*, 295 Md. at 390–91. The Court of Appeals has emphasized that when fashioning a remedy for a discovery violation, a trial court should impose the "least severe sanction that is consistent with the purpose of the discovery rules[,]" so that "drastic measures" such as excluding evidence and declaring a mistrial are not favored. *See Thomas*, 397 Md. at 570–72.

On appeal, this Court reviews decisions regarding discovery sanctions for abuse of discretion. *See Bellard v. State*, 229 Md. App. 312, 340 (2016), *aff'd on other grounds*,

452 Md. 467 (2017). An abuse of discretion occurs in the discovery sanction context when the trial court's decision is

> well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable. That kind of distance can arise in a number of ways, among which are that the ruling either does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective.

McLennan v. State, 418 Md. 335, 353–54 (2011) (quotation marks and citation omitted).

The decision whether to grant or deny a mistrial also lies within the sound discretion of the trial judge. *See Carter v. State*, 366 Md. 574, 589 (2001). This reflects that "[t]he judge is physically on the scene," *Simmons v. State*, 436 Md. 202, 212–13 (2013), and therefore "far more conversant with the factors relevant to the determination than any reviewing court can possibly be." *State v. Hawkins*, 326 Md. 270, 278 (1992).

B. Relevant Record

In the defense case, defense counsel recalled Baltimore City Police Detective Joshua Fuller, who was the initial lead detective assigned to the Bowers homicide. Although the case was transferred to Detective Gordon Carew, it was reassigned to Fuller upon Carew's retirement.

When defense counsel asked Detective Fuller how many progress notes were in the Bowers case file, he replied, "six, plus the initial one." Defense counsel immediately objected that she had never seen those six notes. The prosecutor, insisting those documents had been disclosed, argued that in any event, the State had not been obligated to produce them because the substance had been otherwise disclosed. The court recessed until the

following day to give counsel an opportunity to review the documents in order to determine whether they had been disclosed and, if not, whether they contained new information.

The next morning, the prosecutor acknowledged that the six notes identified by Detective Fuller had not been previously disclosed to the defense. In addition, the prosecutor proffered that she herself had never seen the note dated June 15, 2015 (the "Dasean Harris Note"). Defense counsel then proffered that during appellant's first trial, she had questioned the same detective and the same prosecutor about whether there were any such documents, receiving assurances from both that none existed. Defense counsel asserted that this belated disclosure was a discovery violation that required a mistrial because the Dasean Harris Note contained new and potentially exculpatory information.

The trial court then reviewed the Dasean Harris Note, summarizing its contents:

> Progress Report No. 2 dated 6/15/2015, the last line of which – the body of it has to do with Detective[] Sergeant Santos and Detective Carew going to the 4926 Harford Road address which I was told it to be what's been characterized here as, and during this trial, is the pink house, in search of a juvenile to interview by the name of Raeshawn who is a 14-year-old. There's one paragraph devoted to why they were going there for that and what they were going to do there.
>
> Then there's this separate line that doesn't even have a period at the end of it, indicating that somebody named Dasean, spelled D-A-S-E-A-N Harris, a black male, date of birth – lists the date of birth, XX/XX/1999 was identified by a photo array by suspect An and just has two letters. It's not Ann like a female. It's An, like someone [of] indeterminative gender A-N, and that ends the progress report. And your allegation[] is that there's a suspect by the name of An who is not mentioned in any . . . other discovery documents that you've received and a photo identification made by this suspect An of a Dasean Harris who is not mentioned in any other place.

Based on this mention of a new suspect ("An") and an undisclosed positive photo identification of a previously unknown subject of the investigation ("Dasean Harris"), defense counsel moved for a dismissal of the charges with prejudice, a mistrial, or "extensive leave in order to ask Detective Fuller about the disclosure of these items and his prior statements in the last trial," along with an instruction that the State violated its discovery obligations and that the jury could draw a negative inference from that. The trial court concluded that more information was necessary before determining which, if any, sanction was appropriate. Pointing out that the Dasean Harris Note "may pan out to be absolutely nothing but a misstatement in a police report[,]" the court ruled that defense counsel nevertheless "should have the ability on behalf of her client to investigate that." At that point, the court gave defense counsel the options of arranging for access to the author of the Note (retired Detective Carew) and for additional time to investigate in any other way she saw fit.

In response, defense counsel pondered whether her only viable alternative to relying on representations and recollections of the State's law enforcement witnesses was to have everything "pulled from the warehouse" in an effort to determine whether an additional, positive photo array occurred. When the court asked what remedy other than a mistrial she sought, defense counsel again requested a jury instruction "that in a progress report Dasean Harris, it says that he is positively identified by Suspect AN and . . . [the] State has no explanation for that[.]"

The trial court declined to instruct the jury on how to interpret the evidence. Instead, the court suggested to defense counsel that she question Detective Fuller and former Detective Carew about the Note. When Detective Fuller resumed his testimony, he demurred when asked about the Dasean Harris Note, referring the inquiry to former Detective Carew. He explained that when he was asked about the contents of the case folder during "a hearing" that took place before this trial, he did not see those progress notes because "they were not in the spot where [he] would have put them, so [he] answered based on what [he] saw."

Later, after reviewing the file over a recess, Fuller suggested the following explanation for the Dasean Harris Note:

> I had an idea. Again, you'd have to talk to Detective Carew, but I believe I know what it's referring to . . . .
>
> When Mr. Dixon was interviewed at the time, we were still trying to figure out [who] Raeshawn was. We just had the name Raeshawn at the time. So Dreshawn [sic] Harris obviously has a similar name. We were just trying to see if that was the person, the Raeshawn that Mr. Dixon was referring to. So I actually showed Mr. Dixon a photo array of Dreshawn [sic] Harris and it was negative. He didn't pick anybody out of it.

Defense counsel then called Detective Carew, who testified that the Dasean Harris Note was an initial draft of a progress report that he never corrected or completed. Pointing to the notation at the top of the report reading "Work in progress[,]" Carew explained:

> When I did this progress report, things are very busy sometimes in Homicide and I was kind of getting ahead of myself. I started the progress report and we were trying to determine who Raeshawn Rivers was but we didn't know his government name at the time. We were showing some photo arrays to Adonay [Dixon] to find out who Raeshawn was, get his real government name and Dasean Harris was one of the ones that was shown to him, but

> evidently it wasn't the one and it was a negative array, which means that the [sic] wasn't the person, Raeshawn, that he was talking about in this interview.
>
> Regarding "suspect An," defense counsel elicited the following explanation:
>
> [DEFENSE COUNSEL]: So the A-N, even though it's spelled capital A, lower-case N was supposed to be A-D or Adonay or –
>
> [DET. CAREW]: Right. I may have stopped mid-word there.
>
> [DEFENSE COUNSEL]: Okay. And it was just a mistake because you thought he had identified –
>
> [DET. CAREW]: Like I opened the progress report to try and get ahead of the game. Things are kind of moving quickly.
>
> THE COURT: Again, Detective, speak forward.
>
> [DET. CAREW]: There's interviews going on, like it's a very fluid situation when there's an investigation in progress and sometimes things are happening. We have several different detectives that are working on the cases, people running names, people showing photo arrays. Like, I didn't even show that photo array. But we're all working at the same goal, trying to find the name of the person that's relative to the investigation. So we utilize everyone's skills in order to do that.
>
> But I got up mid-report and never went back to it. I just never got back there. The investigation went on. We were able to identify [Raeshawn] and I should have gone back and completed all the reports but sometimes we have so many cases that that doesn't happen and that didn't happen in this case and that's why it says, "work in progress" at the top. It was never completed.

At the end of that day, defense counsel again asked for a mistrial. Counsel argued that despite the explanation for the Dasean Harris Note, she still did not know "what else may not have made it into the file[.]" Focusing on the prejudicial effect of the belated disclosure, the trial court asked defense counsel to identify what "remedial action" she could and would take if the court were to declare a mistrial. When defense counsel suggested that she would have asked Adonay Dixon about the photo array, the prosecutor

volunteered to make Dixon available for additional questioning without the jury present. The court deferred ruling on appellant's motion to give counsel a chance to review the file "and see what other sort of trial tactic [she] may have taken in light of the evidence that [she is] now privy to[.]"

The following day, defense counsel renewed her motion for a mistrial, maintaining that the belated disclosure of the Dasean Harris Note altered her trial tactics because she did not want to call Detective Carew as a witness but felt "forced to" do so in order "to address this issue" in light of Detective Fuller's testimony that she would have to ask Detective Carew about the Note. In counsel's view, "the overall case strategy" would have been "better for the jury to think that even though [Carew] retired he didn't want to come back or that there's these issues" and "doubts about where Carew is and what he did[.]" In addition, she objected to the State recalling Adonay Dixon "to fix this error that they caused, when they didn't ask him about [the photo array with Dasean Harris] in the first place."

The trial court affirmed its preliminary denial of a mistrial, summarizing its reasoning as follows:

> I've made my ruling and in a nutshell, for me to declare a mistrial, there has to be manifest necessity. And manifest necessity is that an injustice occurred here. I have recognized that there has been a discovery error made here. That the discovery error did in fact, could have in fact, affected substantial rights of the Defendant inasmuch as it affected, and could have affected, the ability of [defense counsel] to advocate on behalf of the client and prepare for this matter on behalf of her client.
>
> But the prejudice aspect is what I'm having a problem reaching, as I sit here right now. For there to be prejudice there would have to be shown that there

was an ill-effect wrought by this. And what I have now is more speculative than substantive.

The proffered reason that this incomplete progress report occurred was voiced in testimony by Detective Carew. And Detective Carew indicated that, in the rush of events surrounding this investigation, he got up, walked away from the note he was making – as is evidenced by the fact that there's not even a period at the end of the sentence that is the subject of so much of this discussion – and that this is the reason for the confusion surrounding the statement that was not disclosed.

So it's two-fold. One, I've already found that the statement was not disclosed. The statement in question was not disclosed to the Defense. That statement, on its face, is something material. On further examination it seems to be credible that . . . the reason that statement, which seems to be material, is something less than material, is that the credible evidence of Detective Carew indicates it was written by mistake. It was a mistake on his part, never corrected, and thus it lies in unfortunately perpetuity as a mistake.

I have given the opportunity for Defense to examine Mr. Dixon in as much [sic] as one of the ill-effects of the non-disclosure may have been a change in tactic as far as the examination of Mr. Dixon goes, but the Defense has opted not to examine Mr. Dixon in that regard. Given the opportunity to do so again – and I realize that there's a perception of a burden shift by Defense Counsel in that opportunity and in having Detective Carew come in and testify as to it, as to the statement.

But in looking at the prejudice prong of this entire analysis, I have to see what the possible effects could have been, and so far there's been nothing proffered, the proffered ill-effects could have been, and there's been nothing really substantial that I can hang my hat on such that would allow me to find that there's a manifest necessity for declaring a mistrial here. So with all due respect and in acknowledgement of the fact that it did put [defense counsel] at some disadvantage in preparing this matter, I am respectfully denying the Motion for Mistrial at this time.

C. Appellant's Challenge

Appellant argues that the trial court abused its discretion in denying his requests for a mistrial because the belated disclosure of the photo identification of an individual other

than appellant severely prejudiced his defense. In appellant's view, such prejudice "is considerable" for several reasons:

> First, it is patent that [a]ppellant was not afforded the "avowed purposes for discovery rules: to assist the defendant in preparing his defense and prevent unfair surprise at trial." *Williams v. State*, 364 Md. 160, 178 (2001). Prior to [a]ppellant's first trial, defense counsel questioned whether any additional notes existed, and was told no. During the first trial, defense counsel questioned Detective Fuller about the notes and was told that he had not seen any other notes. To then learn during Detective Fuller's testimony, in the second trial, that there are additional notes and to learn about an additional photo array that was never previously disclosed constitutes enormous unfair surprise. Defense counsel was then forced to investigate this information and call witnesses during the defense case because of the State's failure to provide all necessary discovery. As defense counsel argued to the court, if she had the progress reports before the case had started, she would have asked different questions of people. In addition, defense counsel argued that she might have questioned Mr. Dixon about the photo array and other information contained in the notes.
>
> Also, as part of the defense trial strategy, the defense had not originally wanted to have Gordon Carew testify. Defense counsel informed the court that as part of her strategy, she thought that it would be better for the jury to wonder where Mr. Carew was or have doubts about him. However, because of the discovery violation, the defense was forced to call Mr. Carew as a witness to address the report he wrote that Detective Fuller did not know about.

We are not persuaded that the trial court erred or abused its discretion in denying a mistrial because appellant failed to establish a level of prejudice warranting that drastic remedy. The court correctly recognized that it should impose the least severe sanction that satisfied the purpose of the discovery rule, which was to give appellant sufficient time to investigate the new information and present his defense in light of it. *See Thomas*, 397 Md. at 570–71. As detailed in our summary of the relevant record, the trial court weighed the appropriate factors, including the reasons for the State's belated disclosure, the

prejudice to appellant's defense, and alternatives short of a mistrial. *See Raynor v. State*, 201 Md. App. 209, 228 (2011), *aff'd on other grounds*, 440 Md. 71 (2014) (citation omitted).

With respect to the reasons why the six progress notes were not disclosed earlier, the court found that the State did not intentionally violate its disclosure obligation by deliberately withholding the notes. The evidence supports that finding. According to Detective Fuller, when he reviewed the file during appellant's first trial, these notes were not stored in the expected location within the folder, having been created and filed by Detective Carew.

"Under Rule 4-263, a defendant is prejudiced only when he is unduly surprised and lacks adequate opportunity to prepare a defense, or when the violation substantially influences the jury." *Thomas*, 399 Md. at 374. Concerned about the prejudice to appellant and its amenability to cure by measures short of a mistrial, the trial court invested significant time over three days of trial before finding that the impact of the belated disclosure was not so detrimental that it could not be remedied by the corrective measures undertaken by court and counsel. The record also supports that determination.

From the outset, the court ruled that the discovery violation required close scrutiny. When the nondisclosure was discovered, defense counsel told the court that her "main issue is that DaSean Harris was positively identified in the photo array by suspect An" and complained that she did not "know how [to] get beyond that especially when the detective

[i.e., Fuller] has no knowledge of any of it." The court recognized "that it's worth investigation" given its exculpatory potential.

In response, the prosecutor, maintaining that "it's a tempest in a teapot," proffered that "[t]here are no mystery photo arrays in this case and there were no interviews with any suspects other than on videotape and there are no suspects named A-N." According to the prosecutor, Detective "Fuller brought from Evidence control a sealed envelope that contain[ed] all of the photo arrays in this case." With the exception of retired Detective Carew, all other detectives involved in the investigation, including the supervisor "who should be aware of all ID's," were present for trial. As for Carew, the prosecutor proffered that he was working for the Attorney General's office and out on medical leave that day, but that he could be contacted and likely made available to defense counsel for questioning.

The court, urging defense counsel to explore the nature of any prejudice and alternatives to declaring a mistrial, inquired, "do you want to investigate that today through the means suggested by [the prosecutor] or do you need more time?" Defense counsel, complaining that she was left with no viable investigatory option other than to rely on the police officers or "have everything pulled from the warehouse[,]" asked for an instruction "that in a progress report Dasean Harris . . . is positively identified by Suspect AN and . . . the State has no explanation for that[.]"

The court refused to tell the jury "who to believe" or "what they should find" and ruled that it would not allow the jury to hear about the "discovery violation" because that was a "hyper-technical word" that jurors "would not understand[.]" Instead, the court

suggested that defense counsel proceed to cross-examine Detective Fuller "fully on this as best you can" and then "call Detective Carew as a witness" in order to establish that "at trial, the Detective said, no, this is the only document, . . . and now there's suddenly five more roughly documents[,]" which could undermine the State's credibility by showing that a detective presented by the State as having encyclopedic knowledge of a case . . . perhaps has less than encyclopedic knowledge about [it]."

In addition, before the jury returned, the court allowed the prosecutor to phone Detective Carew, prompting the following conversation on speakerphone in the courtroom:

> [DEFENSE COUNSEL]: Detective Carew, in your progress reports you indicate that somebody positively identified Dasean Harris. What's that about?
>
> DET. CAREW: (inaudible at 11:42:17 a.m.) I'd really have to look it up in the case folder.
>
> [STATE]: Let me just ask you this. Were there any suspects every develops [sic] besides Childs, Dixon and Rivers?
>
> DET. CAREW: No.
>
> [STATE]: And did you put all the photo arrays that you did into ECU?
>
> DET. CAREW: Yes.
>
> [STATE]: Okay. Thanks. We'll talk to you later. That's it for now.

When Detective Fuller returned to the stand that afternoon, defense counsel cross-examined him about the contents of the DaSean Harris Note, asking whether he had "any information whatsoever about that[.]" Fuller responded that counsel "would need to ask Detective Carew." When asked why his testimony in the previous proceeding was that there were no notes in the case file other than the original incident report, Fuller answered,

"I looked in the folder at the hearing and they weren't in the spot where I would have put them, so I answered based on what I saw."

Following the next recess, during which Detective Fuller reviewed the file, defense counsel asked him to relate his "explanation for what was being referred to when [the note] said Dasean Harris was positively identified by Suspect An[.]" Fuller responded, with a caveat that "you'd have to talk to Detective Carew," that he believed they had been trying to determine whether the suspect identified to them only as "Raeshawn" might be a sixteen-year-old named Dasean Harris, given the "similar name" and "somewhat similar ages[.]"

When trial continued the next day, defense counsel called Detective Carew, who testified that he "got up mid-report and never went back to" correct his "work in progress" referencing Adonay Dixon as "suspect An" and misstating that he positively identified Dasean Harris's photo. The trial court credited that testimony, concluding that the Dasean Harris note was not "material" because it was a "mistake."

Based on this record, we are satisfied that the trial court did not abuse its discretion in denying a mistrial. The court afforded defense counsel adequate time to evaluate the belatedly disclosed documents, then facilitated an opportunity for defense counsel to talk with Detective Carew about both the circumstances under which he wrote the DaSean Harris Note and its contents. After Carew explained that "suspect An" was a misnomer for Adonay Dixon and that Dixon did not identify Harris as a participant in the murder, defense counsel elected not to question Dixon about those matters. The court concluded that defense counsel did not establish that she would do anything differently in preparation for

a new trial. Although the court did not expressly reject defense counsel's complaint that the testimony of Detective Carew was made necessary by the inadvertently belated disclosure, it did not weigh in favor of granting a mistrial.

This was a substantial factual and sound legal basis for the court's determination that the discovery violation was not so prejudicial that a mistrial was manifestly necessary. *Cf. McIntyre v. State*, 168 Md. App. 504, 524 (2006) (recognizing that a mistrial is an "extreme sanction" that should be granted only "when such overwhelming prejudice has occurred that no other remedy will suffice to cure the prejudice") (internal quotation marks and citations omitted). Accordingly, we hold that the trial court did not abuse its discretion in denying mistrial as a sanction for the State's discovery violation.

II. Supplemental Jury Instructions

Appellant next contends that "the trial court erred in its supplemental response to a jury question on accomplice liability," when it "repeatedly refused defense counsel's request to clarify for the jury that they must find that [a]ppellant possessed the specific intent to aid in the commission of a robbery, as opposed to a general intent to make a crime happen." For the reasons explained below, we disagree.

A. Standards Governing Supplemental Jury Instructions

Upon request, a trial court is required to "instruct the jury as to the applicable law[,]" but "[t]he court need not grant a requested instruction if the matter is fairly covered by instructions actually given." Md. Rule 4-325(c). After a trial court instructs the jury at the

close of evidence, it may later supplement those instructions "when appropriate" during deliberations. Md. Rule 4-325(a).

We are mindful that clarifying instructions regarding an issue central to the case should not be "ambiguous, misleading, or confusing." *Appraicio v. State*, 431 Md. 42, 51 (2013) (quotation marks and citation omitted). We review a decision to give such supplemental instructions for abuse of discretion, *see Sidbury v. State*, 414 Md. 180, 186 (2010), and the substance of the instructions to determine whether they accurately state the law. *See State v. Bircher*, 446 Md. 458, 463–64 (2016).

Because this assignment of error relates to the court's instructions on the criminal responsibility of an accomplice, we set forth those principles as background for our discussion:

> As a general rule, when two or more persons participate in a criminal offense, each is ordinarily responsible for the acts of the other done in furtherance of the commission of the offense and the escape therefrom . . . . 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. . . . 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.

Sheppard v. State, 312 Md. 118, 121–22, 538 A.2d 773 (1988) (citations omitted), *abrogated in part on other grounds by State v. Hawkins*, 326 Md. 270 (1992). *See also* Md. Code, § 4-204(b) of the Criminal Procedure Article (abrogating "the distinction

between an accessory before the fact and a principal" and providing that "an accessory before the fact may be charged, tried, convicted, and sentenced as a principal").

Applying these concepts, we have held that "when the defendant participates in the main thrust of the criminal design, it is not necessary that he aid and abet in the consequential crimes in order for him to be criminally responsible for them." *Owens v. State*, 161 Md. App. 91, 105–06 (2005) (citing *Sheppard*, 312 Md. at 123). For example, Sheppard's conviction for assaulting police officers with intent to murder was affirmed even though Sheppard was already in police custody at the time his fellow robbers fired at officers who were in hot pursuit of them following a liquor store holdup. The Court of Appeals explained that:

> the principal offense was the armed robbery of the two women at the liquor store. The aggravated assaults against the police officers, perpetrated during the escape from the commission of the robbery, were secondary or incidental offenses. Thus, contrary to Sheppard's contention that his responsibility for the aggravated assaults is dependent upon proof that he aided and abetted the commission of those offenses, Sheppard's complicity rests on the fact that he aided and abetted the armed robbery.

Id. at 123. *Cf. Todd v. State*, 26 Md. App. 583, 585–86 (1975) (affirming murder conviction based on evidence that defendant kicked the victim, then stood by as his companions stabbed her to death, because the fact finder could "draw a reasonable inference that [the defendant] was not a mere onlooker, but rather a participant in the commission of the [original] crime.").

B. Relevant Record

The State's theory of prosecution for the robbery was that appellant's aiding and abetting role in the burglary ripened into an accomplice role in the consequential crimes, including robbery, because appellant "knew the plan was to steal" and "[s]tealing is part of robbery." The trial court gave the following jury instruction on accomplice liability, which adds the highlighted language concerning intent to the pattern instruction:

> Now this concept at play here called accomplice liability, which is a little . . . difficult for some lawyers to grasp, much less lay people – but I'll lay it out for you as best as I can. The Defendant may be guilty of first degree burglary, third degree burglary, fourth degree burglary and/or robbery as an accomplice, even though the Defendant [did] not personally commit the acts that constitute those crimes. In order to convict a Defendant – in this case Mr. Rivers – of those crimes as an accomplice, the State must prove that one or more of those crimes occurred and that the Defendant, with intent to make the crime happen knowingly aided, counseled, commanded, or encouraged the commission of a crime, or communicated to a participant in the crime that he 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 a crime in order to act as an accomplice. The mere presence of the Defendant at the time and the place of the commission of a crime is not enough to prove the Defendant is an accomplice. If the presence as [sic] the scene of the crime is proven, that fact may be considered, along with all the other surrounding circumstances, in determining whether the Defendant intended to aid a participant and communicated that willingness to a participant.
>
> The Defendant may also be found guilty as an accomplice to crimes that he did not assist in or even intend to commit. In this case, in order to convict the Defendant of first degree burglary, third degree burglary, fourth degree burglary, and/or robbery the State must prove beyond a reasonable doubt (a) that the defendant committed the crime of first degree burglary, third degree burglary, or fourth degree burglary either as a primary actor [or] as an accomplice; (b) that the crime of robbery was committed by an accomplice; and (c) that the crime of robbery was committed by an accomplice in furtherance of or during the escape from the underlying crimes of first degree burglary, third degree burglary, or fourth degree burglary.

> It is not necessary the Defendant knew his accomplice was going to commit an additional crime. Furthermore, the Defendant need not have participated in any fashion in the additional crime. In order for the State to establish accomplice liability for the additional crime, the State must prove that the Defendant actually committed the planned offense or the Defendant aided or abetted in that offense, and that the additional criminal offense, not within the original plan, was done in furtherance of the commission of the planned criminal offense or the escape therefrom.
>
> **The accomplice must possess criminal intent. Aid or encouragement will not make the accomplice guilty unless she or he knew or had reason to know of the intent of the principal in the first degree – that means the person actually doing the crime – and shared in it. When specific intent is a necessary element of a particular crime, one cannot be an accomplice for that crime unless such person entertained the requisite intent, or knew that the principal in the first degree – the person that's actually committing the crime – entertained such intent.**

See Maryland State Bar Ass'n, *Maryland Criminal Pattern Jury Instructions* 6:00, at 1081–82 (2d ed. 2018). Defense counsel did not object to this instruction before deliberations began.

In closing argument, the State maintained that appellant was either a participant in the robbery or an accomplice to it based on his aiding and abetting role in the burglary. The prosecutor pointed to evidence that appellant agreed with Childs and Dixon that he would distract Bowers while Childs and Dixon covertly stole her iphone and other valuables from the residence. Although that plan failed because the configuration of the house did not afford privacy for appellant to have "alone time" with Bowers while Childs and Dixon were guests in the house, the plan was revised when Childs and Dixon left the house, waited outside while appellant and the victim went to her bedroom to engage in sexual activity, then entered

through the basement and proceeded upstairs to steal valuables while appellant was "distracting" Bowers. After Bowers' discovery of Dixon and Childs hiding in her grandmother's bedroom foiled that opportunity for covert theft, appellant admittedly did nothing as the encounter escalated beyond burglary into robbery. He then actively helped Dixon and Childs gather valuables.

Based on the testimony and statements of Dixon and appellant, the evidence generated the need for instructions asking the jury to determine whether appellant played an aiding and abetting role in the burglary, which then ripened into an accomplice role in the robbery. Indeed, based on Dixon's testimony that after Childs bludgeoned Bowers into unconsciousness, appellant worked alongside Dixon to ransack the house, the State asked the jury to infer that appellant was either a principal participant or an accomplice in that robbery.

At 3:35 p.m. on the first day of deliberations, the jury sent the court a note asking for "clarification from the judge on accomplice liability. If possible, please explain in person." In a written response, the court stated: "[w]e would need to know what in particular you would like to have explained." The jury then responded, "[p]lease clarify the highlighted areas in the attached documents[,]" which contained two margin notes raising questions about specific portions of the instructions.

The jury's first question was linked by arrows to the paragraphs of the written instruction covering "mere presence," the elements of the offense based on an

accomplice role, and the provisos that a defendant need not know the first-degree principal is going to commit an additional crime and need not actively participate in that additional crime, if the State proves that the defendant "actually committed the planned offense, or . . . aided and abetted in that offense[.]" That margin note read:

> *in the case of a defendant acting as an accomplice w/ no intent to commit the crime, it is not clear to me [crossed out words] whether the defendant and accomplice can be considered the same.

A second margin note, linked by an arrow from the portion of the instruction stating that "[t]he accomplice must possess criminal intent[,]" read as follows: "there are discrepancies as to whether intent must be present. Please clarify."

In response to these concerns about the intent necessary to convict based upon an accomplice role, defense counsel asked the court to instruct jurors that there must be a "common criminal intent" between the accomplice and the first-degree principal. The trial court invoked the holding in *Sheppard,* 312 Md. at 121–22, that "when an actor aids and abets in the main thrust of the criminal design, it is not necessary that she or he aid and abet in the consequential crimes in order to be responsible for them[.]" Because that statement of the law differed from defense counsel's position, the court declined to add the language she requested.

Instead, the court revised the written instructions in two respects. First, the court clarified the meaning of accomplice, by substituting for the word "accomplice," the phrase "another party to the crime," so that the jury was required to find that "(2) the crime of Robbery was committed by **another party to the crime**; and (3) the crime of Robbery was

committed by **another party to the crime** in furtherance of or during the escape from the underlying crime of First Degree Burglary, Third Degree Burglary, or Fourth Degree Burglary." (Revisions shown in boldface type.) Over defense objection, the court's second revision altered the ensuing paragraph concerning an accomplice's knowledge and intent with respect to consequential crimes, by adding new language that the court highlighted for the jury by showing it in boldface type, as follows:

> It is not necessary that a defendant knew his accomplice was going to commit an additional crime. **An accomplice's liability extends not only to the planned or principal offense, but to all other crimes incidental thereto, if done in furtherance of the commission of the offense and the escape therefrom. Thus, when an actor aids and abets in the main thrust of the criminal design, it is not necessary that she or he aid and abet in the consequential crimes in order to be responsible for them.** Furthermore, the defendant need not have participated in any fashion in the additional crime. In order for the State to establish accomplice liability for the additional crime, the State must prove that the defendant actually committed the planned offense, or the defendant aided and abetted in that offense, and that the additional criminal offense not within the original plan was done in furtherance of the commission of the planned criminal offense or the escape therefrom.

Shortly after deliberations resumed the following Monday morning, the jury sent out another note at 9:55 a.m., asking the court to review more "comments included on the accomplice liability revision." Portions of the revised instructions were underlined and numbered as follows:

> [Numbered item 1:] In order to convict the defendant of those crimes as an accomplice, the State must prove that the one or more of those crimes occurred and that the defendant, <u>with the intent to make the crime happen</u>, knowingly aided, counseled, commanded, or encouraged the commission of the crime, or communicated to a participant in the crime that he was ready, willing, and able to lend support, if needed.

> [Numbered item 2:] "The defendant may also be found guilty as an accomplice of crimes that he did not assist in or even intend to commit. In this case, in order to convict the defendant of First Degree Burglary, Third Degree Burglary, Fourth Degree Burglary and/or Robbery, the State must prove beyond a reasonable doubt that:
>
> > (1) the defendant committed the crime of First Degree Burglary, Third Degree Burglary, or Fourth Degree Burglary either as the primary actor or as an accomplice . . . .
>
> [Numbered item 3:] The accomplice must possess criminal intent.

With respect to the second numbered item, the jury raised the following question in the margin:

> If we are trying to define whether the defendant is an accomplice, how can we apply this criteria? In other words how can we define accomplice using the word accomplice in the definition?

In addition, referring to all three itemized excerpts, the jury noted the following:

> 1, 2, 3
> There are three statements regarding intent and whether it is required in order to be considered an accomplice. It seems as though 1 & 2 represent two unique scenarios under which the defendant can be deemed an accomplice. However, it is not clear how #3 fits in – must intent always be present for a defendant to be considered an accomplice?

Defense counsel asked the court to instruct the jury that the State must prove that appellant "knew or had reason to know that the crime was going to occur and – knew or [had] reason to know of the main person's intent." The trial court denied that request, noting it already had "lifted" language regarding accomplice liability "basically from the [*Sheppard*] and the *Grandison* case[s] and they don't seem to require that."

Instead, the court gave the jury another supplementary written instruction. Although the trial transcript does not contain its text, this Court granted the State's motion to correct the record by adding a copy of the following document:

> Response to Jury Note of 3/27/17 @ 9:55 p.m.
>
> There are two (2) ways an accomplice can be found liable for the criminal act(s) of another.
>
> A. The State must prove beyond a reasonable doubt that the alleged crime occurred, and that the Defendant with the intent to make that crime happen, knowingly aided, counseled, commanded or encouraged the commission of the crime, or communicated to a participant in the crime that he was ready, willing, and able to lend support, if needed.
>
> In that scenario, the accomplice must possess the same criminal intent as the individual who actually committed the crime. Aid or encouragement will not make the accomplice guilty unless he knew or had reasons to know of the intent of the individual who actually committed the crime.
>
> B. Alternatively, it is not necessary that a Defendant who did not physically commit the crime, know ahead of time that another crime was going to be committed to be held liable as an accomplice. An accomplice's liability extends not only to the planned or principal offense, but to all other crimes incidental thereto, if done in furtherance of the commission of the contemplated offense and/or the escape thereto. Thus when a Defendant aids or abets in the main thrust of the criminal design, it is not necessary that he aid or abet in the consequential crimes in order to be responsible for them.
>
> In any event, in order to hold a Defendant criminally liable as an accomplice, the State must prove beyond a reasonable doubt that a) the offense was committed by another, and b) the Defendant participated in the crime as an accomplice in one of the two (2) ways described above.
>
> Judge Philip S. Jackson
> 3/27/2017 @12:01 p.m.

C. Appellant's Challenge

Appellant challenges these supplemental instructions, arguing that they failed to adequately instruct the jury on a fundamental part of his defense, *i.e.*, that he lacked the "common criminal intent with the principal offender," because he had "no knowledge that Dixon changed the plan of what was to occur[.]" In his view, the court

> failed to provide the jury with needed specificity and clarity. Were this Court to hold otherwise, [it] would permit an individual who had participated in planning a crime and then changed his or her mind about their participation, to be found guilty for any crime thereafter surreptitiously committed by a co-defendant. This simply cannot be enough.
>
> The jury was obviously struggling with the intent aspect of the accomplice liability jury instruction, given the questions that were asked. This fact, combined with the failure of the trial court to specify for the jury in the supplemental instructions that Appellant needed to share a common intent with the principal in the first-degree, creates a very reasonable possibility that the error contributed to the verdict, thus rendering the error categorically harmful.

The State counters that appellant's "suggested instruction [was] an incorrect statement of law" and that "[b]oth of the court's answers to the accomplice liability question were within its discretion" because they "came straight from" Maryland case law establishing that "an accomplice's liability extends beyond the principal offense to all other crimes incidental to the principal offense that were committed in furtherance of, or escape from, the principal offense." We agree with the State.

As the trial court instructed, "when two or more persons participate in a criminal offense, each is responsible" not only "for the commission of the offense" but also "for any other criminal acts done in furtherance of the commission of the offense or the escape

therefrom." *Sheppard*, 312 Md. at 121–22. Accordingly, if appellant "participate[d] in the main thrust of the criminal design," by aiding and abetting that crime, then it was not necessary for the jury to also find that he aided and abetted "in the consequential crimes in order for him to be criminally responsible for them." *See Owens*, 161 Md. App. at 106.

The trial court correctly informed the jury that it could conclude that the robbery of Arnesha Bowers was a consequential crime that occurred in furtherance of the burglary that appellant aided and abetted. *Cf. Sheppard*, 312 Md. at 121–22 (affirming conviction of defendant as accomplice to attempted murder of police officers, even though the shots were fired after defendant had been apprehended, because that was a consequential crime committed by other members of the group with whom defendant committed armed robbery). Appellant's concern about a robbery conviction premised on his participation in a theft conspiracy ignores that the court instructed the jury that it could not convict appellant as an accomplice to robbery without finding that he had an intent to commit the robbery only if it convicted him as an aider and abettor on one of the burglary counts.[4] Because the supplemental instructions requested by defense counsel either contradicted or duplicated the legally correct supplementary instructions given by the trial court, we hold that the court did not err or abuse its discretion in responding to the jury's questions about accomplice liability.

III. Closing Argument

[4] As the not guilty verdicts on all the burglary counts indicate, the jury ultimately did not convict appellant of robbery based on this accomplice theory. Instead, the jury apparently found that even though appellant did not aid and abet in the burglary, he did participate in the robbery, either as a principal or an aider and abettor.

In his final assignment of error, appellant complains that the trial court prejudicially erred in overruling defense objections to closing arguments that constituted both impermissible vouching and an improper appeal to the passions and prejudices of the jury. After summarizing the standards governing closing argument, we address each challenge in turn, explaining why neither warrants appellate relief.

A. Standards Governing Closing Argument

This Court recently reviewed the legal principles and precedent governing appellate review of closing argument:

> "A trial court is in the best position to evaluate the propriety of a closing argument[.]" *Ingram v. State*, 427 Md. 717, 726 (2012) (citing *Mitchell v. State*, 408 Md. 368, 380–81 (2009)). Therefore, we shall not disturb the ruling at trial "unless there has been an abuse of discretion likely to have injured the complaining party." *Grandison v. State*, 341 Md. 175, 243 (1995) (citing *Henry v. State*, 324 Md. 204, 231 (1991)). Trial courts have broad discretion in determining the propriety of closing arguments. *See Shelton v. State*, 207 Md. App. 363, 386 (2012).
>
> "[A]ttorneys are afforded great leeway in presenting closing arguments[.]" *Degren v. State*, 352 Md. 400, 429 (1999). "The prosecutor is allowed liberal freedom of speech and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom." *Id*. at 429–30. "Generally, counsel has the right to make any comment or argument that is warranted by the evidence proved or inferences therefrom; the prosecuting attorney is as free to comment legitimately and to speak fully, although harshly, on the accused's action and conduct if the evidence supports his comments, as is [the] accused's counsel to comment on the nature of the evidence and the character of witnesses which the (prosecution) produces." *Wilhelm v. State*, 272 Md. [404, 412 (1974)]; *accord Degren v. State*, 352 Md. at 430.
>
> 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.
>
> *Wilhelm v. State*, 272 Md. at 413; *accord Degren v. State*, 352 Md. at 430.
>
> Even when a prosecutor's remark is improper, it will typically merit reversal only where it appears that the remarks of the prosecutor actually misled the jury or were likely to have misled or influenced the jury to the prejudice of the accused.

Winston v. State, 235 Md. App. 540, 572–73 (2012), *cert. denied sub nom* (internal citations and quotations omitted). *See also Mayhew v. State*, 458 Md. 593 (2018).

B. Vouching

"Vouching typically occurs when a prosecutor 'place[s] the prestige of the government behind a witness through personal assurances of the witness's veracity . . . or suggest[s] that information not presented to the jury supports the witness's testimony.'" *Spain v. State*, 386 Md. 145, 153 (2005) (citation omitted). The dangers in vouching are that it jeopardizes "the defendant's right to be tried solely on the basis of the evidence presented to the jury" and that it "may induce the jury to trust the Government's judgment rather than its own view of the evidence." *Id.* at 153–54 (quoting *United States v. Young*, 470 U.S. 1, 18–19, 105 S. Ct. 1038, 1048 (1985)).

Appellant contends that the following closing argument by the prosecutor constituted impermissible vouching:

> [PROSECUTOR]: Then [appellant] says "[b]ecause the main thing they really probably supposed to do is kill me and Arnesha". Now there's a plan,

> he imagines, for two to die, and he's one of them. The point is, there's a plan to kill someone. "Because I mean, he kept talking about, talked to Tiny about getting him into a gang. And only way you can prove yourself is to kill somebody. And I guess that was the mission. He's supposed to have killed me and Arnesha, but Tiny stopped him from killing me". *Do I think this is true? No I do not.* This is about the messiest murder you can imagine. *Do I think this is some big gang initiation? No I do not, ladies and gentlemen.* I think this is the Defendant's –
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: But the Defendant tells us it was a plan. He says, in his first taped statement, "[w]hat I'm sayin' like, he had already planned everything out, everything out, because for somebody to be in a gang you gotta prove yourself, so he must have already had everything ordered. But his plan was to come in on Arnesha, but Tiny stopped him". Yeah there was a plan. There was a plan to, like I said, Raeshawn have sex, the other two take what they want. Except it went bad.

(emphasis added.)

In appellant's view, the italicized argument by "the prosecutor specifically told the jury that she did not believe the statement of [a]ppellant" and indicated the prosecutor might know something more than what was presented at trial, so that the jury should simply "trust the government's judgment." *See, e.g.*, *Sivells v. State*, 196 Md. App. 254, 278–80 (2010) (prosecutor impermissibly vouched for police witnesses by repeatedly arguing that they were "honorable men" who "told the truth," without indicating that statement was "tied to the evidence in the case" rather than the prosecutor's personal opinion). Appellant maintains that because the prosecutor expressed her personal opinion about the credibility of witnesses, whose conflicting statements were central to the jury's verdicts, "during rebuttal closing argument, when defense counsel did not have a chance to respond[,]" her

improper vouching was "particularly likely to jeopardize the fundamental fairness of trial." *Cf. Woodland v. State*, 62 Md. App. 503, 501 (1985) (recognizing that improper rebuttal arguments may be more prejudicial because defense counsel has no opportunity to respond).

When viewed in context, we cannot say that the challenged argument constituted improper vouching that misled the jury in a manner necessitating reversal. Nothing in the prosecutor's remarks suggests she had information other than what was presented to the jury. Yet closer scrutiny is warranted by the prosecutor's use of classic "vouching" words when she stated that she did not "think" appellant's statements (*i.e.*, that he was supposed to be killed along with Arnesha Bowers and the murder was committed as part of a gang initiation) were "true." Although we caution counsel that the better practice is to avoid declarations regarding what the advocate thinks is true, when the challenged argument is considered in context, we are satisfied that both of these comments were adequately "tied to the evidence in the case" rather than the prosecutor's personal opinion of witness credibility. *See Sivells*, 196 Md. App. at 278–79.

Counsel did not suggest that a particular prosecution witness was telling the truth, but instead expressed her view of appellant's claim that he was an intended victim of what was a carefully planned mission for Childs to kill someone in order to earn gang initiation. She then tied that view to the evidentiary record, pointing out that "[t]his is about the messiest murder you can imagine," which was more consistent with Dixon's testimony that there had been "a plan [for] . . . Raeshawn to have sex, the other two take what they want.

Except it went bad." Because the challenged remarks were not improper vouching, the trial court did not abuse its discretion in overruling the defense objection.

C. Appeal to Passion and Prejudice

Among the few substantive limits placed on closing argument is a prohibition against appealing to the passions and prejudices of the jury. *See, e.g., Lawson v. State*, 389 Md. 570, 597, 599 (2005) (prosecutor's references to defendant as "a monster and a child molester" were "inappropriate"); *Hill v. State*, 355 Md. 206, 225 (1999) ("appeals to jurors to convict a defendant in order to preserve the safety or quality of their communities are improper and prejudicial"); *Walker v. State*, 121 Md. App. 364, 375 (1998) (prosecutor's references to defendant as "an animal" and "pervert" were "excessive appeals to passion").

Appellant contends that the prosecutor crossed this line with arguments that "were a blatant attempt to appeal to the passions of the jury, because Baltimore City asked them to do justice in memory of Arnesha." In support, appellant cherry-picks from the State's closing rebuttal the following italicized portions of that argument:

> [STATE]: Our Constitution guarantees us the right of freedom, awesome of freedoms [sic]. Life, liberty, and justice. Arnesha's liberty was taken away from her at a very very young age. But we live in a democracy, something rare in this world today. Something that other people would give anything to have. And that democracy protects the rights of the Defendant.
>
> I have to prove this case beyond a reasonable doubt in order for you to convict the Defendant of anything. And that is a blessing that most people in the world wish they had. As jurors, you're the gatekeepers. You're the ones that make sure that the State is put to the test. That we do the job right. That we're fair. That we're honest. That we're thorough. And that we're complete. And when we ask you to find Raeshawn Rivers guilty beyond a

reasonable doubt, we want you – let me say that again – we want you to make sure we've done it right. *Because this is the blessing of democracy, to do justice. To seek justice. It's in the Bible, justice justice thou shall pursue.*

[DEFENSE]: *Objection.*

THE COURT: *Overruled*.

[STATE]: *And it's your job, as jurors, to pursue justice vigorously. Do it right.* So that when this trial is over and you go home, you know that you've contributed to what's best about our country, our state and our city as jurors. So no you do not have a horrible task. You are entrusted with a precious precious responsibility, that is the heart and soul of our liberty. So I don't thank jurors for staying here longer than they expected to. We should all be grateful that we get to be jurors. That the State is held to this responsibility. That we have to do it right.

And yes, it's an inconvenience. I know that. I know that no one told you you'd be here this long. No one expected you to do that. And yet, not one of you, not for one moment, has ever looked disinterested, discouraged or fed up. Because every human life matters. And Arnesha's life was snuffed out too you[ng], very violently, very viciously because she trusted Raeshawn Rivers. He may be a child by age but he is not a child by deed.

Adonay Dixon never would have gotten into that house without Raeshawn. Tiny never would have gotten into that house without Raeshawn. Neither one of them was remotely of interest to Arnesha. But for some horrible reason, that maybe we'll never quite understand, she was fascinated with him. Even he said it in his first statement, from the beginning. "She liked me." And every witness said that, she liked him. And so he was in a unique position to take advantage of the trust of an innocent young woman, and help his friends destroy her life, the life of her family, the life of her mother, the life of her grandmother, and destroy the body, her home, everything. Arnesha Bowers did not (inaudible 4:39:40 p.m.)

Erica will have to live with this the rest of her life, what she saw. How she didn't realize what danger she was in. Mrs. Bowers, the mother, will have to live for the rest of her life wondering oh my God, why did I send her to Baltimore. *And Mrs. Bowers, the grandmother, is going to have to live the rest of her life wondering what she could have done differently. And so I ask you remember this family and every part of the City that I know as Baltimore asks you –*

> [DEFENSE]: *Objection*.
>
> [STATE]: *– to care.*
>
> THE COURT: *Overruled*.
>
> [STATE]: *To care enough to apply the law fairly and honestly and justly, in tribute to our democracy and in memory of Arnesha.*
>
> [DEFENSE]: *Objection.*
>
> THE COURT: *Overruled*.
>
> [STATE]: Now, Counsel said I was going to scream about accomplice liability. Ladies and gentlemen, I don't intent to scream about anything. I don't want to scream. The facts scream. The facts are so brutally ugly. I do get indignant. It's my job. It's my job to make sure that I can go to bed at night knowing that I've given you everything I can give you. . . .

(emphasis added.)

Reviewing the challenged portions of the State's rebuttal argument within the full context of those remarks, it is clear that the prosecutor did not unfairly appeal to passions or prejudices of the jury. Instead, she appropriately invited from jurors a passion for justice, imploring them to "make sure we've done it right[,]" by requiring the State to prove appellant's guilt beyond a reasonable doubt. That was not a prejudicial invitation to convict based on passions rather than evidence or law. To the contrary, as the not guilty verdicts on all charges except robbery indicate, the prosecutor's call to "apply the law fairly and honestly and justly" was equally likely to have inspired the jury to acquit as it did to convict. Accordingly, the trial court did not err or abuse its discretion in overruling the defense objections.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY ARE AFFIRMED. COSTS TO BE PAID BY APPELLANT.