Circuit Court for Baltimore City
Case No.: 120238003

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1954

September Term, 2021

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MICHAEL BISCOTTI

v.

STATE OF MARYLAND

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Nazarian
Shaw
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Sharer, J.

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Filed: May 5, 2023

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland and the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022.

Appellant, Michael Biscotti, was charged by indictment in the Circuit Court for Baltimore City with first-degree murder and related counts, in connection with the death of his friend, Freska Yerby, who sustained multiple gunshot and knife wounds in her residence on July 13, 2020.

After the jury deliberated for approximately one hour, Appellant was convicted of first-degree murder, use of a firearm in the commission of a crime of violence and wearing and carrying a dangerous weapon openly with intent to injure. After post-trial motions were denied, he was sentenced to life imprisonment without possibility of parole plus twenty years.

Appellant timely appealed to this Court and asks us to address, as slightly rephrased, the following questions:

> 1. Did the trial court err by failing to inform Appellant, and/or defense counsel, that the courtroom clerk notified the jury, during deliberations, that court would recess for the day at 5:00 p.m., and the jury replied, "they only needed a little more time" before reaching a verdict?
>
> 2. Did the trial court abuse its discretion in denying Appellant's motion for new trial based on post-trial communications from two unidentified jurors that they felt "rushed" in reaching their verdict?
>
> 3. Did the trial court abuse its discretion in not declaring a mistrial after the prosecutor made a factual misstatement during opening statement over defense objection?
>
> 4. Did the trial court abuse its discretion giving the pattern jury instruction on flight?

Finding neither error nor abuse of discretion, we shall affirm.[1]

BACKGROUND

This case concerns the homicide of Freska Yerby on July 13, 2020 at her apartment located at 1122 Comet Street in Baltimore City. Early that afternoon, 11-year-old J.J., Ms. Yerby's son, was napping in his mother's bedroom when he was awakened to the sound of her yelling "Please, Mike. I love you. Don't. Please."[2] J.J. ran downstairs and saw "[m]y mother on the ground bleeding, and Mike with a knife in his hand." He then saw Appellant,

[1] Appellant's questions presented were, verbatim, as follows:

> 1. Did the court err by failing to inform the defense before communicating with the jury *ex parte* about recessing for the day, and then by failing to inform the defense that the jury said they needed more time to deliberate at 5:00 p.m. on a Friday, thereby denying Appellant an opportunity to provide input on the court's communications with the jury and prevent a rushed verdict?
>
> 2. Did the court abuse its discretion by denying Appellant's motion for a new trial, where the jury started deliberating after 4:00 p.m. on a Friday and returned a verdict an hour later, and two jurors disclosed after the verdict that they felt pressured to rush their deliberations?
>
> 3. Where Appellant was charged with murdering a woman, did the court abuse its discretion in not declaring a mistrial after the prosecutor told the jury in opening statement that Appellant had said while being arrested, "she was playing games," when in fact Appellant had not said that?
>
> 4. Where there was evidence that Appellant was present a crime scene inside someone else's house and walked away before the police had been called, did the court err by instructing the jury that they could infer consciousness of guilt from Appellant's "flight"?

[2] It is unnecessary to identify the minor in this case beyond his initials. *See, e.g.*, *Muthukumarana v. Montgomery Cnty.*, 370 Md. 447, 458 n.2 (2002); *Thomas v. State*, 429 Md. 246, 252 n.4 (2012).

whom he identified in court, place a knife on the table in the living room and walk out the backdoor.[3] Appellant was wearing a t-shirt and J.J. testified that Appellant took it off as he was leaving because "it had blood on it." J.J. confirmed he had known Appellant for approximately five months prior to the incident, testifying that Appellant was his mother's friend and would often come over and spend time with them.

An autopsy revealed that Yerby sustained multiple gunshot and knife wounds. The assistant medical examiner concluded that those wounds were the cause of death and that the manner of death was by homicide.

Other evidence of Appellant's involvement in the murder was admitted. In addition to J.J.'s identification, Appellant was seen by a responding police officer near the scene at around the time of the murder. He was not wearing a shirt and was carrying an unidentified item. A few minutes later, the same shirtless man was seen on surveillance video, walking behind a local delicatessen near 1009 East Lombard Street, and carrying the same unidentified item towards a dumpster. Police recovered a blood-soaked shirt from that dumpster. Additionally, Appellant lived in a nearby apartment from which police recovered a bloody hand towel in Appellant's bedroom. And finally, when he was arrested, four days later, Appellant had a number of unexplained cuts on his hands.

We shall include additional detail in the following discussion.

[3] Multiple knives were found throughout the residence.

## DISCUSSION

### I. Jury Communication

Appellant first contends the court erred by communicating with the jury *ex parte* during deliberations and that this violated Maryland Rule 4-326(d), the rule on communications with the jury. Specifically, Appellant asserts there was a "two-part communication" wherein, during deliberations, the courtroom clerk informed the jury that it was time to recess for the day, and the jury responded that "they only needed a little more time" before reaching a verdict. Whereas these communications were not relayed to defense counsel before the jury returned to the courtroom and announced their verdict, Appellant asks us to reverse and grant him a new trial.

The State responds that Appellant's argument is without merit because the communication did not "pertain to the action," as required by Maryland Rule 4-326(d)(2)(B). Summarizing the counterarguments, the State explains that a communication "pertains to the action" only when it implicates either: (1) the jury's inability, unwillingness or reluctance to deliberate; (2) inability to reach a unanimous decision on any counts; or (3) asks for input on legal issue. Further, the State argues that any error in not relaying the communication to the parties was harmless beyond a reasonable doubt given that defense counsel never raised any concern about the circumstances attendant to deliberations and because the evidence in this case was strong.

Initially, and by all accounts, at approximately 5:00 p.m. during on the one and only day the jury deliberated in this case, the courtroom clerk, at the direction of the court, knocked on the jury room door and advised the jurors that court would recess for the day.

The jury replied that "they only needed a little more time." After this communication, and according to the trial transcript, the jury entered the courtroom at 5:14 p.m. and the court took the verdict. There is no dispute that the specific communications, *i.e.*, the clerk knocking and advising the jury it was time to recess for the day and the jury responding "they only needed a little more time," were never relayed to the parties.

However, based on our independent review of the appellate record, and not cited by either party on appeal, in the interim between the communication and the jury's return to open court, the jury sent a note to the court at 5:12 p.m., stating "We have reached a verdict." [4] These facts inform the chronology of pertinent events:

*December 2, 2021* - First day of trial, Witness Testimony and Reception of Evidence

Prior to receiving any evidence, the trial court informed the jury that the court would attempt to recess every day at around 5:00 p.m. The court repeated this advice toward the end of the day. Consistent with this routine, the record of court proceedings for this day was turned off at 4:59:35 p.m.

*December 3, 2021* - Second day of trial, Instructions, Arguments, Verdict

**2:50 p.m.** - Prior to instructions and closing arguments, the court noted that, given the possibility that counsel's closing arguments would be "very close to 5:00[,]" or at least, "it's gonna be close to 4:00[,]" that it was not sure if the jury would want to start

[4] Although the clerk did not record this note on the docket entries, Jury Note #7 is part of the record on appeal. *See Perez v. State*, 420 Md. 57, 62 (2011) (treating jury notes as part of the judicial record); *Denicolis v. State*, 378 Md. 646, 658 (2003) (same); *Stovall v. State*, 144 Md. App. 711, 717 n.2 (taking judicial notice of official entries in circuit court records), *cert. denied*, 371 Md. 71 (2002).

deliberations given the lateness of the hour. The jury then heard the court's instructions and the parties' closing arguments.

**4:07 p.m.** - At the end of closing arguments, the court made additional remarks concerning deliberations and the verdict sheet. The court advised the jury that "all communications from now own [sic] should be in writing" and that "[s]ometimes we can answer you in writing. Sometimes you have to come back in the courtroom for us to answer you." The court also stated the following:

> So it – it's getting late. When you're ready to recess for the day, if you haven't reached a verdict, just let us know, and let me know what time you want to come back on Monday.
>
> When you have reached a verdict, you will be brought into the courtroom.

There was neither objection nor question by either party. Moreover, after deliberations began, the court and the parties agreed on what evidence and instructions would be given to the jury. During that colloquy, the court explained "I didn't ask them about coming – because it was still so early, four o'clock. That's why I just said let them start." Again, no objection was made at this time.

**4:15 p.m.** – The following ensued:

> THE COURT: So, Counsel, I would like for you to wait around for a bit to see if we hear from them.
>
> [PROSECUTOR]: I'll be here.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: I didn't – I didn't hear what you said?
>
> THE COURT: I want you to wait around here for a while, really until 5:00. It's 45 minutes.

[PROSECUTOR]: That's fine, Your Honor.

[DEFENSE COUNSEL]: Okay.

THE COURT: Okay. But, Mr. Biscotti, you'll be going back downstairs. And then as soon as we – if we get a question, or something comes up, you'll be brought back.

**4:18:27 p.m.** – The record was turned off.

**5:00 p.m.** (approximate) - The courtroom clerked knocked on the jury room door and advised the jurors that court would recess for the day. The jury replied that "they only needed a little more time."

**5:12 p.m.** - The jury sent out a note stating "We have reached a verdict." In pertinent part, the handwritten notes provides, "Juror Note #7 5:12 p.m."

**5:14:08 p.m.** – The parties reentered the courtroom.

**5:14:12 p.m.** – Appellant reentered the courtroom. After Appellant's handcuffs were removed, the court and defense counsel discussed whether Appellant's leg irons should be removed, with the court ruling they would remain. The court then asked for the jury to be brought into the courtroom.

**5:17:50 p.m.** – The jury returned to the courtroom and announced their verdict.

**5:22:43 p.m.** – The jury was excused. No objection was raised.

*December 13, 2021* – Motion for New Trial Filed

Appellant filed a written motion for new trial, alleging multiple evidentiary errors and that the jury was "rushed to complete deliberations." The issue presented here as Appellant's first issue on appeal was not raised.

*February 2, 2022* – Motion for New Trial Hearing and Sentencing

During argument on the motion for new trial, the court noted the majority of Appellant's claims concerned evidentiary issues that were addressed during trial. Pertinent to this issue and the next, Defense Counsel turned to the claim that deliberations were "rushed to completion[.]" Counsel proffered:

> And again I believe that they were rushed to return a verdict. I think when they were sent out, there wasn't really any kind of guidance as to how long they were gonna be out for. And I talked to two jurors afterwards who – who just indicated that they – that it was Friday p.m., 5:00 p.m[.] Friday – on a Friday. And so they felt like they had to – they were up against the clock.

The court replied that "I don't know if that's appropriate for you to tell me what your discussion with jurors." The colloquy continued:

> [DEFENSE COUNSEL]: Well, I mean generally I had that feeling when you released the jury at 4:15. But I wanted to just say that I think that that's not just me having that issue.
>
> THE COURT: You had – you had what feeling?
>
> [DEFENSE COUNSEL]: Oh. That what – that it's gonna be a rushed verdict when they get released at 4:15. But there was no guidance that we're gonna come back at 5:00 and see how you're doing. It was just, "Okay. Go deliberate."
>
> THE COURT: Okay. Actually, we listened to the CD, and I specifically told them that if they did not reach a verdict today, the[y] would – could come back on Monday.
>
> [DEFENSE COUNSEL]: Right. But I don't know what "today" means, Your Honor, in terms of is that 5:00 p.m.? 7:00 p.m.? 11:00 p.m.?
>
> THE COURT: I told them from the beginning of the trial that we usually recess around 5:00. I don't like to keep people past 5:00, so, yeah, I think there was guidance.

After further argument from Defense Counsel, and after the Prosecutor submitted, the court denied the motion for new trial as follows:

> I am denying the motion for a new trial. As I indicated, I, and as you indicated, the majority of the grounds were based on objections you made during trial, which were discussed, and I ruled on. So I wasn't provided with anything that would make me change those rulings.
>
> And as I said, I told the jury that if they – they were going to start deliberating, but if they didn't reach a verdict, we would come back on Monday. And they knew that we always – *as a matter of fact, we told them around 5:00 we were going to recess, and they said they needed more time. And then they just needed a little bit more time, and they had a verdict at 5:15.*
>
> So I'm denying the motion for new [sic] a new trial.

(Emphasis added.)

*February 11, 2022* – Notice of Appeal Filed

*August 19, 2022* – COSA grants Unopposed Motion to Correct the Record with affidavits of the Honorable Althea M. Handy, Judit Otvos, Esq. (Defense Counsel) and Jeffrey R. Maylor, Esq. (Prosecutor).

After the instant appeal was filed, Appellant filed, and this Court granted, an Unopposed Motion to Correct the Record with affidavits from the trial judge and the two trial attorneys. Pertinent to this issue, Judge Handy's affidavit provides, in part:

> 2. The jury was sent to begin deliberations at approximately 4:10 p.m. on Friday. Before they left the courtroom, I advised them that it was getting late and to let us know when they were ready to recess for the day. I also asked them to let us know what time they would like to return on Monday, December 6th, 2021.
>
> 3. At approximately 5:00 p.m. I asked our courtroom clerk to knock on the jury room door and ask the jury to pack their belongings because we were going to recess for the day.

> 4. The courtroom clerk advised me that the jurors indicated they only needed a little more time.
>
> 5. I asked the courtroom clerk to call the attorneys and advise them of that information and to return to the courtroom. Mr. Biscotti was also requested to be brought back into the courtroom.
>
> 6. As the transcript indicates, Mr. Biscotti entered the courtroom at 5:14:12 p.m. Both attorneys were present.
>
> 7. The jury returned to the courtroom at 5:17:50 p.m. and delivered their verdict.

The affidavit of Judit Otvos, Appellant's trial counsel, provides in pertinent part:

> 4. To the best of my knowledge and recollection, I was not informed on December 3, 2021 of any communications between the jury and the court, during the jury's deliberations, regarding scheduling and/or a request for more time to deliberate. Nor was I asked to weigh in on how the Court should initiate and/or respond to a communication on this topic.
>
> 5. The only communication between the court and the jury regarding the timing of the jury's deliberations that I was made aware of on December 3, 2021 occurred immediately before the jury retired to begin their deliberations, at approximately 4:07 p.m., when Judge Handy said to the jury, on the record: "[I]t's getting late. When you're ready to recess for the day, if you haven't reached a verdict, just let us know, and let me know what time you want to come back on Monday." The next communication that I was made aware of was that the jury had reached a verdict, which was shortly before 5:14 p.m.

The affidavit of Jeffrey R. Maylor, the prosecutor, provides in pertinent part:

> 3. To the best of my knowledge and recollection, I do not remember a communication between the Court and the jury during the jury's deliberations.

Maryland Rule 4-326(d) mandates that, whenever a "court official or employee . . . receives any written or oral communication from the jury or a juror[,]" the trial judge must be notified, and if the communication "pertains to the action," the judge must, before responding to the communication, "direct that the parties be notified of the communication

and invite and consider, on the record, the parties' position on any response." Md. Rule 4-326(d)(2)(A)-(C).[5]

Maryland Rule 4-326(d) helps implement "the Constitutional and common law right of a criminal defendant to be present at every critical stage of trial." *Denicolis*, 378 Md. at 656; *see also* Md. Rule 4-231 (presence of defendant). The Rule guarantees a defendant's constitutional right to be present "when there shall be any communication whatsoever between the court and the jury[,] *unless* the record affirmatively shows that such communications were not prejudicial or had no tendency to influence the verdict of the

[5] Md. Rule 4-326(d)(2) provides:

> (2) **Notification of Judge; Duty of Judge. –**
>
> (A) A court official or employee who receives any written or oral communication from the jury or a juror shall immediately notify the presiding judge of the communication.
>
> (B) The judge shall determine whether the communication pertains to the action. If the judge determines that the communication does not pertain to the action, the judge may respond as he or she deems appropriate.
>
> **Committee note**. – Whether a communication pertains to the action is defined by case law. See, for example, *Harris v. State*, 428 Md. 700 (2012) and *Grade v. State*, 431 Md. 85 (2013).
>
> (C) If the judge determines that the communication pertains to the action, the judge shall promptly, and before responding to the communication, direct that the parties be notified of the communication and invite and consider, on the record, the parties' position on any response. The judge may respond to the communication in writing, or orally in open court on the record.

Although in this case the communication was initiated by the court, not the jury, we are satisfied that it falls within the ambit of the Rule.

jury." *Midgett v. State*, 216 Md. 26, 36-37 (1958); *accord Morton v. State*, 200 Md. App. 529, 538 (2011).

While the rule requires notice to counsel of any and all communications from the jury to the judge, its fundamental purpose is to provide counsel with an opportunity for input to help shape the judge's response and also to help inform counsel's trial strategy going forward. *See Perez v. State*, 420 Md. 57, 77 (2011) ("The trial judge's failure to disclose the receipt of the jury notes to counsel deprived counsel of the opportunity to have input into the form and substance of the court's response."); *Smith v. State*, 66 Md. App. 603, 624 (stating the Rule's "very spirit is to provide an opportunity for input in designing an appropriate response to each question in order to assure fairness and avoid error"), *cert. denied*, 306 Md. 371 (1986).

In alleging a violation of Maryland Rule 4-326(d), an appellant must establish that an error was in fact committed. *Denicolis*, 378 Md. at 657. A court errs if it does not promptly disclose a juror's communication that "pertains to the action." *See, e.g., Harris*, 428 Md. at 720; *accord Gupta v. State*, 452 Md. 103, 121 ("Communications raising issues that implicate and concern the juror's ability to continue deliberating pertain to the action under Rule 4-326(d)(2)." (cleaned up)), *cert. denied*, 138 S. Ct. 201 (2017). If the communication "pertains to the action," then the trial court is "required, before responding to the communication, to promptly notify the parties; to consider, on the record, the parties' position on any response; and to respond to the communication in writing or orally on the record." *Gupta*, 452 Md. at 123 (emphasis omitted). Then, it is the State's burden to prove beyond a reasonable doubt that the error was harmless. *Denicolis*, 378 Md. at 658-59.

Although neither party has provided a case precisely on point, the State compares this case to a number of cases where Maryland appellate courts have concluded that a communication "pertained to the action." *See, e.g.*, *Gupta*, 452 Md. at 122-27 (holding it was error, albeit harmless, for the trial judge not to inform counsel of a juror's communication concerning a scheduling conflict affecting her ability to deliberate and of the judge's response); *Grade*, 431 Md. at 103-04 (holding that a communication concerning a juror's late arrival to court on the day of deliberations, accompanied by court's replacement of that juror with an alternate, without informing the parties, pertained to the action); *State v. Hart*, 449 Md. 246, 270 (2016) (holding that a note indicating jury was deadlocked and requesting further guidance "directly related to the jury's ability to reach a verdict, and thus, it 'pertained to the action'"); *Harris*, 428 Md. at 715-16 (holding that a communication from the court secretary telling a juror his grandmother died and asking if the juror was okay to continue, without informing defendant, pertained to the action because it was "[i]nformation that implicates, and may impact, a juror's ability to continue deliberation"); *Denicolis*, 378 Md. at 653, 658 (holding judge erred by failing to inform defendant of jury note asking for the definition of solicitation, a substantive question about the case); *Taylor v. State*, 352 Md. 338, 345 (1998) (determining it was reversible error when judge answered multiple jury questions on substantive issues in the case without informing the parties, and stating that the rules are "mandatory, not directory," and that, in this case, "the trial court completely and intentionally disregarded" the rules); *Stewart v. State*, 334 Md. 213, 217-18, 223-24 (1994) (concluding it was reversible error where judge talked with distressed juror, just outside the jury room, about the juror's

reluctance to continue deliberations and sent her back to deliberate, without informing the parties).

In the context presented, the State's argument is that these cases establish that the phrase "pertains to the action," under Rule 4-326(d)(2), only applies to a jury's inability or unwillingness to deliberate, not its ability or willingness to do so. Appellant disagrees, suggesting this distinction is "an absurd and unworkable rule[.]" Instead, Appellant contends that a communication does not "pertain to the action" when it is of "a purely personal nature" and is "not likely to impact the jury's deliberations." *See Denicolis*, 378 Md. at 656-57 ("The kinds of communication that may be regarded as non-prejudicial, …, are those that clearly do not pertain to the action or to a juror's qualification to continue serving and that are of a purely personal nature."); *Graham v. State*, 325 Md. 398, 415 (1992) (stating "the Rule relates to communications 'pertaining to the action,' and we do not suggest that the failure to disclose the contents of a note from a juror requesting transmittal of a purely personal message to a member of the jurors' family or to a babysitter would constitute error").

Although we agree with Appellant that the communication at issue in this appeal does, in fact, "pertain to the action," we are not persuaded the trial court erred in this case. At its core, Maryland Rule 4-326(d)(2) requires that the parties be informed of communications with the jury and to have an opportunity to provide input into any response. *Perez*, 420 Md. at 64. Here, the trial court repeatedly informed the jury in open court that it would try to recess every day by 5:00 p.m. At 4:00 p.m. on the day in question, and immediately prior to deliberations, the court told the jury to let everyone know when

they were ready to recess for the day. The court excused the jurors to their deliberations, and told the parties to stay close until 5:00 p.m. At approximately 5:00 p.m., the courtroom clerk knocked on the jury room door and advised that it was time to recess. The jury responded that they "only needed a little more time."

At that point, notably "promptly" and "before responding," to the "communication," *see* Md. Rule 4-326(d)(2)(C), the judge asked the clerk to call the attorneys and Appellant and "advise[d] them of that information and to return to the courtroom." Simultaneously, the jurors sent out Jury Note #7 indicating they had reached a verdict. As defense counsel averred, "[t]he next communication that I was made aware of was that the jury had reached a verdict, which was shortly before 5:14 p.m." Everyone returned to the courtroom at 5:17:50 p.m. and the verdict was received in open court.

The record, as supplemented by the trial judge's and the party's affidavits to this Court, persuade us the trial court substantially complied with the rules governing jury communications and the Appellant's presence in court. Accordingly, we find no error.

We also tend to agree with the State that any error was harmless beyond a reasonable doubt. *See Gupta*, 452 Md. at 126-28 (concluding any error for violation of Md. Rule 4-326 was harmless beyond a reasonable doubt). In addition to the record establishing that the jury and the parties were well aware of the trial judge's daily dismissal routine, as well as the fact that defense counsel never objected to the judge's decision to begin deliberations as late in the day as 4:00 p.m. with an expected dismissal an hour later, the evidence of guilt in this case was strong. Appellant was found standing over the bleeding victim, alone,

holding a bloody knife. When confronted by the victim's son, he left the knife on the counter, removed his blood-stained shirt and fled the murder scene.

We have little trouble concluding any error in not informing Appellant or his attorney of the precise words the jury used when indicating they were almost ready to render a verdict, which they confirmed in writing roughly twelve minutes later (according to Jury Note #7), was harmless beyond a reasonable doubt. *See Dorsey v. State*, 276 Md. 638, 659 (1976) (stating that error will be harmless when reviewing court, upon independent review, is able to declare a belief beyond a reasonable doubt that there is no reasonable possibility that the error contributed to the verdict).

## II. Verdict Impeachment

Appellant asserts that the court abused its discretion in denying his motion for new trial based on his counsel's proffer that two jurors "felt pressured to reach a speedy verdict because they started deliberating on a Friday evening." That proffer was based on defense counsel's post-verdict interview with jurors. The State counters that the court properly exercised is discretion. We concur.

The pertinent facts were recounted in our discussion of Appellant's first issue. Generally, an appellate court reviews for abuse of discretion of a trial court's denial of a motion for a new trial. *See Grandison v. State*, 425 Md. 34, 75 (2012), *cert. denied sub nom. Grandison v. Maryland*, 568 U.S. 1093 (2013). The Supreme Court of Maryland has provided:

> "It has long been the rule in Maryland, without any deviation, that a juror may not impeach his or her verdict." *Stokes v. State*, 379 Md. 618, 637 (2004) (citations omitted). *See also Colvin-el v. State*, 332 Md. 144, 184

> (1993), *cert. denied sub nom. Colvin-El v. Maryland*, 512 U.S. 1227 (1994) ("The well-settled Maryland rule is that jurors cannot be heard to impeach their verdict." (Citations omitted)). "[O]ne reason for the rule is to protect the secrecy of jury deliberations. . . . [W]hile privacy is not a constitutional end in itself, it is the means of ensuring the integrity of the jury trial itself." *Stokes*, 379 Md. at 638 (citations omitted). This is because allowing a juror to impeach a verdict "would disclose the secrets of the jury room and afford an opportunity for fraud and perjury." *Id*. at 637 (citation omitted). Other purposes of the no-impeachment rule include avoiding "harassment of jurors by disgruntled losing parties; removal of an element of finality from judicial decisions; and through allowing jurors to swear to alleged examples of reprehensible conduct, a decrease in public confidence in the judicial process." *Id*. at 637 (citation omitted).

*Williams v. State*, 478 Md. 99, 131 (2022) (discussing history of the doctrine); *see also* Md. Rule 5-606(b) (rule addressing inquiries into validity of verdict).

Based on this "well-settled Maryland rule," we discern no abuse of discretion by the learned trial judge in denying the motion for new trial.

## III. Motion for Mistrial

Appellant next asserts the court abused its discretion in not declaring a mistrial when, during opening statement, the prosecutor erroneously informed the jury that Appellant made a "highly prejudicial statement, akin to a confession, while being arrested for Yerby's murder." The factual misrepresentation occurred when the prosecutor stated the following during opening statement:

> Now, not only is this incident horrific, the multiple gunshots, the multiple stab wounds, you'll see at Mike's arrest, which is four days after this incident, he sat down on the sidewalk, and he requested for a medic. So the officers are kind of standing around and not talking to him, not doing anything.
>
> But someone he knows comes up and starts to him [sic], asking about what's going on. And Mike's reply is, "I had to do it. It had to be done." And I'm paraphrasing something to the effect that that *she was playing games.*

(Emphasis added.)

Appellant maintains that the emphasized misrepresentation was "so prejudicial, and so inconsistent with Biscotti's right to a fair trial, that a curative instruction was insufficient and the only appropriate remedy was a mistrial."

The State does not disagree that the prosecutor made a factual misstatement when he "paraphrased" the expected evidence during opening statement. However, directing our attention to the prosecutor's explanation during the ensuing bench conference, Appellant's friend apparently stated, "she was playing games," at the time of Appellant's arrest, and Appellant nodded in agreement, replying "It had to be done." The State maintains that this was an adoptive admission and was within the bounds of proper opening statement.

In any event, the State continues, a mistrial was not warranted in the circumstances. Notably, the underlying evidence concerning what Appellant may or may not have said or adopted at the time of his arrest was excluded when the court granted Appellant's motion *in limine* to that effect. Thus, the State argues, the prosecutor's opening statement was not evidence and was but an isolated occurrence that did not warrant a mistrial. As will be explained, we conclude the court did not abuse its discretion in denying the mistrial.

Here, after the prosecutor made the opening remarks at issue, defense counsel immediately asked to approach the bench and the following ensued:

> [DEFENSE COUNSEL]: I don't want to interrupt the prosecutor while he's talking, so I'm putting my objection on the record now. I believe that what the prosecutor said in opening is not only incorrect but is now highly prejudicial and has tainted the jury.

At no point in the evidence does Mr. Biscotti ever say she was playing games. That was actually what the officer wrote that another person passing by on the street, which is hearsay, was possibly saying to Mr. Biscotti.

THE COURT: What's the – what's the last thing what you just said?

[DEFENSE COUNSEL]: That another person walking on the street was talking to Mr. Biscotti, and the other person said she was playing games. And the State in opening just said that Mr. Biscotti said that, and made it a very elaborate point to explain why he did it. And I think that's, well, completely not in the evidence, highly prejudicial, and taints the jury, and so I'm asking for a mistrial.

[PROSECUTOR]: Your Honor, the statement that was made is one that Mr. Biscotti, even acknowledges, essentially is a[n] adopted admission on Mr. Biscotti's behalf, what the gentleman asked him, if she was playing games, she plays too much, and Mr. Biscotti shaking his head and saying, "Yeah. It had to be done."

THE COURT: But he didn't say that? I thought you did sound like you said he said she's playing games?

[PROSECUTOR]: Well, if I didn't clarify it then, that's my mistake. I – I agree with counsel that it – it was the other gentleman. But his – his adopted admission of it [sic].

THE COURT: And especially with the defendant's statement, you've got to be so careful.

I think you should have objected at the time because then I could have corrected it right when he said it. But I'm gonna tell the jury – I'm gonna deny your motion for a mistrial.

They haven't even heard any evidence yet. I don't think they are so swayed. I told them already in the opening instructions that opening statements are not evidence in the case. I'm going to repeat that to them and tell them so –

[DEFENSE COUNSEL]: Well, I don't know how you are going to remedy it. They've heard basically a statement of his saying that the –

THE COURT: I can say the State misspoke and Mr. Biscotti didn't make the statement "She's playing games."

Is that what you – is that what you have objection to?

[DEFENSE COUNSEL]: Yes.

THE COURT: They're gonna hear from the judge –

[PROSECUTOR]: Well, also, and I did say that I was paraphrasing, and it's an adopted admission in that the gentleman is saying it to him and he is agreeing along with it.

THE COURT: Are you calling that person to testify?

[PROSECUTOR]: No, Your Honor. It's on video.

THE COURT: Well, then, how can –

[PROSECUTOR]: It's on body worn camera. It's on body worn camera. And it's – it's an adopted admission.

THE COURT: Just because it's on body worn camera doesn't mean that it's going to be admissible.

The court then heard argument concerning whether the out of court statement by an unavailable declarant was admissible as an adopted admission, and also whether defense counsel should have raised this issue before trial. The court continued:

THE COURT: And you're bringing it to me the last minute. And now this is the third issue with body worn camera. So I'm trying to figure out how to instruct them.

All right. [Prosecutor], I'm going to say, talked about – well, yes. He did indicate he was paraphrasing.

[PROSECUTOR]: Yeah.

[DEFENSE COUNSEL]: Well, afterwards. But he said that Mr. Biscotti said she was playing games. That was very clearly said in opening. And I do think that that is highly prejudicial.

THE COURT: All right. I'm going to strike that from the record.

[DEFENSE COUNSEL]: I understand you striking from the record, I'm not sure you can un-ring that bell, though.

THE COURT: Oh. I do.

[DEFENSE COUNSEL]: We will try.

THE COURT: I can say –

[DEFENSE COUNSEL]: We will try.

THE COURT: Because what I said is it's not evidence. I told them that. I'm going to tell them again.

But see, he – he – you know, I don't know if they are going to understand your legal theory about this hearsay exception.

[PROSECUTOR]: Uh-huh.

THE COURT: So I'm just going to tell them to remember, your – it's you have to base your decision on the testimony, what – the evidence in the case. Please strike that Mr. Biscotti said the victim was playing games.

The court then gave the following curative instruction to the jury, without further objection:

THE COURT: Members of the Jury, you may recall during the opening instructions I gave you yesterday, I said opening statements and closing arguments of the lawyers are not evidence in this case. It's what they expect the evidence will be.

During the State's opening [the Prosecutor] made a statement about Mr. Biscotti saying that the victim was playing games. He also later said he was paraphrasing. I'm striking [that] from the record, please disregard the statement that attributes to Mr. Biscotti the victim was playing games, and remember it's not evidence in the case. Thank you – unless, again it's actually introduced or someone testifies.

All right. So thank you.[6]

[6] Both in the trial court and this Court, the parties dispute the admissibility and law concerning Appellant's purported adopted admission recorded on a police officer's body worn camera. The trial court excluded the proffered evidence, and without addressing the merits of its admissibility, we note there was no evidence presented, or factual finding by (continued…)

"Appellate review of a decision to deny a mistrial is conducted 'under the abuse of discretion standard.'" *Vaise v. State*, 246 Md. App. 188, 239 (quoting *Nash v. State*, 439 Md. 53, 66-67, *cert. denied*, 574 U.S. 911 (2014)), *cert. denied*, 471 Md. 86 (2020). The court "declaring a mistrial is an extreme remedy not to be ordered lightly." *Nash*, 439 Md. at 69. "The determining factor as to whether a mistrial is necessary is whether 'the prejudice to the defendant was so substantial that he was deprived of a fair trial.'" *Kosh v. State*, 382 Md. 218, 226 (2004) (quoting *Kosmas v. State*, 316 Md. 587, 594-95 (1989)). When determining if a defendant has been prejudiced, the court "first determines whether the prejudice can be cured by instruction. Such an instruction must be timely, accurate, and effective. Unless the curative effect of the instruction ameliorates the prejudice to the defendant, the trial judge must grant the motion for a mistrial." *Id*. (internal citations and quotation marks omitted).

Our Supreme Court has identified five factors relevant to the determination of whether a mistrial is required. The factors include:

> "whether the reference to [the inadmissible evidence] was repeated or whether it was a single, isolated statement; whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; whether the witness making the reference is the principal witness upon whom the entire prosecution depends; whether credibility is a crucial issue; [and] whether a great deal of other evidence exists."

*Rainville v. State*, 328 Md. 398, 408 (1992) (quoting *Guesfeird v. State*, 300 Md. 653, 659 (1984)); *accord Carter v. State*, 366 Md. 574, 590 (2001); *Washington v. State*, 191 Md.

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the trial court for that matter, that the State engaged in bad faith or a "prejudicial lie" during opening statement. Indeed, the prosecutor told the jury he was "paraphrasing" what was said between Appellant and his unidentified friend. *See generally Garner v. Archers Glen Partners, Inc*., 405 Md. 43, 46 (2008) ("[A]n appellate court should use great caution in exercising its discretion to comment gratuitously on issues beyond those necessary to be decided.").

App. 48, 100, *cert. denied*, 415 Md. 43 (2010); *see also McIntyre v. State*, 168 Md. App. 504, 524-25 (2006) (adding a factor of whether and when a curative instruction was given and stating, "no single factor is determinative in any case, nor are the factors themselves the test . . . [r]ather, the factors merely help to evaluate whether the defendant was prejudiced").

We apply these factors to the prosecutor's opening statement. First, the misstatement was a single, isolated statement and no evidence was presented as to what Appellant actually said or how he replied to the unidentified bystander at the time of his arrest. It is well-settled that "[a]n opening statement by counsel is not evidence and generally has no binding force or effect." *Wilhelm v. State*, 272 Md. 404, 412 (1974); *see also* Jacob A. Stein, *Trial Handbook for Maryland Lawyers* § 7:2 (3d ed. 2022) ("Purpose of opening statement is to fairly apprise jury of issues and evidence to be presented to them and what each party will be seeking of them in terms of verdict.").

Second, whether the reference was solicited by counsel or was an inadvertent and unresponsive statement; clearly, it was the prosecutor's own statement. Third, whether the witness making the reference is the principal witness upon whom the entire prosecution depends; the unidentified bystander was not a trial witness, ameliorating concern about the jury's consideration of improper evidence. Indeed, the jury was instructed that opening statements are "not evidence" and that these were "an opportunity for the lawyers to give you an overview of what the case is about and what they expect the evidence will be[.]" And, during instructions at the end of the case, the court reminded the jury:

> Opening statements and closing arguments of lawyer[s] are not evidence. They are intended only to help you to understand the evidence and to apply the law.
>
> Therefore if your memory of the evidence differs from anything the lawyers or I may say, you must rely on your own memory of the evidence.

Fourth, whether credibility is a crucial issue; the question before us does not concern a credibility dispute between witnesses, or any attempt to bolster a specific witness's testimony by the prosecutor. *Cf. Washington*, 191 Md. App. at 104 (recognizing that "credibility was a crucial factor in the case," but that the contested statement was made by a witness whose "testimony neither enhanced nor detracted from the credibility of any of these witnesses"). However, the prosecutor's misstatement concerned an alleged admission by Appellant made at the time of his arrest. This factor arguably weighs in Appellant's favor. *Cf. Walls v. State*, 228 Md. App. 646, 658, 668-70 (2016) (observing that, although prosecutor erroneously suggested during opening statement the defendant would testify, implicating his rights under the Fifth Amendment, the statement, "although glaring to the court and counsel as people schooled in the law, probably did not even register to the jurors[,]" and any error in denying mistrial was harmless).

Fifth, whether a great deal of other evidence exists; the evidence of Appellant's culpability in this case was substantial. The victim's son, J.J., identified Appellant, standing over the victim holding a bloody knife. Appellant was seen by another witness, leaving the crime scene, shirtless, and carrying what turned out to be a blood-stained shirt. Surveillance video captured a person matching Appellant's description walk towards dumpsters behind

a delicatessen, where a blood-stained shirt was later found. There was more than sufficient direct and circumstantial evidence supporting the jury's verdict.

Finally, the trial court properly struck the prosecutor's statement and gave a curative instruction. As this Court recently stated, "[w]hen a trial judge decides that the prejudice can be remedied by a curative instruction, and denies the mistrial motion and gives such an instruction, appellate review focuses on whether 'the damage in the form of prejudice to the defendant transcended the curative effect of the instruction.'" *Walls*, 228 Md. App. at 668-69 (quoting *Kosmas*, 316 Md. at 594). This is because the trial judge is in the "most advantageous position to evaluate any potential prejudice" from an opening remark, and a reviewing court "must give due weight to the conclusion of the trial judge who witnessed the presentation and heard the actual remarks – in the context in which they were made, in the trial arena – and who found no prejudice." *Wilhelm*, 272 Md. at 436-37. *Accord Hill v. State*, 355 Md. 206, 221 (1999).

Moreover, "[e]ven if the prosecutor's statement during opening argument was, in fact, improper, the record must compellingly demonstrate sufficient prejudice to warrant granting [a mistrial]." *Miles v. State*, 88 Md. App. 360, 388-89 (1991) (citation and quotation marks omitted); *see also Tibbs v. State*, 72 Md. App. 239, 250 (considering whether the prosecutor acted in bad faith when making alleged improper comments during opening), *cert denied*, 311 Md. 286 (1987); *Malekar v. State*, 26 Md. App. 498, 501-04 (holding that the trial court did not err in failing to give a curative instruction, *sua sponte*, during opening statement, when the prosecutor mentioned a confession later ruled inadmissible, where there was no showing of bad faith), *cert. denied*, 276 Md. 747 (1975).

To the extent that the prosecutor's argument was improper, we are not persuaded that the prosecutor acted in bad faith; nor are we persuaded that Appellant sustained sufficient prejudice in the circumstances to have warranted a mistrial. We find no abuse of the court's discretion in denying the motion for a mistrial.

## IV. Flight Instruction

Finally, Appellant asserts the court erred by giving the pattern flight instruction. During discussions at the end of the first day of testimony, defense counsel objected to the inclusion of a flight instruction. Counsel argued there was no evidence of flight, and that the evidence simply showed that Appellant was not at the scene when police arrived. The State disagreed, observing that after J.J. came downstairs, Appellant "left the scene and walked away." Further evidence was elicited from Officer Garvin who testified he saw Appellant walking in the area.

The court tentatively ruled at the end of the day that it would give the flight instruction, finding, in pertinent part, as follows:

> All right. I'm – at this point, I do plan on giving it. I – I just want to check one other thing this evening, but I do believe that the behavior of the defendant suggested flight when he – the – the witness, the child did testify that he saw the defendant with a knife in his hand, that he put the knife down, went out the back door, and as he was going out the door is taking off his blood covered T-shirt.
>
> So he's leaving the scene, fleeing from the scene, that the reason he's doing this suggests consciousness of guilt. He doesn't want to be caught there with the knife and with the deceased.
>
> The consciousness of guilt is related to the crime charged, or closely related to the crime because the homicide had just occurred. And he's seen leaving at that very time. And the consciousness of guilt would, of the crime charged, suggest actual guilt of the crime charged.

The beginning of the next trial day, the court added the following:

All right. So I am going to give the flight instruction. And what I read from yesterday, was from Thompson versus State 393 Md. 291. And I – my law clerk printed out a copy of the entire case.

And as I stated yesterday, four inferences must reasonably be able to be drawn from the facts of the case as ultimately tried; one, the behavior of the defendant suggests flight. So leaving the scene of the crime, so to speak, does suggest flight.

And it was several days before he was actually apprehended. And he saw – he walked right past the police car that was approaching the scene. And as he was leaving, he was taking off a T-shirt allegedly covered in blood.

Two, the flight suggests a consciousness of guilt. Well, what other reason would he be leaving the scene where this homicide had occurred? So certainly that's a consciousness of guilt, and especially when he was seen by one of the witnesses.

Three, the consciousness of guilt is related to the crime charged, which it is obviously, because that's why he would be leaving, and the fleeing from the scene.

And the consciousness of guilt of the crime charged suggests actual guilt of the crime charged of a close related crime. And I do believe that the facts of this case do support that inference as well.

It seems like when it's not appropriate for the court to give that instruction is when there is some explanation of why they were fleeing.

For instance, in this Thompson case, when there were drugs found on the defendant, that is an explanation of why he was fleeing. And not because of being guilty of a particular crime.

The court concluded that because the court was aware – in this case, the case, it was reversed because the judge did give the flight instruction, and even though it was in admissible, the evidence that he had drugs on him when he was apprehended, it says the court concluded that because the court was aware of an explanation for the defendant's flight, which was at that time inadmissible, we are of the opinion the flight instruction should not have been granted.

> Well, I am not aware of any explanation for the defendant's flight, and so therefore, I will be giving that instruction.

After hearing from several witnesses throughout the day, the court returned to the issue of jury instructions. Defense counsel stated, "Your Honor's aware that I'm objecting to the flight instruction being given?" to which the court replied in the affirmative. The court then instructed the jury, in pertinent part as follows:

> A person's flight immediately after the commission of a crime or after being accused of committing a crime is not enough by itself to establish guilt, but it is a fact that may be considered by you as evidence of guilt.
>
> Flight under these circumstances may be motifie – mo – excuse me. Flight under these circumstances may be motivated by a variety of factors, some of which are fully consistent with innocence.
>
> You must first decided [sic] whether there's evidence of flight. If you decide there is evidence of flight, then you must decide whether the flight shows a consciousness of guilt.

*See* Maryland Criminal Pattern Jury Instructions 3:24 ("MPJI-Cr").[7]

Maryland Rule 4-325(c) provides: "The court may, and at the request of any party

[7] We note that, although defense counsel did not object at the conclusion of jury instructions, she did object to inclusion of the flight instruction immediately before the court instructed the jury. Although the State noted the timing of defense counsel's objections, the State does not argue preservation. Because we conclude Appellant substantially complied with Maryland Rule 4-325(f), we shall consider this issue on the merits. *See* Maryland Rule 4-325(f) ("No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection."); *Watts v. State*, 457 Md. 419, 426 (2018) ("[T]he purpose of Rule 4-325([f]) is 'to give the trial court an opportunity to correct its charge if it deems correction necessary.'" (citation omitted)); *see also B-Line Med., LLC v. Interactive Digit. Sols., Inc*., 209 Md. App. 22, 59 (2012) ("[W]hen the objection is clearly made before instructions are given, and restating the objection after the instructions would obviously be a futile or useless act, we will excuse the absence of literal compliance with the requirements of the Rule[.]" (citation and quotation marks omitted)).

shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." "[T]he decision whether to give a jury instruction 'is addressed to the sound discretion of the trial judge,' unless the refusal amounts to a clear error of law." *Preston v. State*, 444 Md. 67, 82 (2015) (citation omitted). In determining whether a trial court has abused its discretion we consider whether "(1) the requested instruction is a correct statement of the law; (2) the requested instruction is applicable under the facts of the case; and (3) the content of the requested instruction was not fairly covered elsewhere in the jury instruction actually given." *Ware v. State*, 348 Md. 19, 58 (1997).

We review the question of whether there was sufficient evidence to generate a requested jury instruction *de novo*. *Howell v. State*, 465 Md. 548, 561 (2019). The test is whether there is "some evidence" in the record to support the requested instruction. *Dykes v. State*, 319 Md. 206, 216-17 (1990). The threshold of demonstrating "some evidence" is very low. *Bazzle v. State*, 426 Md. 541, 551 (2012). "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.'" *Arthur v. State*, 420 Md. 512, 526 (2011) (citations, quotation marks, and emphasis omitted). In determining whether "some evidence" exists, the court views the facts in the light most favorable to the party requesting the instruction, in this case the State. *Page v. State*, 222 Md. App. 648, 668-69, *cert. denied*, 445 Md. 6 (2015).

With respect to the flight instruction, our Supreme Court has stated:

> [F]or an instruction on flight to be given properly, the following four inferences must reasonably be able to be drawn from the facts of the case as ultimately tried: that the behavior of the defendant suggests flight; that the flight suggests a consciousness of guilt; that the consciousness of guilt is related to the crime charged or a closely related crime; and that the consciousness of guilt of the crime charged suggests actual guilt of the crime charged or a closely related crime.

*Thompson v. State*, 393 Md. 291, 312 (2006); *accord Wright v. State*, 474 Md. 467, 483 (2021); *Page*, 222 Md. App. at 669. This Court has elaborated:

> As to the first inference, "[f]light is defined as an 'act or instance of fleeing, esp. to evade arrest or prosecution . . . . [a]lso termed flight from prosecution; flee from justice.'" "At its most basic, evidence of flight is defined by two factors: first, that the defendant has moved from one location to another; second, some additional proof to suggest that this movement is not simply normal human locomotion." As to the second inference, the movement also "must reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt." To this end, there is a distinction between mere departure from the crime scene and actual flight. "An accused's departure from the scene of a crime, without any attendant circumstances that reasonably justify an inference that the leaving was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt, does not constitute 'flight,' and thus does not warrant the giving of a flight instruction."

*Page*, 222 Md. App. at 669-70 (internal citations and emphasis omitted).

Here, after J.J. heard his mother screaming, he came downstairs and saw Appellant standing in the kitchen over her body, holding a bloody knife. Appellant put the knife down, walked out the door, took off his blood-stained t-shirt and left his dying "friend," bleeding out on the kitchen floor behind him. Surveillance video captured a person of his likeness walking shirtless several blocks through Baltimore City carrying an item, most likely that same shirt, to a row of dumpsters behind a delicatessen near his home. A bloody shirt was found in the one of these same dumpsters, and a bloody towel at his residence. Several

knives were found throughout the victim's home. Although no gun was ever found, the victim died of both gunshot and stab wounds.

Apparently conceding he was identified leaving the crime scene, Appellant maintains that the circumstances do not suggest consciousness of guilt. To the contrary, we are persuaded that this is "some evidence" suggesting that: 1) Appellant fled from the scene of a violent stabbing; 2) Appellant's flight, and the concealment of evidence for that matter, were done to avoid apprehension; 3) this was related to consciousness of guilt of the stabbing; and, 4) this suggested actual guilt of the crime of murder. The trial court properly exercised its discretion in giving the pattern flight instruction.

**JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED.**
**COSTS ASSESSED TO APPELLANT.**