UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0071

September Term, 2016

CLIFTON LEE JENKINS

v.

STATE OF MARYLAND

Krauser, C.J.,
Wright,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: November 17, 2016

In the early morning of January 9, 2015, Officer Desmond Tubman of the Howard County Police Department observed two men burglarizing a convenience store as he passed by in his patrol car. Officer Tubman then tracked the men as they attempted to leave the scene of the crime and arrested them with the assistance of another officer. The two men he apprehended were identified as Shahn Jenkins and Clifton Jenkins, appellant. Appellant was charged with second-degree burglary, malicious destruction of property, and theft. After a jury trial in the Circuit Court for Howard County, he was convicted on all counts and received a sentence of twelve years in prison, with all but eight years suspended.

Appellant appealed, and now presents one question for our review:

> Did the trial court err in instructing the jury on accomplice liability?

For the following reasons, we answer no to the question and affirm the judgment of the circuit court.

BACKGROUND

On January 9, 2015, at around 2:20 a.m., Officer Tubman was patrolling in the area of a 2Go convenience store. Although it was closed at the time, Officer Tubman noticed two black males wearing dark clothes and ski masks standing outside looking into the store. Officer Tubman passed the store in his car and made a U-turn. When he returned to the store, the window had been shattered and the two men were now inside the store. Officer Tubman called for backup and approached the store in his cruiser. He observed the two suspects as they emerged from the store with stolen items in their

possession. Officer Tubman ordered them to stop, but they ignored his command and moved to the rear of the store. He followed the suspects' path through an alley to an apartment complex parking lot behind the store. Officer Tubman lost sight of them for about thirty seconds, but then encountered the two men in the parking lot, still wearing the same clothes and masks. Officer Tubman drew his service weapon and ordered the suspects to stop, informing them that they were under arrest. At that time, Corporal Jay Webber arrived in his police cruiser and assisted Officer Tubman in arresting the two suspects, Jenkins and appellant. Stolen items were retrieved from the two men, and identified by the owner of the 2Go convenience store as belonging to his store.

Appellant was charged with second-degree burglary, malicious destruction of property, and theft of property valued between $1,000 and $10,000. A two-day jury trial was held on August 17-18, 2015, in the Circuit Court for Howard County. At the conclusion of the trial, appellant was convicted on all counts. On March 3, 2016, he was sentenced to twelve years of incarceration, with all but eight years suspended and three years of supervised probation.[1]

DISCUSSION

Maryland Rule 4-325(c) provides that "[t]he court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding. . . . The court need not grant a requested instruction if the matter

[1] The sentence was for the second-degree burglary conviction. The remaining two convictions merged with the burglary conviction.

is fairly covered by instructions actually given." "A Maryland appellate court reviews a trial court's refusal or giving of a jury instruction under the abuse of discretion standard." *Stabb v. State*, 423 Md. 454, 465 (2011).

> We consider the following factors when deciding whether a trial court abused its discretion in deciding whether to grant or deny a request for a particular jury instruction: (1) whether the requested instruction was a correct statement of the law; (2) **whether it was applicable under the facts of the case**; and (3) whether it was fairly covered in the instructions actually given.

Id. (Emphasis added). Appellant contends that the trial court abused its discretion in giving the instruction on accomplice liability because it was not applicable under the facts of the case.

"A requested jury instruction is applicable if the evidence is sufficient to permit a jury to find its factual predicate." *Bazzle v. State,* 426 Md. 541, 550 (2012). The minimum threshold of evidence required to generate a jury instruction is low, with the requesting party only needing to produce "some evidence" to support the requested instruction. *Id.* at 551. To determine whether there was "some evidence," "we view the facts in the light most favorable to the requesting party, here being the State." *Page v. State*, 222 Md. App. 648, 668-69, *cert. denied*, 445 Md. 6 (2015). "*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.'" *Dykes v. State*, 319 Md. 206, 216-17 (1990) (emphasis in original).

Appellant contends that the State failed to reach even this low threshold with regards to the accomplice liability instruction. Jury instructions were discussed in chambers at the beginning of the second day of trial. After the chambers discussion, the trial court proceeded to instruct the jury. The jury instruction on accomplice liability was given over defense counsel's objection. The accomplice liability instruction provided:

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

Appellant argues that this was inapplicable because the State's theory at trial was that appellant was one of the two subjects seen leaving the 2Go convenience store; therefore, he was a first-degree principal in the burglary. Appellant claims that "the State presented no theory of liability for appellant as an accomplice." Appellant asserts that his defense at trial was of mistaken identity, thus "any determination of appellant's guilt

hinged on whether the jury accepted Officer Tubman's testimony that the two subjects he ultimately arrested were the same people he had earlier observed, given that he had lost sight of them during his pursuit." Appellant contends that this instruction prejudiced him by presenting a "'watered down' theory of liability for the jury to latch onto in the event they had a reasonable doubt about appellant's participation as a princip[al]."

We disagree with appellant's assertion that the State failed to present "some evidence" in support of this jury instruction. Appellant was charged with, and convicted of, both second-degree burglary and malicious destruction of property. The trial court instructed the jury that "burglary in the second degree is the breaking and entering of someone else's building with the intent to commit theft." Furthermore, the trial court instructed the jury that in order to convict appellant of second-degree burglary, the State needed to prove "that [appellant] was the person who broke and entered." "Breaking" was defined to the jury as "the creation or enlargement of an opening, such a breaking or opening a window or pushing open a door." To prove malicious destruction, the State needed to show that appellant "damaged, destroyed, or defaced someone else's property." Accordingly, as the State argues, under these instructions, the State needed to prove that appellant was the one who broke the window to the convenience store. In his testimony, Officer Tubman explained that when he first drove past the store he saw the two men standing outside of the store, and that when he turned around and came back they had already broken into the store. Therefore, although there was evidence put forth that at least one of the men broke into the store, there was no testimony on which of the two

burglars did the actual "breaking." Appellant's trial counsel even pointed this out during his closing argument, stating:

> So, [Officer Tubman] makes a U-turn and he comes back around at which point he sees the window broken and persons inside of the store. **He didn't see who broke the window** but he knows that it wasn't broken when he first passed.
>
> * * *
>
> You've never heard him say the entire time yesterday that he saw [appellant] do anything in particular.

With no way to prove which of the two men specifically broke the window, the accomplice liability instruction was applicable because the State put forth considerable evidence that appellant was present for the burglary and aided in the commission of it. As the State argues, "the accomplice liability instruction was necessary so that the jury understood that [appellant] was guilty of second-degree burglary and malicious destruction, if he, *or someone with whom he was participating*, broke the window." (Emphasis in original). There was "some evidence" from which a reasonable juror could conclude that appellant did not personally commit all the acts necessary for second degree burglary – specifically who did the actual "breaking" – but that he "knowingly aided" in the commission of the crime. There was enough evidence of accomplice liability to meet what the Court of Appeals has acknowledged is a low threshold. *See Bazzle,* 426 Md. at 551; *Dykes*, 319 Md. at 216-17.

We also fail to find any harm in the instruction even if it was considered superfluous, because there was overwhelming evidence presented to the jury to convict

appellant as a primary actor in the burglary and destruction of property. The evidence showed that appellant was seen by Officer Tubman dressed in black with a ski mask outside of the store, and then shortly later inside the store after the window had been broken. Officer Tubman witnessed appellant and Jenkins leave the store with stolen items, followed them behind the store, and arrested them. With these facts, it would have been reasonable for the jury to conclude that appellant committed all of the elements of burglary himself.

JUDGMENTS OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.