Circuit Court for Baltimore City
Case No.: 118353003

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2409

September Term, 2019

KARL PECK JR.,

v.

STATE OF MARYLAND

Leahy,
**Gould,
Albright, Anne K.,
(specially assigned)

JJ.

Opinion by Gould, J.

Filed: September 28, 2021

** Steven B. Gould, now serving on the Court of Appeals, participated in the hearing and conference of this case while an active member of this Court; he participated in the adoption of this opinion as a specially assigned member of this Court.

Appellant Karl Peck, Jr. was convicted by a jury in the Circuit Court for Baltimore City for voluntary manslaughter arising out of a fatal shooting of one Walter Paige. The shooter, however, was not Mr. Peck; Mr. Peck was nevertheless held responsible for Mr. Paige's death under a theory of accomplice liability that permits the imposition of criminal liability for a crime the defendant neither assisted nor intended to commit. On appeal, Mr. Peck contends that the trial court committed reversible error by instructing the jury on this theory of liability. He also contends that the evidence was insufficient to sustain the conviction, and that the trial judge erroneously admitted testimony of the investigating detective that Mr. Peck's account of the events during his interrogation was inconsistent with other evidence the detective had gathered. Finding no reversible error, we shall affirm the judgments of the circuit court.

BACKGROUND

On November 30, 2018, Mr. Peck was driving home with his then girlfriend when he was cut off by car driven by Mr. Paige. Mr. Peck alleged that he honked and flashed his lights at Mr. Paige, who, in turn, began following Mr. Peck's car. Eventually, Mr. Paige followed Mr. Peck into a parking lot where the two got out of their cars and argued. One witness testified that Mr. Peck bullied Mr. Paige and acted in a threatening manner as Mr. Paige tried to retreat and diffuse the situation. In the midst of their argument, a masked man ran to them from across the parking lot, and he and Mr. Peck began to beat Mr. Paige. At one point, Mr. Paige grabbed a knife from inside his car and cut Mr. Peck's arm. As the tussle continued, the masked man pulled out a handgun and fatally shot Mr. Paige. Mr.

Peck continued to strike Mr. Paige until the masked shooter pulled him off, at which point, the two men ran from the scene in the same direction.

The entire incident in the parking lot was captured on surveillance video footage that was admitted into evidence at trial. Within hours of the shooting, Mr. Peck shaved his beard, changed his clothes, threw his shirt, which was bloody, into the trash, and then went to the hospital. At the hospital, Mr. Peck informed the nurse about his stabbing, prompting the hospital to notify law enforcement. Mr. Peck was subsequently charged with first-degree murder, second-degree murder, voluntary manslaughter, and use of a handgun in a crime of violence under a theory of accomplice liability.

Mr. Peck has consistently claimed that he does not know who the masked shooter was, let alone that the man intended to shoot Mr. Paige. The State disagreed, pointing to two phone calls just before and after the shooting. The first was a call from Mr. Peck's phone to a number with a 443 area code at 1:29 pm, and the second was a call from that same 443 number to Mr. Peck's girlfriend's phone. The State presented these calls as evidence that Mr. Peck called the masked man to aid him in a planned assault. The State did not connect the cell phone number that Mr. Peck called to a possible suspect. The masked shooter was never identified.

Mr. Peck was tried by jury in the Circuit Court of Baltimore City. The trial lasted six days. One of the State's witnesses was Baltimore City Police Detective Michael Vodarick, who interrogated Mr. Peck following the shooting. The video of the interrogation was admitted into evidence. Mr. Peck explained his version of events following the

shooting, which included changing his clothes, shaving his face,[1] and going to Northwest Hospital to have the knife wound on his arm treated. After playing the video of the interrogation at the trial, the following exchange took place:

> [PROSECUTOR]: Now, Detective Vodarick, as you were questioning the Defendant, was his rendition of what happened consistent with the evidence that you gathered in this case?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> DETECTIVE VODARICK: No.
>
> [PROSECUTOR]: And did there come a point in time when you followed up with his statements regarding going to the hospital?
>
> DETECTIVE VODARICK: Yes.
>
> [PROSECUTOR]: And what if anything did you do to follow up?
>
> DETECTIVE VODARICK: I went out to Northwest Hospital.
>
> ***
>
> [PROSECUTOR]: And is Northwest Hospital the closest hospital in relations to the crime scene?
>
> DETECTIVE VODARICK: No.

Detective Vodarick went on to describe how he obtained security footage from the hospital which showed Mr. Peck and his girlfriend checking into the hospital around 4:11pm on the day of the shooting. Although Mr. Peck had long hair and a large beard in the footage from the shooting three hours earlier, at the hospital, he was cleanshaven.

[1] Mr. Peck claimed that he shaved his face as a result of post-traumatic stress syndrome from his time in the Army.

At the close of evidence, the court discussed the proposed jury instructions with counsel. The court indicated it would use the pattern instruction for so called "*Sheppard*" accomplice liability, explaining:

> . . . And then the accomplice liability, and as I indicated to you, I have, because I think the record has support for it, the entirety of this instruction, which is the Defendant may be found guilty as an accomplice of a crime that he did not assist in or even intend to commit, in this case, in order to convict the Defendant of murder the State must prove beyond a reasonable doubt that the Defendant committed the crime of assault, either as a primary actor or as an accomplice. Second, the crime of murder was committed by an accomplice. And, third, the crime of murder was committed by an accomplice in furtherance of or during the escape from the underlying crime of assault. **It is not necessary that a Defendant knew his accomplice was going to commit an additional crime.** Furthermore, 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, in which case it's the assault, or the Defendant aided and abetted in that offense, and that the additional criminal offense was not within the original plan – 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.

(Emphasis added). After the court read the proposed instruction to counsel, the following colloquy ensued:

> [DEFENSE COUNSEL]: Judge, on accomplice liability --
>
> THE COURT: Yes.
>
> [DEFENSE COUNSEL]: I didn't hear any mention made of the statements prove that the murder occurred and that the Defendant with the intent to make the crime happen knowingly aided, counseled --
>
> THE COURT: Yes, yes. That's in there as well
>
> [DEFENSE COUNSEL]: Oh okay, right.

THE COURT: No, I -- what I was saying, I think we need the complete instruction as opposed to the abbreviated instruction.

[DEFENSE COUNSEL]: Okay. Because the latter that you just read really doesn't make reference to his state of mind which, you know, this former section does.

THE COURT: I have both.

[DEFENSE COUNSEL]: Okay.

THE COURT: I have -- so the beginning, what's on yours, is the mandatory portion of accomplice liability. And then where I went was there's the optional portion

[DEFENSE COUNSEL]: Well, that's what we would object to, the optional. I mean, I'm not --

THE COURT: Well, I think this record and even your argument --

[DEFENSE COUNSEL]: Right.

THE COURT: -- was the optional --

[DEFENSE COUNSEL]: Yes, expect that my optional, there's no reference to his state of mind. It's --

THE COURT: Because it's not a part of Maryland law, state of mind.

[DEFENSE COUNSEL]: Well, it sounds almost like, no matter what, if someone comes to your aid and they get seriously injured, that you're responsible for it. And I don't think that's the law in Maryland. That – and I think that's why --

THE COURT: The Defendant may also be found guilty as an accomplice of the crime that he did not assist in or even intend to commit is Maryland law.

[DEFENSE COUNSEL]: Okay. Well, we would object to that because, if he -- that -- that's the point. There was no -- that one says even if he didn't intend. The former says --

THE COURT: That's exactly right . . . there's two theories.

[DEFENSE COUNSEL]: Yeah, well, I – yeah, I guess. All right. Well, we would object to that. I understand what the Court's saying. It's just that, certainly, it sounds almost like, you know, if a stranger comes to the aid of someone else in a fight such as this, and the, you know, person dies, that this person who sits where he sits is legally responsible.

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[DEFENSE COUNSEL]: . . . And from my vantage point, you know, there ought to be no . . . jury instruction on accomplice liability that does not lend some -- pay some attention to the person's state of mind in order to be held responsible as an accomplice.

THE COURT: But that's not the law in Maryland.

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THE COURT: So they first have to find that the Defendant committed the crime of assault. If they find he didn't commit it, then this is done. That's the way this reads. The State must prove beyond a reasonable doubt, first, the Defendant committed a crime of assault either as the primary actor or as an accomplice. Second, the crime of murder was committed by an accomplice. Third the crime of murder was committed by an accomplice in furtherance of or during the escape from the underlying crime of assault. If the State doesn't convince the jurors that Mr. Peck was involved in an assault on Mr. Paid, then they don't go any further. That's what the instruction tells them.

[DEFENSE COUNSEL]: And, conversely, your - - and I understand the Court's reading that, that if he is engaged in an assault, then all bets are off as to what --

THE COURT: No.

[DEFENSE COUNSEL]: -- someone else does.

THE COURT: Then they also must find that the -- they also must find that the murder was committed by an accomplice and that the murder was committed by an accomplice in furtherance of or during the escape from the underlying crime of assault.

[DEFENSE COUNSEL]: Yea, okay. I got it . . . but I just see the -- it's fraught with injustice because essentially, what -- what you're saying is that, if

there's an assault and between these two, and a third party intervenes, you're responsible for that party's intervention if you are guilty of assaulting this person. So if I punch a guy, and then this guy comes up and shoots him, that under that it sounds like I'm responsible for the shooting. And I don't --

THE COURT: The person --

[DEFENSE COUNSEL]: -- even have to know him

THE COURT: -- comes up is an accomplice.

[DEFENSE COUNSEL]: I'm sorry?

THE COURT: If the person that comes up is an accomplice.

[DEFENSE COUNSEL]: Well, that -- but that's what that seems to be saying, that that's what that person is, an accomplice, who comes up and aids in it.

THE COURT: So --

[DEFENSE COUNSEL]: Well, but anyway, that -- we'll see.

THE COURT: Okay. So I'll note your exception to that.

The above exchange took place on a Friday. The trial court instructed the jury the following Monday. Before it did so, the court had the following exchange with defense counsel:

THE COURT: Defense, have you reviewed the evidence and the jury instructions?

[DEFENSE COUNSEL]: Yes.

THE COURT: Would you like to be heard?

[DEFENSE COUNSEL]: No.

The court then proceeded to instruct the jury.[2] As to accomplice liability, the court instructed the jury as follows:

> Now the Defendant may be guilty of murder as an accomplice even though the Defendant did not personally commit the acts that constitute that crime.
>
> In order to convict the Defendant of murder as an accomplice the State must prove that the murder occurred and that the Defendant with the 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.
>
> 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 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 of a crime that he did not assist in or even intend to commit. In this case, in order to convict the Defendant of murder the State must prove beyond a reasonable doubt, first, that the Defendant committed the crime of assault either as a primary actor or as an accomplice, second, the crime of murder was committed by an accomplice, and, third, that the crime of murder was

[2] The court's instruction pertaining to the voluntary manslaughter charge, which Mr. Peck was ultimately convicted of, was:

> Now voluntary manslaughter is an intentional killing which is not murder because the Defendant acted in partial self defense. Partial self defense does not result in a verdict of not guilty, but rather reduces the level of guilt from murder to manslaughter.
>
> You have heard evidence that the Defendant killed [Mr. Paige] in self defense. You must decide whether this is a complete defense, a partial defense, or no defense in this case. . . .
>
> If the Defendant did not act in complete self defense but did act in partial self defense your verdict must be guilty of voluntary manslaughter and not guilty of murder.

> committed by an accomplice in furtherance of or during the escape from the underlying crime of assault.
>
> It is not necessary that 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 and abetted in that offense and that the additional criminal offense was not within the original plan was done in furtherance of the commission of the planned criminal offense or the escape therefrom.

Immediately following this instruction, the court again asked whether the defense would like to be heard, and defense again declined.

During deliberations, the jury initially sent two notes requesting additional guidance on the issue of accomplice liability.[3] The first note asked for the exact charges brought against Mr. Peck**.** After reading the note to the counsel for both sides, the court said:

> THE COURT: When I got that note . . . I was inclined to bring them out because there is a definition of assault on the jury instructions . . . and the word "assault" is used in the accomplice liability [instructions], but it's not a charge that is brought against him. I just thought it would be easier if I answered it with them in the room so I could sort of see their faces to see if I am answering the question that they are asking.
>
> So . . . unless you all disagree, I would be inclined to point them to the instruction on Page 6 which is "A Defendant is charged with murder," and then tell them it includes first, second, and voluntary manslaughter, "conspiracy to commit murder, and use of a firearm," and then just explain assault is included in the jury instructions but it is not one of the charges and that the reason assault is there is to explain the accomplice liability which uses the word assault, unless someone wants to disagree with me.

[3] There was also a third note from the jury, but it was only a request for the definition of "plan" that was included in the accomplice liability instruction.

[DEFENSE COUNSEL]: I respectfully would only to the extent that the second, the qualification. The first portion of it I am fine with because that's what they ask, what are the charges.

THE COURT: Right

[DEFENSE COUNSEL]: And it's a quite specific question and the charges are A, B, C, and D, so I would prefer that. Thank you.

THE COURT: Does the State want to be heard?

[THE STATE]: Your Honor, I think there needs to be some clarity in a sense because assault is listed in the jury instructions and is a part of the accomplice liability aspect of it.

THE COURT: Right.

[THE STATE]: So I can understand the confusion and I would appreciate if we did do the second part, Your Honor.

THE COURT: Okay. So [Defense Counsel], I am going to note your objection . . . But to -- that's why I want to look at their faces, but to the extent that they see the very first two charges are assault and first degree assault because it's the way they come numerically, I need to explain that those are not charged in this case and that it's only given as a definition.

[DEFENSE COUNSEL]: I got you, but still note my objection.

THE COURT: Okay, all right. Now the third note you don't have a copy, but I will make a copy for you.

[DEFENSE COUNSEL]: Right.

THE COURT: This is the one that just arrived as you arrived, Mr. Brown. "Please define the word "plan" as in "original plan or planned criminal offense" on Page 13, which is the accomplice liability question. And I think that the answer that I give them is there is no legal definition of "plan." "Plan" retains its meaning as we use it in regular English.

[DEFENSE COUNSEL]: That's fine with the defense.

[THE STATE]: That's fine with the State, Your Honor.

The court then brought out the jury and responded to their questions. In response to the question asking, "What are the exact charges brought against Mr. Peck," the court told the jury the following:

> So I am going to give you a little bit of a long answer. The exact charges are listed on Page 6 of the jury instructions and they are murder, where murder includes first degree murder, second degree murder, and manslaughter are all under the umbrella of murder, conspiracy to commit murder, and the use of a firearm in the commission of a crime of violence.
>
> Those are the three charges that have been brought against Mr. Peck, understanding that the first charge has some sub-branches in it. On your jury instructions, which is what I think your question might be, I included second degree assault and first degree assault. They are not charges against Mr. Peck
>
> They are not charged, which is why they are not on your verdict sheet. They are there as a definition because the word "assault" is used in accomplice liability instruction, and so those two chares are there as a definition because the word "assault" is used in the accomplice liability instruction. So the charges are murder, conspiracy to commit murder, and use of a firearm in a crime of violence.

The court invited further questions from the jury, prompting four more questions regarding accomplice liability. The court called counsel for both sides to the bench to discuss how to respond to each question, and the following discussion ensued:

> THE COURT: [Reading the first question] "If he is not charged with assault can he be guilty of accomplice to murder because there is no furtherance of the assault?"
>
> [DEFENSE COUNSEL]: I don't know what he means by "no furtherance of an assault" . . . I mean I understand the first portion.
>
> THE COURT: The instruction on furtherance of an assault is in that he can be found guilty of a crime even if that additional crime was not within the original plan but if it was done in furtherance of the commission of the planned criminal offense or escape therefrom.
>
> [DEFENSE COUNSEL]: Okay.

THE COURT: So I think the short answer is yes.

[DEFENSE COUNSEL]: Okay.

THE COURT: Does anybody object to me giving that answer?

[THE STATE]: No objection from the State, Your Honor.

[DEFENSE COUNSEL]: No.

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THE COURT: [Reading the second question] So the question is "Can the Defendant be charged with use of a firearm if he did not brandish, touch the weapon?"

[THE STATE]: Yes.

THE COURT: The answer to this is also yes and this is –

[DEFENSE COUNSEL]: Under –

[THE STATE]: Under a theory of accomplice liability

[DEFENSE COUNSEL]: Yes, under certain circumstances yes.

THE COURT: Right, right. So I want to be careful because I don't want to tell them what to think, but accomplice liability is if an accomplice committed a crime you can also be responsible for it. I think that that's the answer, so the answer is yes.

[THE STATE]: I would agree, Your Honor.

THE COURT: Okay.

[DEFENSE COUNSEL]: Very well.

THE COURT: Anybody want to be heard?

[DEFENSE COUNSEL]: No.

THE COURT: Okay.

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THE COURT: . . . So we have an additional note. The Note is "In the case of murder is accomplice in any degree sufficient or do we have to establish the degree?" The answer is you must establish the degree. Do you agree?

[THE STATE]: Yes, Your Honor.

[DEFENSE COUNSEL]: Yes.

THE COURT: And I think that I will just send this back to them in writing.

[DEFENSE COUNSEL]: That's fine, Judge.

THE COURT: Okay. But I want you all to see it. . . So what I have written is "Ladies and gentlemen, you must establish the degree under the murder charge even for accomplice liability."

[DEFENSE COUNSEL]: That's fine.

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THE COURT: All right. So we have an additional question . . . . "If we believe Defendant is guilty of being an accomplice do we substitute the actions of the shooter when reading through the murder charges," and then bracketed "[against the Defendant]?

For example, one could argue the Defendant did not raise force to a deadly level. Shooter did raise the level of force. As accomplice[,] would Defendant be held responsible for shooter's actions?"

And then it seems like the second question is "Or does accomplice have some level of liability?" . . . I don't know if it's "same" or "some," but I read "level of liability" to mean limit, but it just might be "or does accomplice have same level of liability?"

[THE STATE]: I think it's "same."

THE COURT: Yes.

[DEFENSE COUNSEL]: Yes.

> THE COURT: So would you all like to be heard about how the court responds to this?
>
> [DEFENSE COUNSEL]: Yes. If the court's position is just yes, yes, yes, I mean --
>
> [THE STATE]: Yes. . . We agree.
>
> THE COURT: Okay. Would you all like me to bring them out to answer it orally or would you like me to just send back a written --
>
> [DEFENSE COUNSEL]: Yes, I am satisfied with just sending something back since it's pretty cut and dry.

Following deliberations, the jury found Mr. Peck guilty of voluntary manslaughter and use of a handgun in the commission of a felony or crime of violence; the jury acquitted Mr. Peck of murder in the first- and second-degree and conspiracy to commit murder. He was sentenced to 30 years' imprisonment, with all but with 17 years suspended.

On appeal, Mr. Peck presents us with the following questions:

1. Did the court err in instructing the jury regarding accomplice liability?

2. Was the evidence sufficient to sustain Appellant's convictions?

3. Did the court err in permitting a detective to opine on Appellant's credibility?

DISCUSSION

I.

JURY INSTRUCTION FOR ACCOMPLICE LIABILITY

Mr. Peck argues that the court erred by instructing the jury on what is known as the "*Sheppard* form"[4] of accomplice liability.

Mr. Peck argues that it was an error to use the *Sheppard* instruction because his alleged intended crime was an assault that was non-collateral to the killing carried out by the alleged accomplice. He bases his argument on certain "incongruities" between *Sheppard* accomplice liability and the felony murder doctrine. Specifically, Mr. Peck points to the fact that a non-collateral assault cannot serve as a predicate for either first- or second-degree murder under the felony murder doctrine, but, under the *Sheppard* accomplice liability, a non-collateral assault could serve as a predicate for first- and second-degree murder. He argues that there is no rationale for these incongruities, and that these two doctrines "cannot co-exist in the same law of homicide."

Mr. Peck relies upon the Court of Appeals' opinion in *State v. Jones*, 451 Md. 680 (2017), which, in overruling its previous decision in *Roary v. State*, 385 Md. 217 (2005), held that first-degree assault cannot support a second-degree felony murder. In *Jones*, the Court stated:

> . . . because a homicide generally results from the commission of an assault, every felonious assault ending in death automatically would be elevated to

[4] *Sheppard* accomplice liability originates from the case *Sheppard v. State*, 312 Md. 118 (1988). In that case, a defendant who robbed a store with two accomplices, was found criminally liable for his accomplice shooting at police while attempting to escape, even though the defendant was already in police custody at the time.

> murder in the event a felonious assault could serve as the predicate felony for purposes of the felony-murder doctrine. Consequently, application of the felony-murder rule to felonious assaults would usurp most of the law of homicide, relieve the prosecution in the great majority of homicide cases of the burden of having to prove malice in order to obtain a murder conviction[.]

Jones, 451 Md. at 702 (cleaned up). Mr. Peck argues that the same logic applies to *Sheppard* accomplice liability. *Sheppard* accomplice liability likewise usurps the law of homicide and renders *Jones* and the felony murder statute "nugatory," because it permits an individual to be held liable for murder with only the general intent to commit an assault. Specifically, Mr. Peck states that "[t]he extreme mismatch between the general intent to make physical contact with a person and criminal responsibility for the murder of that person stretches fundamental principles of criminal law to the breaking point and offends due process."

A.

PRESERVATION

Preliminarily, we will address the State's contention that Mr. Peck failed to preserve his objection to the accomplice instruction. This issue is governed by Maryland Rule 4-325(f), which provides:

> 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. Upon request of any party, the court shall receive objections out of the hearing of the jury. An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

(Emphasis added).

In *Gore v. State*, 309 Md. 203, 209 (1987), the Court of Appeals recognized that even if a party does not strictly comply with Rule 4-325(f), it may still substantially comply if certain enumerated criteria are met, namely:

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

Thus, "under certain well-defined circumstances, when 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." *Sims v. State*, 319 Md. 540, 549 (1990). If the trial court record reflects that the court "understands the objection and, upon understanding the objection, rejects it, the issue [is] preserved . . . . However, where the trial record reflected only a vague comment without an articulable basis for the objection" the issue will not be considered preserved. *Jones v. State*, 240 Md. App. 26, 36 (2019) (cleaned up).

Circumstances warranting a finding of substantial compliance "represent the rare exceptions [to Rule 4-325(f)] and the requirements of the Rule should be followed closely." *Montague v. State*, 244 Md. App. 24, 61 (2019), *aff'd*, 471 Md. 657, (2020) (quoting *Sims*, 319 Md. at 549). Rule 4-325(f)'s requirement that objections to instructions be made *after* they are read to the jury accounts for the fact that "[o]ften, after discussion, defense counsel will be persuaded that the instruction under consideration is not warranted, and will abandon the request." *Sims*, 319 Md. at 549. Thus, "[u]nless the attorney preserves the point by proper objection after the charge, or has somehow made it crystal clear that there

is an ongoing objection to the failure of the court to give the requested instruction, the objection may be lost." *Id.*

This case is a close call. We cannot say from our review of the record that defense counsel necessarily made it "crystal clear" that there was an *ongoing* objection the accomplice liability instruction. *Id.* There was extended discussion between defense counsel and the trial judge concerning whether the *Sheppard* accomplice liability instruction should be included. Defense counsel argued in response, without citing to any specific law in support, that the accomplice liability instruction was "fraught with injustice" without a state of mind requirement.

The court's discussion with counsel occurred on Friday, October 4, but it did not instruct the jury until Monday, October 7. The court asked defense counsel if he would like to be heard both before and after the jury was instructed, and both times, defense counsel declined. Furthermore, when the jury presented several questions to the court during its deliberations pertaining directly to the *Sheppard* accomplice liability instruction, defense counsel failed to renew any objections to the instruction based on an alleged lack of state of mind requirement.

Under these circumstances, the court could have reasonably posited, just as Rule 4-325(f) contemplates, that in the intervening weekend after defense counsel lodged his initial objection, defense counsel researched the applicable law in Maryland and concluded that the judge's understanding was correct. Or, the court could have reasonably posited

that if defense counsel had found law to support his position, he would have presented it to the judge when he was given the opportunity to do so.[5]

On the other hand, at the conclusion of the court's discussion with defense counsel during the charging conference, the court stated that defense counsel's "exception is noted." Although it would have been preferable for defense counsel to have adhered to the requirements of Rule 4-325(f), we hold that it would have been reasonable for defense counsel to have believed that repeating the objection would have been futile. Under these circumstances, we hold that Mr. Peck preserved the issue.

B.

ANALYSIS

As summarized above, Mr. Peck's argument against the accomplice instruction given in this case rests on a comparison between the felony murder doctrine and *Sheppard* accomplice liability. Leaning heavily on a footnote in *Sheppard*, Mr. Peck argues that the two theories "mirror[]" each other because, he alleges, both "eliminate the need for the State to prove an intent to kill." Thus, his argument goes, because a non-collateral assault ending in a killing cannot serve as the underlying felony for either first- or second-degree

[5] This case is distinguishable from our recent decision in *Sequeira v. State*, 250 Md. App. 161, 248 A.3d 1151 (2021), where we found that Rule 4-325(f) was substantially complied with pursuant to *Gore*. In that case, the court had an extended discussion with defense counsel in which defense counsel made clear the specific instructions requested, and it was evident from the discussion that the judge understood but rejected the proposed instructions. 250 Md. at ___, 248 A.3d at 1171-72. Furthermore, because the court instructed the jury almost immediately after it ruled against the defense's proposed instruction, there would have been no reason for defense counsel to believe the court would change its mind or vice versa. 250 Md. at ___, 248 A.3d at 1172. The same cannot necessarily be said in this case.

felony murder, neither should such an assault serve as the basis for a murder conviction under a *Sheppard* accomplice liability standard.

We are not persuaded by Mr. Peck's comparison of accomplice liability with the felony murder doctrine, and hold that the jury was properly instructed on accomplice liability.

The footnote from *Sheppard* relied on by Mr. Peck states, in relevant part:

> While we disagree that the natural and probable consequence rule predicates liability on a negligence *mens rea*, we do agree that tort standards of foreseeability have no place in criminal complicity law. Thus, consistent with the rules of complicity in conspiracy law and under the felony murder doctrine, we prefer the language "in furtherance of the commission of the offense and the escape therefrom."

Sheppard, 312 Md. at 123 n.3. When read in context, it is evident that this footnote does not stand for the proposition that *Sheppard* accomplice liability and the felony murder doctrine are intended to "mirror" each other. Rather, it is a rejection of the use of tort foreseeability principles in the context of criminal liability. Thus, the Court's opinion in *Sheppard* does not support Mr. Peck's argument.

Mr. Peck is also incorrect that *Sheppard* accomplice liability eliminates the need for the State to prove an intent to kill. Felony murder is a "legal fiction in which the intent and the malice to commit the underlying felony is 'transferred' to elevate an unintentional killing to first-degree murder." *State v. Allen*, 387 Md. 389, 401 (2005) (quoting *State v. Buggs*, 995 S.W.2d 102, 106-07 (Tenn. 1999)). In contrast, accomplice liability, including *Sheppard* accomplice liability, is a type of liability whereby one person "as a result of his

or her status as a party to an offense, is criminally responsible for a crime committed by another." *Sheppard*, 312 Md. at 122.

Under *Sheppard* accomplice liability:

> 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.

312 Md. 118, 122–23 (1988), *abrogated on other grounds by State v. Hawkins*, 326 Md. 270 (1992). Thus, to hold a defendant liable for murder under *Sheppard* accomplice liability, the State still must prove the existence of the *mens rea* for murder. *See, e.g.*, *Diggs & Allen v. State*, 213 Md. App. 28, 87 (2013), *aff'd sub nom. Allen v. State*, 440 Md. 643 (2014) (holding that *Sheppard* accomplice liability instructions properly required that "to find someone guilty as an accomplice, the jury was first required to find that the 'crime was committed'—i.e., that the above-quoted instruction for attempted first degree murder was satisfied, including the premeditation and deliberation elements"). *Sheppard* accomplice liability merely permits the *mens rea* to be imputed from one accomplice to another, for any additional crimes committed by an accomplice "in furtherance of the commission of the planned offense or escape therefrom." 312 Md. at 122. Unlike felony murder, it is the *mens rea* from the other accomplice (here, the shooter), not the *mens rea*

for the original offense (here, Mr. Peck's assault of Mr. Paige), that allows for *Sheppard* accomplice liability.[6]

We disagree with Mr. Peck that the Court of Appeals' reasoning in *Jones*, which did not involve accomplice liability, is applicable to *Sheppard* accomplice liability. In *Jones*, the defendant was part of a group of men that robbed, beat, and shot the victim. 451 Md. at 687-88. The jury in his first trial acquitted him on charges of first-degree murder and second-degree intent to inflict serious harm murder. The jury hung on the first-degree felony murder and use of a handgun in the commission of a felony or a crime of violence charges. The State sought to retry the defendant but sought to proceed on a charge of second-degree felony murder predicated on first-degree assault. *Id*. at 689. The trial court granted the State's request, and the defendant appealed.

The Court of Appeals took the opportunity to revisit its holding in *Roary v. State*, 385 Md. 217, 230 (2005), which held that a first-degree assault could support a second-degree murder conviction "if the nature of the crime itself or the manner in which it was perpetrated was dangerous to human life." Reversing course, the Court in *Jones* held that "first-degree assault may not serve as a predicate for second-degree felony murder when that assault is not collateral to the lethal act." 451 Md. at 686. The Court explained:

> As we have noted, second-degree felony murder is an unlawful killing in the course of the commission of a felony that is inherently dangerous to human life but is not included among the felonies enumerated in § 2–201. This Court has recognized that felony murder should not be enlarged and we have, in fact, restricted its application. In *Fisher*, we noted that "*in order to ameliorate the harshness of the strict common law felony murder doctrine,*

[6] It is, of course, true that the State must still prove the defendant had the *mens rea* required for the original offense.

> *many jurisdictions limit the predicate felonies to those that are dangerous to human life*" 367 Md. at 254, 786 A.2d at 727. In order to maintain the integrity of the different levels of culpability of murder and manslaughter and to ameliorate its perceived harshness, today we adopt the "merger doctrine" and we hold that first-degree assault that results in the victim's death merges with the homicide and therefore cannot serve as an underlying felony for the purposes of the felony murder rule. *Roary v. State*, 385 Md. 217, 867 A.2d 1095 (2005), is overruled. First-degree assault, either intent to inflict serious physical injury or assault with a firearm, cannot, as a matter of law, serve as the underlying felony to support felony murder. The assaultive act merges into the resultant homicide, and may not be deemed a separate and independent offense that could support a conviction for felony murder. Where the only felony committed (apart from the murder itself) was the assault upon the victim that resulted in the death of the victim, the assault merges with the killing and cannot be the predicate for felony murder nor relied upon by the State as an ingredient of a felony murder.

Id. at 708. In other words, a defendant cannot be convicted of second-degree murder for conduct committed with the *mens rea* of first-degree assault; to permit otherwise would obliterate the distinction between murder and manslaughter.

The accomplice theory on which Mr. Peck was convicted raises no such concern. *Sheppard* accomplice liability preserves the requirement that the State prove the requisite *mens rea* for murder; thus, the concerns expressed in *Jones* that prompted the Court to adopt the "merger doctrine" are not applicable. *Sheppard* accomplice liability does not threaten "the integrity of the different levels of culpability in homicide." *Id.* Rather, it applies "the general rule" that "when two or more persons participate in a criminal offense, each is responsible for the commission of the offense and for any other criminal acts done in furtherance of the commission of the offense or the escape therefrom." *Sheppard*, 312 Md. at 118 (citing *Veney v. State*, 251 Md. 159 (1968), *cert. denied*, 394 U.S. 948 (1969)); *Fabian v. State*, 235 Md. 306 (1964), *cert. denied*, 379 U.S. 869 (1964); 2 W. LAFAVE &

A. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW §§ 6.6-6.8 (1986); W. CLARK & W. MARSHALL, LAW OF CRIMES §§ 8.00-8.15 (1958); 1 WHARTON, CRIMINAL LAW §§ 29-38 (14th ed. 1978, 1987 Cum. Supp.)); *see also Diggs & Allen*, 213 Md. App. at 90-91.

Thus, here, Mr. Peck was not convicted of voluntary manslaughter merely because he committed a first-degree assault. Rather, he was convicted because the jury concluded beyond a reasonable doubt that Mr. Peck and the masked man were accomplices and the masked man committed the crime of voluntary manslaughter in furtherance of Mr. Peck's assault of Mr. Paige or his escape therefrom. The mens rea for the crime for which Mr. Peck was convicted—voluntary manslaughter—matched precisely the mens rea for the crime that resulted in Mr. Paige's death—voluntary manslaughter. Mr. Peck's liability for voluntary manslaughter stems from his intentional participation in the assault of Mr. Paige, and that the shooting death of Mr. Paige was in furtherance of or escape from Mr. Peck's assault of Mr. Paige. Thus, the mismatch in culpability that so concerned the Court in *Jones* is simply not implicated here.

Accordingly, we hold that the trial court did not err in instructing the jury on accomplice liability.

II.

SUFFICIENCY OF THE EVIDENCE

Mr. Peck challenges the sufficiency of the evidence supporting his conviction for voluntary manslaughter. Citing the first part of MPJI-Cr 6:00, he argues that "the State [failed] to prove that, 'with the intent to make the crime happen, [he] knowingly aided, counseled, commanded, or encouraged the commission of the crime, or communicated to

a participant in the crime that [he][she] was ready, willing and able to lend support, if needed.'" He proceeds to argue that the State failed to introduce any evidence that he acted with any such state of mind. Mr. Peck did not argue that the evidence was insufficient under the second part of MPJI-Cr 6:00 that addresses *Sheppard* liability.

We will nevertheless address his argument under the *Sheppard* liability. As we stated above, under a theory of *Sheppard* liability, the State had to prove that Mr. Peck committed the crime of assault as either the primary actor or as an accomplice, and that the murder of Mr. Paige was committed by the masked shooter in furtherance of or during the escape from Mr. Peck's assault of Mr. Paige. The evidence was sufficient to convict under this theory.

"The test of appellate review of evidentiary sufficiency is whether, 'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Donati v. State*, 215 Md. App. 686, 718 (2014) (quoting *State v. Coleman*, 423 Md. 666, 672 (2011)) (internal quotations omitted). This standard applies to all criminal cases, "including those resting upon circumstantial evidence, since, generally, proof of guilt based in whole or in part on circumstantial evidence is no different from proof of guilt based on direct eyewitness accounts." *Neal v. State*, 191 Md. App. 297, 314 (2010). Moreover, "the limited question before an appellate court is not whether the evidence *should have or probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Darling v. State*, 232 Md. App. 430, 465 (2017). In making that determination, "[w]e 'must give deference to all reasonable

inferences [that] the fact-finder draws, regardless of whether [we] would have chosen a different reasonable inference.'" *Donati*, 215 Md. App. at 718 (quoting *Cox v. State*, 421 Md. 630, 657 (2011)). We also "defer to the fact finder's 'opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence[.]'" *Neal*, 191 Md. App. at 314.

The trial testimony allowed for the jury to conclude that: (1) Mr. Peck was bullying and threatening Mr. Paige even as Mr. Paige tried to retreat and diffuse the situation; (2) Mr. Peck and the masked man together "jumped" Mr. Paige and were "stomping him"; and (3) the masked man "pulled out a gun" and shot Mr. Paige. From the surveillance videotape introduced at trial, the jury could have concluded that the masked man ran to the scene of the altercation in a purposeful manner, prepared and eager to enter the fray in aid of Mr. Peck. The jury could have further concluded from the videotape that Mr. Peck did not seem the least bit surprised at the sudden appearance of the masked man and continued his attack of Mr. Paige in concert with him. After Mr. Paige was shot, the jury could see that the unmasked man appeared to physically pull Mr. Peck away from Mr. Paige and that they both ran off in the same direction. And after they both ran off, Mr. Peck's girlfriend drove away from the scene and met up with Mr. Peck at their house.

The evidence also showed that Mr. Peck shaved his beard and threw away his bloody shirt before going to the hospital. The evidence showed that Mr. Peck made a call to a 443 telephone number minutes before the altercation, and that his girlfriend received a call from that same number minutes after the incident. Although the State never tied that number to a specific suspect, in combination with the other evidence, the jury could have

reasonably inferred that such calls were linked to the incident generally, and to the shooter specifically. Construed as a whole, evidence is sufficient to sustain Mr. Peck's conviction for voluntary manslaughter. *See Todd v. State*, 26 Md. App. 583,585-86 (1975) (finding that evidence in the form of eyewitness can be "in and of itself sufficient, if believed," to support a conviction); *Owens v. State*, 161 Md. App. 91, 106 (2005) ("[W]hen 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.").

III.

THE DETECTIVE'S TESTIMONY

Mr. Peck contends that the trial court erroneously overruled his objection when the State asked Detective Vodarick whether "[Mr. Peck's] rendition with what happened [was] consistent with the evidence that [he] gathered in this case[.]" Mr. Peck argues that by allowing Detective Vodarick to answer that question, the court improperly allowed the detective to opine on Mr. Peck's credibility. Mr. Peck further maintains Detective Vodarick besmirched not only his credibility, but also that of his girlfriend, whose testimony aligned with Mr. Peck's statement during his interrogation. In support of this argument, Mr. Peck relies primarily on *Bohnert v. State*, 312 Md. 266 (1988).

The State responds that police officers are permitted to testify about their observations and conclusions in order to explain the steps they took or didn't take during the investigation. *See Daniel v. State*, 132 Md. App. 576, 589 (2000); *Rosenberg v. State*, 129 Md. App. 221, 252-53 (1999).

We generally apply an abuse of discretion standard to the trial court's evidentiary rulings, which standard reflects our reluctance to reverse a trial court "unless the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion." *Merzbacher v. State*, 346 Md. 391, 404-05 (1997). A trial court abuses its discretion when its ruling is far removed "from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Thompson v. State*, 229 Md. App. 385, 404 (2016) (citations and quotations omitted). Applying this standard of review here, we conclude that the trial court did not commit reversible error in overruling Mr. Peck's objection.

In *Bohnert v. State*, the defendant was convicted of a second-degree sexual offense of a 14-year-old girl. 312 Md. at 268. The jury trial came down to a credibility contest between him and his accuser. An expert witness, "in the field of child abuse[,]" testified on behalf of the State and opined that the victim had been sexually abused, which testimony effectively put the imprimatur of an expert on the credibility of the victim. *Id.* at 271-72. The State made the most of the expert's testimony, emphasizing that the defense had failed to rebut the expert with an expert of his own. *Id.* at 273. Ultimately, the jury was persuaded by this compelling testimony and convicted the defendant. *Id.* at 271. The issue before the Court was whether the trial court impermissibly permitted the expert to opine on the credibility of a witness.

The Court's analysis started with the "fundamental principle" that the "credibility of a witness and the weight to be accorded the witness' testimony are solely within the province of the jury." *Id.* at 277. The Court also acknowledged that it is "error for the

court to permit to go to the jury a statement, belief, or opinion of another person to the effect that a witness is telling the truth or lying." *Id.* The Court thus reversed the judgment and granted the defendant a new trial. *Id.* at 279. Mr. Peck insists that the same reasoning applies here with respect to Detective Vodarick's remark about Mr. Peck's statement.

On the other hand, in *Daniel v. State*, the detective was cross-examined by defense counsel as to whether he thought that a witness—whom the defense was suggesting should have been a suspect—was lying when the detective interviewed him. 132 Md. App. at 584. On re-direct, and over the defendant's objection, the State elicited the detective's testimony that the witness was eliminated as a suspect once the detective had collected all of the available information. *Id.* at 587. The Court found no reversible error in that evidentiary ruling for two independent reasons: (1) "police officers routinely testify about the conclusions they draw from their investigations that lead them to take various actions, such as making arrests, following 'leads,' interviewing witnesses, and eliminating suspects," *id.* at 590 (citing *Jones v. State*, 310 Md. 569, *vacated and remanded on other grounds*, 486 U.S. 1050, *sentence vacated on remand on other grounds*, 314 Md. 111 (1988)); and (2) the defense opened the door to such testimony in his cross-examination of the detective. *Id.* at 590-91.

As we see it, this case more closely aligns with *Daniel* than *Bohnert*. Again, here is the testimony that is at issue:

> [PROSECUTOR]: Now, Detective Vodarick, as you were questioning the Defendant, was his rendition of what happened consistent with the evidence that you gathered in this case?
>
> [DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

DETECTIVE VODARICK: No.

[PROSECUTOR]: And did there come a point in time when you followed up with his statements regarding going to the hospital?

DETECTIVE VODARICK: Yes.

[PROSECUTOR]: And what if anything did you do to follow up?

DETECTIVE VODARICK: I went out to Northwest Hospital.

The substance and sequencing of the questions and Detective Vodarick's responses seemed designed to elicit an explanation of the steps he took in his investigation. Under *Daniel*, and the authority cited therein, such testimony is permissible. Moreover, Detective Vodarick's testimony did not impugn Mr. Peck's credibility in a manner remotely comparable to what transpired in *Bohnert*, where, in a classic he said she said case, the expert rendered an opinion on who to believe. In contrast, here, Detective Vodarick testified only that Mr. Peck's story was inconsistent with other evidence—he didn't say which evidence, and he didn't even say that he thought Mr. Peck was lying or wasn't credible.

In any event, even if the court's evidentiary ruling was erroneous, we would hold that the error was harmless beyond a reasonable doubt. As the Court of Appeals has stated:

> [W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed "harmless" and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.

Hutchinson v. State, 406 Md. 219, 227 (2008) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)). Whether Detective Vodarick concluded that Mr. Peck's story was inconsistent with other evidence was not the centerpiece of the State's case. Rather, the State's case centered on eyewitness testimony, phone records and, of course, the surveillance video that showed the altercation. Moreover, the jury acquitted Mr. Peck of the more serious charges (first-degree murder, second-degree murder, and conspiracy to commit murder), indicating that the jury focused its deliberations on the evidence—not on the conclusion that Detective Vodarick's testimony on the consistency of Mr. Peck's story with other evidence.

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