Circuit Court for Washington County
Case No. 21-K-17-053886

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0593

September Term, 2019

EASTON BLICKENSTAFF,

v.

STATE OF MARYLAND

Arthur,
Shaw Geter,
Ripken,

JJ.

Opinion by Shaw Geter, J.

Filed: August 17, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Easton Blickenstaff, appellant, was convicted by a jury in the Circuit Court for Washington County of first-degree murder, attempted first-degree murder, conspiracy to commit first-degree murder, conspiracy to commit attempted first-degree murder, five counts of reckless endangerment, two counts of first-degree assault, four counts of second-degree assault, wearing, carrying or transporting a handgun in a vehicle, and three counts of conspiracy to commit first-degree assault. The court sentenced him to life imprisonment, suspended all but forty years, imposed a three-year consecutive sentence and ordered five years of supervised probation upon his release. Appellant timely appealed and presents the following questions for our review:

1. Did the trial court err in failing to give an instruction on accessory after the fact, where the trial court relied on a case that did not recognize that the common law as to accessory after the fact changed?
2. Did the trial court err in failing to give a curative instruction after the State commented in its closing argument that the defense conceded almost all of the issues in the case?

For reasons set forth below, we affirm.

BACKGROUND

In the early morning of May 20, 2017, appellant, Easton Blickenstaff, and his friend, Jason Carter, were parked on Noland Drive in front of an apartment complex near a small red car;[1] they had encountered that car earlier that day in a shooting.[2] They observed two

[1] According to appellant's pretrial statement, he told the police that he was driving a silver Chrysler Pacifica belonging to his live-in girlfriend, Kera Hollar.

[2] Mr. Carter believed the shooter in the small red car to be Dalvin Williams, also known as "D-Stacks."

women in a white Nissan Versa pull into a parking spot next to the red car, and two men entered the backseat. After the Nissan pulled off, Mr. Carter instructed appellant to follow it.

As both cars approached a stop sign, Mr. Carter told appellant to pull up next to the Nissan. Mr. Carter then got out of the passenger seat and fired into the backseat of the Nissan with what appeared to be a "high-powered nine" millimeter handgun.[3] Appellant later told police that he believed he heard roughly two to three gunshots but was uncertain of the exact number of shots fired. After the incident, both cars drove off in opposite directions. Appellant went home and was later arrested by police.

The two men in the backseat of the Nissan were Eddie Ragland and Jaseye Stephens. Mr. Ragland died from gunshot wounds, and Mr. Stephens was wounded but survived. A baby in the backseat was unharmed. The two women in the car were Paris Beaver, the driver, and Asa Green, the front passenger. Neither was injured.

Appellant was indicted in the Circuit Court for Washington County, and a jury trial was held in January 2019. During the state's case in chief, Detective Varner testified that he interviewed Mr. Carter after the shooting and that Mr. Carter admitted that he fired the gun into the backseat of the Nissan and that Mr. Blickenstaff was the driver of the vehicle.

[3] In appellant's pretrial statement to police, he said he saw Mr. Carter with a gun about a month prior to the shooting, but he was unaware that Mr. Carter had a gun that night. He observed Mr. Carter load a clip earlier that day; however, he did not see a gun present until the shooting occurred.

On cross-examination, Detective Varner conceded that Mr. Blickenstaff told him "on more than one occasion that he had no intention of killing [Eddie Ragland]."

Immediately before closing arguments, during discussions with the judge, appellant's counsel requested two instructions that were not initially submitted to the court. The first request was for Maryland Pattern Jury Instruction 4:17.4 Homicide First Degree Premeditated Murder, Second Degree Specific Intent Murder, and Voluntary Manslaughter Hot Blooded Response to Legally Adequate Provocation. The court agreed to a modified version, over the State's objection. Appellant then made a second request:

> And I would also request Your Honor that the, the [c]ourt give an instruction on accessory after the fact. And I have that instruction here for the number— is 6:01. And would invite the [c]ourt's attention to a case—I can make a copy of it for Your Honor and the State. I had not provided it in advance. *Dishman*—D—i—s—h—m—a—n — *v. the State of Maryland*. It's found at 352 Md. 279, it's a 1998 case. Basically it holds that the statutory short form charged defendant with first degree murder, second degree murder, manslaughter, and with being an accessory to murder.

The discussion extended to the afternoon. Although the State did not initially contest the accessory instruction, the State ultimately responded:

> We have—the State has not elected that modality. The State is in control of that particular aspect. This is not the, the—Mr. Rozes and I—and, and my situation where we're just taking the 21-902(a) to the jury. And they're not entitled to it unless charged; we haven't charged it by delineation. And the way we would charge it by delineation would be, you know, having a separate count.

The court denied the jury instruction request, stating:

> All right. I'm not going to give 6:01. I, I just—it's not charged. That does appear to be a requirement under *Hawkins*. So I'm not going to give 6:01. Objection noted for the record.

The judge then proceeded to give instructions to the jury. Following instructions, the court asked counsel whether there were any objections. Appellant's counsel responded, "I do believe, Your Honor, again on the facts of this case and the ruling by Judge Chasanow in *Dishman* that Your Honor should have given an accessory after the fact instruction." The court noted the objection for the record.

During the prosecutor's closing argument, he stated:

> I reference back to my colleague's opening statement, and I believe the State has presented the case that she told you that we would. And correspondingly I don't think you heard the case that the defense suggested that you would. And I say that from the outcome because I'll come back to that at the end because it has been a—there has been some, some elements to this whole matter that is—that have confused or concerned the State, but we'll get to those.
>
> But at the heart of it, I believe that the Defendant's original statement was the most correct—that the critical aspect here is what did the Defendant know and when. And keep that in mind as we go through the more general. And I'm going to go as quickly as I can through all of the elements because it is the State's burden to prove all of the elements. So I'm going to ask you to bear with me.
>
> But ultimately the defense has conceded almost all of those issues—that Jason Carter and the Defendant went to Noland Village and stalked somebody they believed was, was a kid named Dalvin, skinny kid name Dalvin, and ended up killing Eddie Ragland instead. And the— shot Jaseye Stephens. Endangered a baby. And scared two innocent women half to death. And that's illegal. That it's wrong. That it's first degree murder because of the lying in wait aspect of it. Because of the premeditated aspect of it. And that no way the Defendant can escape his knowledge and his pre— knowledge of this.

Appellant made no immediate objection to the remarks but after the prosecutor concluded, appellant's counsel asked permission to approach the bench:

> [APPELLANT'S COUNSEL:] Your Honor, I object. I should have objected right at the outset

	when the prosecutor who knows—is all knowing and all seeing is—knows more than the [c]ourt. When he said I have conceded the case. I have done no such thing. And it is totally objectionable to start off his closing argument with that. I'd ask the [c]ourt to instruct the jury that, that the defense, we, we both—it seems like we sat through different trials. I'd ask the [c]ourt to instruct the jury that the defense has not conceded anything
THE COURT:	Mr. Michael.
[STATE]:	Well I, I don't—I, I meant no disrespect to the de—to the Defendant. I mean that he has conceded the facts of where this person—these two people were in this car and that, that he drove the car and Jason Carter shot the man. I believe that is conceded. We can see that that, you know, those facts of the case if it comes down to intent, these are—I'm just parroting the words of his opening statement. So I think he needs to correct this himself
THE COURT:	All right.
[STATE]:	I don't think the [c]ourt has to chime in on it.
THE COURT:	Your objection is noted for the record. I am, however, going to overrule that at this point and I'm not going to get involved. You can address this in your closing.

During appellant's closing arguments, his counsel responded to the State's comments by stating, "I have conceded nothing. I have conceded nothing in this case." He explained, "[t]he part that wasn't conceded was [Mr. Blickenstaff's] knowledge and his intent." The prosecutor, then, in rebuttal closing argument, clarified his prior remarks by agreeing with appellant's counsel that appellant had not conceded that he had knowledge and intent.

Appellant was convicted of first-degree murder, attempted first-degree murder, conspiracy to commit first-degree murder, conspiracy to commit attempted first-degree murder, five counts of reckless endangerment, two counts of first-degree assault, four counts of second-degree assault, wearing, carrying or transporting a handgun in a vehicle, and three counts of conspiracy to commit first-degree assault.

DISCUSSION

This Court "review[s] the trial court's decision not to grant a jury instruction under an abuse of discretion standard." *Gimble v. State*, 198 Md. App. 610, 627 (2011). We consider "whether the instruction was generated by the evidence, whether it was a correct statement of law, and whether it was fairly covered by the instructions actually given." *Newman v. State*, 236 Md. App. 533, 563 (2018); *Johnson v. State*, 223 Md. App. 128, 138 (2015). Generally, a reviewing court will not disturb a trial court's jury instructions "so long as the law is fairly covered." *Farley v. Allstate*, 355 Md. 34, 46 (1999). "The standard for reversible error places the burden on the complaining party to show both prejudice and error." *Harris v. Harris*, 310 Md. 310, 319 (1987).

I. The trial court did not err in declining appellant's request for an accessory after the fact instruction.

Appellant argues the court erred in declining his request to instruct the jury on accessory after the fact because "the State's charging murder by use of the statutory short form includes murder, manslaughter and accessory." Appellant asserts the court's failure to instruct the jury as requested prejudiced him by limiting his convictions to first-degree murder, attempted first-degree murder, and conspiracy to commit first-degree murder. The State counters the court did not err because the statutory short form for murder does not include accessory after the fact.

To be sure, "[a] 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 is fairly covered by instructions actually given." *Lansdowne v. State*, 287 Md. 232, 239 (1980). "Where a particular charge is not before the court, 'it [i]s not incumbent on the judge to give an instruction under Md. Rule 4-235(c).'" *Ball v. State*, 347 Md. 156, 190 (1997) (quoting *Dean v. State*, 325 Md. 230, 240 (1992)).

Appellant contends that accessory after the fact is included in the statutory short-indictment form for murder, and he relies on *State v. Hawkins,* 326 Md. 270 (1992) and *Dishman v. State,* 352 Md. 279 (1998). In *Hawkins*, the defendant was convicted by a jury of first-degree felony murder and of being an accessory after the fact. His indictment included premeditated murder and accessory after the fact counts. The Court of Appeals, in examining the common law distinctions between a principal and an accessory after the

fact, held that "an element of the common law crime of accessory after the fact is that the accessory must not himself be guilty of the substantive felony as a principal." *Hawkins*, 326 Md. at 285. As a result, the convictions on both counts were legally inconsistent. The Court then determined that, in the interest of justice, a change in the common law was necessary and held that "although a verdict of guilty of being an accessory after the fact may stand with a verdict of guilty of the substantive offense when the evidence is sufficient to sustain them, a separate sentence may not be imposed on the conviction of the crime of accessory after the fact." *Id.* at 294.

In *Dishman*, a first-degree murder and robbery case, the Court of Appeals examined whether the defendant's indictment included a charge of manslaughter and whether the trial court correctly refused a request for jury instructions on manslaughter, reckless endangerment, assault, and battery. 352 Md. at 283. The defendant was indicted with the statutory short form for murder, utilizing the terms "deliberately" and "premeditated." *Id*. at 287. This Court held that as a result, the indictment only charged murder. *Id*. The Court of Appeals concluded otherwise, holding that our decision was based on "technical quibble" that the short form of the indictment was meant to eliminate. *Id*. at 303. In the opinion, the Court of Appeals did not examine any issues related to accessoryship as none were presented in the case. The Court did state:

> Although we do not address accessoryship in this appeal, the same analysis applies to the charge of being an accessory to murder. Section 616 explicitly applies to "being an accessory" to murder or manslaughter, and we have so held. *See Williamson*, *supra* (observing that § 616 relaxed the common law charging requirements and holding that defendant could be found guilty of first degree murder if he was an accessory before the fact). Therefore, we

> conclude that Petitioner was charged not just with first degree but also with second degree murder, manslaughter, and with being an accessory to murder.

Id. at 290.

In *Tharp v. State*, the defendant was convicted of second-degree murder and robbery with a dangerous weapon. He argued, on appeal, that, under *Dishman*, the trial court erred in refusing to instruct the jury as to accessory after the fact because the State charged him under the statutory short form for murder. We disagreed, holding that the *Dishman* Court "declined to address the accessory after the fact issue, (and its opinion) does not establish that the short form indictment includes an accessory after the fact charge." 129 Md. App. at 332.

Appellant asserts that *Tharp* should be overruled because it relies on "pre-*Hawkins* law," citing *Osborne* and *Williamson*, which treat accessoryship after the fact as a separate offense. *Osborne v. State*, 304 Md. 323 (1985); *State v. Williamson,* 282 Md. 100 (1978). In *Osborne*, where the defendant had been charged with accessory after the fact to murder, the Court determined that "the punishment for accessories after the fact must be determined by reference to Art. 27, § 626, which limits imprisonment to a maximum sentence of five years." 304 Md. at 337. The *Osborne* Court reasoned:

> Though it is clear that one who assists or is accessory to the principal in the commission of the crime is subject to the same punishment as the principal, an accessory after the fact does not fall into this category because he does not assist in the crime's commission. His assistance consists of a post facto act which is in the nature of an obstruction of justice. The presence of the words "aider, abettor and counsellors" in the pre-1978 enactments does not alter this interpretation; indeed, these words strengthen the conclusion that the [first-degree] murder punishment provision does not apply to accessories after the fact.

Id. at 332. In *Williamson*, the Court held that the use of the statutory short form for murder was sufficient to charge a defendant with being an accessory before the fact. 282 Md. at 110. The Court stated that the distinction between accessories before the fact and principals was "illusory" and that it was "no longer necessary to make such distinctions in an indictment." *Id.*

In our view, *Tharp* addresses this case's precise issue regarding an accessory after the fact. Appellant's arguments are premised on case law that does not expressly or implicitly hold a contrary view. The *Hawkins* Court did not determine that the statutory short form for murder included accessory after the fact, and the *Dishman* Court declined to address the issue. Neither *Osborne* nor *Williamson* support appellant's position. *Williamson*, as stated, analyzes accessory *before the fact*. *Osborne* clearly distinguishes accessory before the fact and accessory after the fact and determines that the *Williamson* rationale does not apply to the two as "accessoryship after the fact is a distinct offense, separate from the principal crime." 304 Md. at 336. We note also the charge for accessory after the fact must have been brought by the State and generated by the evidence, but here it was not.

Further, "under the doctrine of stare decisis, a court's previous decisions should not be lightly set aside[,]" *Unger v. State*, 427 Md. 383 (2012), and "a court must follow earlier judicial decisions when the same points arise again in litigation." *Sabisch v. Moyer*, 466 Md. 327, 379 n.11 (2019). "Merely arguing that the majority was wrong . . . is not sufficient grounds to abrogate the principles of stare decisis." *DRD Pool Serv., Inc. v. Freed*, 416 Md. 46, 69 (2010). "We have recognized two circumstances when it is

appropriate for this Court to overrule its own precedent. First, this Court may strike down a decision that is, clearly wrong and contrary to established principles . . . . Second, precedent may be overruled when there is a showing that the precedent has been superseded by significant changes in the law or facts." 416 Md. at 64 (internal citations omitted). The present case does not fall under either exception. Accordingly, we find no justification for reexamining *Tharp*. In the case at bar, the trial court properly instructed the jury.

II. The trial court did not err in declining to give curative instructions when the State made comments during his closing argument that defense conceded almost all the issues in the case.

Appellant contends the prosecution's statements in closing argument that the defense "conceded almost all the issues in the case" were improper and had two prejudicial effects: 1) "it was improper commentary on Mr. Blickenstaff's failure to testify, call witnesses and cross-examine witnesses[;]" and 2) "it was a [sic] factually and legally incorrect shifting of the burden of proof, that had the effect of suggesting that because it failed to call witnesses and cross-examine witnesses, the defense conceded, and the State would be relieved of its burden of proof." Appellant argues the prosecutor's statements that "the defense has conceded almost all of those issues . . ." was, "at a minimum, susceptible to the inference by the jury that the lack of evidence put forth by the defense, including his failure to testify, was proof of guilt." Thus, he asserts the prosecutor's arguments "constituted a commentary on the failure of the defense to call witnesses and cross-examine many witnesses."

Appellee contends the remarks were not improper and did not shift the burden of proof. Appellee argues "in light of the defense counsel's opening statement, the prosecutor

accurately used the word “concession” to characterize many of the same facts about which defense counsel had said there was “no dispute.” Appellee points to several statements made by the prosecutor reiterating that the State “shouldered the burden of proof.” Appellee argues that, even if the comments were improper, reversal is not warranted in light of the prosecutor’s statements to the jury that it “shouldered the burden of proof[,]” the judge’s “instruction on the burden of proof and Blickenstaff’s right not to testify,” and defense counsel’s statements in closing argument that “I have conceded nothing . . . .”

Appellant, additionally, asserts the State’s comments in closing argument “were untrue,” because “the defense never conceded that Mr. Blickenstaff ‘stalked’ anyone.” Responsively, appellee contends appellant’s “sole objection” was regarding appellee’s statements about concessions. Appellant asserts in his reply brief that “the accuracy of all the issues the State contended the defense conceded,” were challenged, when, at the bench conference, appellant “adamantly stated that he had not concede [sic] the case and said, ‘I’d ask the [c]ourt to instruct the jury that defense has not conceded anything.’”

“We have repeatedly held that pursuant to Rule 8-131(a), a defendant must object during closing argument to a prosecutor’s improper statements to preserve the issue for appeal.” *Shelton v. State*, 207 Md. App. 363, 385 (2012). Here, appellant did not specifically object to the State’s comments during closing argument as being untrue. Appellant also did not timely raise an objection, but rather did so after the State’s closing argument. Counsel acknowledged the untimeliness, stating “Your Honor, I object. *I should have objected right at the outset* when the prosecutor . . . said I have conceded the

case. I have done no such thing." Therefore, assuming arguendo, the issue was properly preserved, we hold, nevertheless, reversal is not required.

"[T]he Fifth Amendment to the United States Constitution and Article 22 of the Maryland Declaration of Rights provide a defendant with the right not to have the prosecutor comment on his decision not to testify." *Harriston v. State*, 246 Md. App. at 372. We have explained that "this constitutional right may be implicated by a prosecutor's attacks on a lack of evidence provided by the defense[.]" *Id*. at 373. "Burden-shifting claims, made in response to prosecutorial comments on a lack of evidence supporting the defense, are borne out of the defendant's constitutional right to refrain from testifying." *Harriston v. State*, 246 Md. App. at 372 (citing *Molina v. State*, 244 Md. App. 67, 174 (2019)). Notwithstanding, we have stated:

> The State's comment on the defense's failure to produce evidence, however, will not always amount to impermissible burden-shifting. For instance . . . the State may "argue or comment that the unexplained possession of recently stolen goods permits the inference that the possessor was the thief." In fact, the State can even request that the court instruct the jury that such an inference is permissible. This is because a factual inference in the State's favor, left unrebutted by the defense, does not shift to the defendant a burden either of persuasion or of going forward with evidence.
>
> But the State may not exceed the bounds of permissibly commenting on the absence of evidence by commenting, instead, *directly on the defendant's failure to testify*.

Id. (citing *Molina v. State*, 244 Md. App. at 174–75 (2019)). "A prosecutor should not be precluded from making *fair comment* on the entire evidence; not every neutral or indirect reference that the State makes which implicitly refers to a defendant's silence is improper comment." 246 Md. App. at 375 (emphasis added). Because "a burden-shifting claim is

an allegation of a violated constitutional right, our review is without deference to the circuit court." *Harriston v. State*, 246 Md. App. 367, 372 (2020), *cert. denied sub nom. Harriston v. State*, 471 Md. 77 (2020).

In opening statements, appellant's counsel listed several facts as not in dispute: "Eddie Ragland being killed by being shot[;]" "Jason Carter pulled that trigger six times[;]" "Jason Carter hit the intended target[;]" "Jaseye was in the car next to Eddie Ragland[;]" and "there was an infant in the backseat as well who . . .was not hurt. And there were two women . . . who were in the front seat of that car . . . Jason Carter endangered the people in that car, including that baby." Appellant's counsel also commented "It may surprise you all that we agree with much of what the evidence is in this case."

During closing argument, the prosecution stated:

> But ultimately the defense has conceded almost all of the those issues that Jason Carter and the Defendant went to Noland Village and stalked somebody they believed was, was a kid named Dalvin, skinny kid name Dalvin, and ended up killing Eddie Ragland instead. And the [sic] shot Jaseye Stephens. Endangered a baby. And scared two innocent women half to death. And that's illegal. That it's [sic] wrong. That it's first degree murder because of the lying in wait aspect of it. Because of the premeditated aspect of it. And that no way the Defendant can escape his knowledge and his pre-knowledge of this.

Responsively, in appellant's closing argument, counsel stated:

> Please don't —so in the closing argument that I intended to give before I was disparaged and insulted of conceding something, the closing argument that I was intending to give was to tell you please, please do not mistake my collegiality, my amenability to letting this case come in rather than keeping you all here for five days or six days, please do not mistake that for conceding a damn thing, other than Mr. Blickenstaff is guilty of reckless endangerment.

In his rebuttal closing argument, the prosecutor stated:

> The concessions that I pointed out to you are exactly what [defense counsel] conceded, and appropriately so. And I applaud him for it; I don't criticize him for it; I don't, you know, he doesn't have to take umbrage about it. Everybody knows that Jason Carter fired these shots. When I say everybody knows that —Everybody in this room because everybody agrees that he fired the shots and everybody agrees that Defendant drove the car, including Defendant. *Those are just facts. The part that wasn't conceded was his knowledge and his intent.*

In analyzing this record, we hold the prosecutor's statements were "fair comment" and did not improperly shift the burden of proof to the defense. The prosecution did not comment "directly on the defendant's failure to testify" or to call witnesses, nor did he imply that. To the extent, the statements were not factually correct, the jurors had been instructed to rely on their own memories regarding the facts.

Even if the comments were improper, they do not warrant reversal as the judge properly instructed the jury regarding the burden of proof and the defendant's right not to testify; the prosecutor emphasized that the State had the burden of proof, and there were clarifications made about the "concessions" by both the defense and prosecution. "When assessing whether reversible error occurs when improper statements are made during closing arguments, a reviewing court may consider several factors, including the severity of the remarks, the measure taken to cure any potential prejudice, and the weight of the evidence against the accused." *Shelton*, 207 Md. App. at 387. Here, any potential prejudice was cured by the actions and statements of the judge as well as the attorneys.

In *Poole v. State*, the Court of Appeals examined whether the prosecutor "improperly argu[ed] that the appellant's counsel had conceded the appellant's guilt." 295 Md. 167, 184–85 (1983). During the State's rebuttal argument, the prosecutor stated:

> One other, very, very interesting remark that Mr. McCarthy said that I can't let, cannot avoid calling to your attention. And I never have heard it quite said before. He says my client is guilty or not guilty rather of this crime. He did not commit this crime, but if you believe he did commit this crime, conceding that—Conceding his guilt, not—But assuming you do find him guilty—

Id. at 184. The Court of Appeals noted that "the prosecutor corrected himself and explained that he meant 'conceding that [the jury] might find Mr. Poole guilty of the charges in this case . . . .'" *Id.* at 185. The Court stated that "'[t]he prosecutor's unfortunate use of the term "conceding" was *more than adequately remedied by [the prosecutor's] later comments,' and the instruction by the trial judge*." *Id.* (alteration in original) (citation omitted).

Here, we also find that the prosecutor's statements were remedied in the same manner. We find no error.

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