Circuit Court for Baltimore City
Case Nos. 105348022, 23

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 606

September Term, 2018

DARRYL EDMOND GREEN

v.

STATE OF MARYLAND

Nazarian,
Friedman,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: January 29, 2020

On July 5, 2007, a jury in the Circuit Court for Baltimore City convicted Darryl E. Green of the murder of his girlfriend, Vanessa Price, and Ms. Price's sixteen-year-old daughter, Bianca Price. Ms. Price and her daughter were killed on June 17, 1992, but Mr. Green was not arrested until 2005, when he was found in Washington, D.C. He had been living there under several assumed names for the preceding thirteen years. We affirmed Mr. Green's convictions on direct appeal.

This appeal grows out of Mr. Green's petition for postconviction relief, which the circuit court denied in all respects except one. The court granted Mr. Green the right to file a belated direct appeal raising a single question: whether, under *Cruz v. State*, 407 Md. 202 (2009), the trial court erred in denying Mr. Green's motion for mistrial after the court instructed the jury *sua sponte*, after closing arguments, that the police investigation and law enforcement techniques were "not [their] concern." We hold that the trial court did not err and affirm.

I. BACKGROUND

A. Procedural History

Mr. Green's trial lasted a total of four days, and on July 5, 2007, the jury found him guilty of all charges.[1] The court imposed two consecutive life sentences for the first-degree murders of Ms. Price and Bianca, two consecutive terms of twenty years for use of a handgun in each murder, and a concurrent three-year term for carrying a handgun. This

[1] Mr. Green's convictions followed a second trial. The court declared a mistrial on February 2, 2007, after the jurors in his first trial declared themselves hopelessly deadlocked.

Court affirmed his convictions and sentences on direct appeal, except that we vacated the sentences for carrying a handgun. *Darryl Green v. State of Maryland*, No. 1190, Sept. Term, 2007 (Md. App. Feb. 20, 2009). One of the questions Mr. Green raised on appeal was whether the trial court had "improperly instruct[ed] the jury, after defense counsel's closing argument, that the police investigation and law enforcement techniques 'are simply not your concern'?" *Id.* at 2. We held that Mr. Green's challenge to that instruction was not preserved because the objection he raised at trial stated a different ground. Mr. Green argued in his first appeal "that the trial court 'usurped' the jur[y's] exclusive fact-finding role when it instructed the jury, after defense counsel's closing argument, that the investigation and techniques of the police were not their concern," whereas at trial he argued that the instruction had been "given in isolation" and was "given after argument." We found that Mr. Green waived the argument that the instruction "usurped" the exclusive fact-finding role of the jury.

Mr. Green filed a petition for writ of certiorari in the Court of Appeals, which remanded the case for further consideration on one issue in light of *Diggs v. State*, 409 Md. 260 (2009). On remand, we again affirmed Mr. Green's convictions. *Darryl Green v. State of Maryland*, No. 1190, Sept. Term, 2007 (Md. App. July 29, 2011). The Court of Appeals denied Mr. Green's subsequent petition for writ of certiorari on November 23, 2011.

On July 3, 2017, Mr. Green filed a petition for post-conviction relief. The petition, which he amended, raised numerous issues, including the question at issue here. The circuit court found that Mr. Green's appellate counsel had been constitutionally ineffective

because of, and that Mr. Green was prejudiced by, counsel's failure to raise on direct appeal a preserved, meritorious claim of error: that under the Court of Appeals's reasoning in *Cruz v. State*, 407 Md. 202 (2009), the trial court erred by giving the supplemental instruction after argument. On that narrow ground, the circuit court granted Mr. Green the right to file a belated direct appeal raising this question.

B. Factual Background[2]

Mr. Green and Ms. Price had been involved romantically for ten to fifteen years. They lived together in the home with Bianca and their four-year-old son, who was at the home of a daycare provider at the time of the murder.

Baltimore City police officers discovered the bodies of Ms. Price and Bianca in their home on July 18, 1992. They had both been shot in the head at close range. Expert testimony revealed that they had been dead for 24-36 hours before police discovered them.

The police recovered bullet fragments obtained during the autopsy and concluded that they were .32 caliber bullets. No gun was ever recovered. Detective William Cole, who responded to the scene, testified at trial that after observing the bodies in an upstairs bedroom, he noticed that the air conditioning had been turned off. To Detective Cole's knowledge, no fingerprints or recovered DNA led to any suspect. Records indicated that the DNA from Ms. Price's fingernails was consistent with her own. Records showed that no latent fingerprints were recovered on the front door frame, stereo, glass door, rear door,

[2] A more detailed recitation of the trial testimony can be found in our opinion on Mr. Green's first direct appeal. *Darryl Green v. State of Maryland*, No. 1190, Sept. Term, 2007 (Md. App. Feb. 20, 2009).

or second floor rear bedroom door frame. The air conditioner was not listed among the areas in the home processed for fingerprints. Records showed that some of the fingerprints processed matched those of a neighbor, James Fleming, who had broken into the house out of concern over Ms. Price's and Bianca's well-being. Detective Cole testified that the only suspect developed in the case was Mr. Green. He also testified that some of the materials from the case file had gone, and remained, missing.

The State's evidence against Mr. Green was largely circumstantial. Ms. Price's sister, Sandra Moulden, and friend, Linda Thompson, testified that Ms. Price and Mr. Green were arguing during the morning of the shooting. Ms. Thompson testified that on June 16, 1992, Ms. Price had shown her a duffel bag containing a revolver with a six-inch silver barrel.[3]

Mr. Green's brother, Otis Green, testified that when he met Mr. Green on the day of the murder, Mr. Green was nervous, sweating heavily, and anxious. Otis Green said that Mr. Green claimed he had an important job interview and asked him to pick up his son from daycare that day.

A friend of Bianca's, Tiffany Cobbs, testified that on the morning of June 17, she had seen Mr. Green at the Cold Spring Subway station and that, although it was hot, he was wearing a turtleneck, a sweater, long pants, and his army jacket. She said that she saw Mr. Green carrying an "army" duffel bag and that he claimed to be leaving to visit friends

[3] When Ms. Thompson spoke to the police immediately after the murders, she did not mention having seen a handgun. She explained this omission by claiming that no one had asked her about it.

in New York.

One of Mr. Green's former girlfriends, Linda Young, testified that Mr. Green borrowed her car but never returned it. Another former girlfriend of Mr. Green, Clara Goldston, who lived in North Carolina, testified that Mr. Green visited her on June 17, 1992, also borrowed her car, and also never returned it.

Finally, several witnesses testified that on June 17, 1992, Mr. Green had shaved his beard, which he had worn for years.

Mr. Green testified in his own defense and, among other things:

- confirmed that he and Ms. Price had disagreements in the days leading up to her death, although he denied that they were arguing;
- testified that he left the house shortly after 8:00 a.m. to purchase doughnuts from a nearby store and, when he returned approximately thirty minutes later, found Ms. Price and Bianca dead from gunshot wounds;
- testified that he panicked and feared he would be blamed for the murders;
- confirmed that he borrowed Ms. Young's car, met with his brother, and then left for North Carolina;
- confirmed he borrowed Ms. Goldston's car in North Carolina and then returned to Baltimore, where he learned that he had been charged with the murders; and
- testified that he eventually went to Washington, D.C. and began a new life under assumed names.

Two witnesses, both of whom shared romantic relationships with Mr. Green, testified on his behalf. They testified, among other things, that Mr. Green was never violent.

During closing argument, the State argued that the evidence revealed that Mr. Green and Ms. Price had argued, and the State highlighted the undisputed aspects of Mr. Green's

flight, that he borrowed but didn't return cars from two former girlfriends, and that he met with his brother and asked him to pick up his son.

Mr. Green's defense theory, as articulated during closing argument, was that he did not commit the murders, but that when he discovered the bodies, he panicked and fled out of fear of being blamed. The defense also argued that there was no evidence of violence with Ms. Price in the past, and that it was unlikely that he would have killed Ms. Price and Bianca without a more calculated plan of escape:

> He ran out. He was scared. Lots of people when they get scared run and do stupid things. He got scared. He ran and he did stupid things. For that we apologize, but that doesn't make him guilty. It means he did stupid things. Look at what the rest of his life shows other than that day when he ran and that one day just built into the next fifteen years, college, high school, served his country. When he was on the street on the run in Washington [he] trained for two different careers. No evidence whatsoever that he was ever involved in any other crime in any fashion whatsoever. Sure, he used other people's names. That was part of getting away, but beyond that you see nothing whatsoever.
>
> Did you hear of any violence? No. Do you hear of any violence with Ms. Vanessa Price? No. Do you hear police being called to the house that he pushed her, that he shoved her, that he was mean to her in any physical sort of way at all? No. People don't reach -- he then would have been forty-four years old. People don't reach forty-four years of age in our experience as people and not do something that would show what kind of a man he was. Not have some kind of a police call to that house. Not have a relative saying yeah I saw him, you know, push her to the ground.
>
> What we have to show as badness is there was some kind of words between he and Vanessa Price. What were they having words about? His leaving the house. We don't know. We know there were raised voices. I think it could have been talking about anything in the entire world or nothing. It is so vague, so

> undefined, that I would submit to you it's not really worthy of a whole lot.
>
> Yeah, there were words according to the witnesses, but we don't know about what, for what, or anything else. The circumstances of that case, those two ladies, and what I'm going to say to you, were executed. One was shot in the head twice, one was shot in the head three times. They lay where they were shot. They were executed.
>
> If he were going to do a killing and if he were going to execute somebody, this isn't a crime where two people are yelling and screaming at each other and dishes are flying and pictures [sic] frames are flying and one of them grabs a knife or a gun and shoots and says oh my God. This is cold. It's cold. It's real cold. And whoever did it did it, not a crime of passion, but shot those ladies in the head and they were found where they lay.
>
> If he was going to kill her where that would come from? Who knows. I mean he turns from Dr. Jenkyl [sic] or Mr. Hyde, whichever is which, into the other one. But if you're going to kill her, wouldn't he plan something that gave him an out? Why in God's name would he set himself up so badly that his worst fear, the police are going to point to me, happens, boom it happens.
>
> Why would he put himself in the position with Bianca coming back? He treated her well. Even Sandra Moulden, who dislikes him now and that's obvious, says he treated her like a real father. He loved the girl and he had no man/woman fights going on with her. Obviously, she's a kid.
>
> ***
>
> I mean, it wasn't a killing during a fight. Look at it. Look at those pictures. They are horrible but look at them. It wasn't a killing during a fight. It was cold. It was something done that was planned. He didn't plan anything. He didn't -- did he plan an escape? Did he plan to get away? No. I mean, he was hustling around trying to put things together, trying to get out of town, borrowing cars, stealing them from girlfriends, not returning them et cetera, et cetera.
>
> No plans, nothing whatsoever. . . .

The defense also argued that the police investigation was inadequate, particularly in

terms of collecting fingerprint and DNA evidence and in searching for other possible suspects. For example, during closing argument, counsel argued that the case against Mr. Green was entirely circumstantial and that there was "no fingerprint evidence or gun evidence or DNA evidence":

> Circumstantial evidence can be complex. It can be difficult and it can have many sides, and this one does and you've got to look at it, because that's what this is a circumstantial case.
>
> The ladies were alive. The ladies are dead. He was there and he was gone. Nobody saw it. Nobody knows. There's no fingerprint evidence or gun evidence or DNA evidence or anything you can wrap your arms around and feel good about. You've got it and that's all that there is.

Later in closing argument, defense counsel called the investigation more directly into question and suggested that the police failed to even look for the murder weapon or other suspects:

> Did the police investigate this case in any real form? Did they do anything whatsoever that makes you feel like they did anything but point to him? No. The killing took place on the 17th. The body was discovered on the 18th. It was autopsied. You can see the autopsy report on the 19th which was a Friday. The 20th was a Saturday. The 21st was Sunday. By the 23rd, which is Tuesday, he's been charged. The arrest warrant is out for him.
>
> Did the police do anything at all except wait for the autopsy to come back and then swear out a statement of charges? The answer is obvious and you've heard it. No, they didn't. I heard no evidence of anybody looking for fingerprints in that bedroom. Nobody tested things like the air conditioner, like any kind of other heating controls, like door knobs, like door sides, bed rails, anything at all. Absolutely no investigation was done in this case.
>
> Did anybody look at what we've at least heard inferences as to other boyfriends to Ms. Bianca Price or Vanessa Price had?

> Did anybody talk to them? Did anybody at least check them out? Did anybody check out her background? I'm not going to sit here and speak ill of the dead, but I mean did she owe money? Did she have – did she get on anybody's bad side? Did they look? Did they pick up a rock? Did they open a door? Did they look any place?
>
> Detective Cole said no they didn't. I mean, they shrugged their shoulders and said it has to be him and swore out an arrest warrant. The room wasn't looked at for prints. No weapon was ever found. Nobody – did anybody canvas the neighborhood? Knock on doors. Hello, Mrs. Jones, there's been a horrible thing two doors down. Did you see anything unusual this morning? Did you hear anything unusual? What did we hear? We hear there's a pipe that's broken that's being fixed. I assume the reason we've heard about that is because that would give noise to cover a gunshot.
>
> Well, if anybody can time when Baltimore City crews are working and not working and making noise and not making noise God bless them, but it would be an impossibility as far as I can see. Did they look in sewers for a gun? Did they do anything – did they even look in that house for the gun? I mean, I heard no evidence that the house was turned. That they went in and looked everywhere looking for the weapon.
>
> I heard no evidence of any fingerprints search except for the back door. You've got the records. I mean that moment when he came back and he saw those ladies in that room dead he panicked and said they're going to charge me, they're going to think it's me, and they did. They absolutely positively brought home his worst nightmare. He ran.
>
> The witnesses, I think we have to take a look at some of the things that the witnesses testified to and wonder about them. I can't, and I'm not going to point fingers, but this man is on trial for two murders and we, unlike the police, have to look at everything.

Later, counsel again questioned the investigation and argued that Mr. Green fled for fear of being caught:

> So what we have is a guy who has never exhibited a behavior like this before. We have the police who has not conducted an

> investigation. We have witnesses who have shown us a great deal of suspicion. That we have on one side. On the other side we have the man ran away. And what did he do when he ran away? He went to school and he became a certified medical assistant. He went to school and became a paramedic, he probably sees way too many women in his life and probably romances way too many women in his life, but he's not on trial for that.

And as the argument wrapped up, defense counsel again questioned the police's diligence in searching for fingerprints, for the murder weapon, and for other suspects, and argued that the police had simply "made up their minds" that the perpetrator was Mr. Green:

> Detective Cole [] said no shell casings found. So if it was an automatic whoever did it took time to pick them up off the floor, put them in their pocket or whatever, and take them out. Detective Cole told us that no prints in that room were submitted. Detective Cole told us that nobody else was investigated in this case. Detective Cole told us that on June the 23rd the warrant was issued. Was anything done after that? Of course not. The file was closed and sat there until he was arrested in November of '05.
>
> Because he ran away, or because he was the one who most likely was accessible, the police jumped to a conclusion. They didn't look under the table for a bill. They didn't ask to find out, at least investigate if anybody was doing anything that could be considered suspicious. They didn't talk to old boyfriends. They didn't talk to neighbors. They didn't scour the neighborhood.
>
> ***
>
> I simply would submit to you that Linda Thompson's testimony is absolutely incredible. The police did not do their job. They did not investigate this case. They did not work it whatsoever. They made up their minds and issued an arrest warrant for him and that was that.

In rebuttal, the State argued that the police had investigated the case adequately. The State pointed out that the police did process some of the fingerprints and linked them to the

neighbor, Mr. Fleming, and that they talked with several witnesses, including Ms. Goldston in North Carolina.

Immediately after the State's rebuttal, the court, on its own initiative, gave the jury two supplemental instructions. The first is the one at issue in this case:

> Ladies and gentlemen, I'm going to give you a couple of final instructions and then you'll go with my law clerk []. Just two here. The lawyers have raised some questions about the police investigation in this case. You may consider these facts in deciding whether the State has met its burden of proof because you should look to all of the evidence or lack of evidence in deciding whether the defendant is guilty or not guilty.
>
> However, there is no requirement that the police conduct the investigation in any particular way. We are not here to judge police investigation, law enforcement or investigative techniques are simply not your concern [sic]. Your concern is whether the evidence which was admitted proved the defendant's guilt beyond a reasonable doubt.

The second *sua sponte* instruction clarified the court's earlier description of circumstantial evidence:

> The second point I wish to address to your concern is I think there may have been some misunderstanding when I described circumstantial evidence to you and I gave you my snow example.[4] [Defense counsel] was quite correct that that is an

[4] In giving the instruction on circumstantial evidence, the trial court seemed to be referring to a portion of the defense's closing argument in which counsel pointed out the limitations of circumstantial evidence:

> You've heard the judge and you've heard [the State] talk about circumstantial evidence. You've heard the judge give and [the State] refer to an example about snow. I'm going to be real blunt. I think the judge was unfair with that example. I think [the State] was unfair with that example. I think it is way too simplistic to put onto [sic] this case. After all, where does snow come from but the sky. If you go to bed and there's no snow and you come out and there's snow, that's it. I mean, unless

> example of a clear place where you would draw the inference from snow on the ground that it had snowed the night before.
>
> I am not, not suggesting to you that the inferences, if they are to be drawn in this case are that clear or not that clear. That's up to you. That's your job. You may find that the inferences are that clear and you may find that they are the exact opposite, not clear at all.

After the jury was dismissed, Mr. Green moved for a mistrial on four grounds, one of which was the *sua sponte* supplemental instruction about the police investigation. Counsel argued that the instruction "was given by itself. It was given in isolation and it was given after argument." The court denied the motion, stating that it is "a perfectly proper instruction" and that "it didn't become relevant in the case until after the argument":

> [DEFENSE COUNSEL]: Your Honor, I'm going to move for a mistrial on four grounds.
>
> THE COURT: Four what?
>
> [DEFENSE COUNSEL]: On four grounds, and I think the Court has shown to the jury its position that the defendant is

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> you live on a ski slope with snow machines, I mean there's no other possible explanation.
>
> No case is that simple and this case certainly is not. I mean, I could sit here and reel off a hundred examples that are more complex. What if you go to a magic show and you see a magician who shows you an empty hat, and empty top hat, and then he pulls out a rabbit. Are you to conclude that that's magic? That the rabbit came from nowhere? Of course not. We know it's a trick.
>
> If you leave your house and you leave a ten dollar bill on the table and only Bill is home and you come back and the money is gone, are you to conclude it's Bill, or are you to ask some questions. Are you to look on the floor? Maybe some wind came and blew it on the floor. Maybe Bill had some company over and maybe they came and went. Until you ask the questions and at least find out, you don't know.

> guilty, and I think it's done so in four ways. One the last instruction you gave which is emphasized because it was given by itself.
>
> THE COURT: What the snow instruction?
>
> [DEFENSE COUNSEL]: No, the instruction on the police investigation.
>
> THE COURT: All right, it's denied as to that. It's a perfectly proper instruction.
>
> [DEFENSE COUNSEL]: I object to it. I object to it because it was given by itself. It was given in isolation and it was given after argument.
>
> THE COURT: No one requested it and it didn't become relevant in the case until after the argument, and the rule on instructions specifically allows the judge to vary the time when he gives the instructions for just this purpose.

We supply additional facts as appropriate below.

II. DISCUSSION

A. The Question Before Us

Identifying the issue to be decided in this case is not a straightforward endeavor. Both Mr. Green and the State identify a single question presented, although each phrases it slightly differently.[5] But both also argue multiple questions in their appellate briefing,

[5] Mr. Green identified the following Question Presented:

> Whether the trial court improperly instructed the jury, after defense counsel's closing argument, that the police investigation and law enforcement techniques "are simply not your concern."

The State rephrased the question as follows:

> To the extent preserved, did the trial court properly exercise its discretion in giving a curative investigative techniques instruction after Green's closing argument and, if the court

including arguments about "anti-CSI effect" jury instructions. To the extent that Mr. Green asks us to find error based on the line of cases addressing the propriety of "anti-CSI effect" jury instructions, we decline the invitation: that is precisely the objection this Court held, in Mr. Green's first direct appeal, had been waived. The sole question before us now is whether the trial court erred, in light of the Court of Appeals's reasoning and holding in *Cruz v. State*, 407 Md. 202 (2009), when it gave *sua sponte* the supplemental instruction regarding the police investigation to the jury after closing arguments, *i.e.*, the instruction stating "We are not here to judge police investigation, law enforcement or investigative techniques are simply not your concern [sic]."

The trial court's jury instruction resembles "anti-CSI effect" instructions that have been challenged in a line of cases beginning with ours in *Evans v. State*, 174 Md. App. 549 (2007). And although the parties recognize that the only issue Mr. Green has been granted leave to appeal now is that the instruction at issue was given in isolation and after oral arguments (the post-conviction court specifically cited *Cruz*), they conflate arguments under *Cruz*, on the one hand, with the anti-CSI effect line of cases on the other. In order to resolve any confusion over what we are *not* deciding, we delve a little into considerations that appellate courts undertake when evaluating the propriety of anti-CSI effect jury instructions.

In *Evans*, we held that the trial court did not err in giving the jury the following

abused its discretion, was any error harmless?

instruction just *before* closing arguments:

> During this trial, you have heard testimony of witnesses and may hear argument of counsel that the State did not utilize a specific investigative technique or scientific test. You may consider these facts in deciding whether the State has met its burden of proof. You should consider all of the evidence or lack of evidence in deciding whether a defendant is guilty. However, **I instruct you that there is no legal requirement that the State utilize any specific investigative technique or scientific test to prove its case**. Your responsibility as jurors is to determine whether the State has proven, based on the evidence, the defendants' guilt beyond a reasonable doubt.

Evans, 174 Md. App. at 562 (emphasis added). The defense in *Evans* had argued that the jury should find the defendant not guilty because the police had failed to use audio or video surveillance equipment during the alleged drug transaction to corroborate the testimony of the officers. *Id.* at 563–64. But we held that the instruction appropriate as a response to defense counsel's "robust and vehement" closing arguments and because the instruction explained correctly that the State did not have the burden to produce other types of evidence, so long as the evidence it did produce supported a finding of guilt beyond a reasonable doubt:

> The jury instruction given was a correct statement of the law, was applicable to the facts in the case and was not fairly covered by other instructions given. The robust and vehement closing arguments of counsel regarding the failure to employ audio or video surveillance equipment and the lack of any other investigative or scientific evidence produced by the State warranted giving the instruction. Moreover, it was consistent with Maryland Rule 4-325(c), *i.e.*, it explained to the jury that, contrary to counsel's argument, there is no requirement on the part of the State to produce other types of evidence, as long as the evidence adduced supports a finding of guilt beyond a reasonable doubt.

Id. at 570.

Since *Evans*, we and the Court of Appeals have developed further (and arguably strengthened) the standard for evaluating anti-CSI effect instructions. They are appropriate only as curative instructions, and only where defense counsel has made a misstatement of the law or has otherwise overreached in closing argument. *Taylor v. State*, 236 Md. App. 397, 430 (2018) ("For a potentially valid CSI-effect message to be delivered, there must be, at minimum, some form of relevant misstatement(s) of law or over-reaching conduct by counsel before the court may issue an appropriate and curative CSI effect jury instruction, or analogous anticipatory grounds to ask a *voir dire* question." (*citing Hall v. State*, 437 Md. 534, 540–41 (2014), *Robinson v. State*, 436 Md. 560, 580 (2014), *Stabb v. State*, 423 Md. 454, 473 (2011), and *Atkins v. State*, 421 Md. 434, 453 (2011)). In *Taylor*, for example, we held that the trial court erred in giving an anti-CSI instruction because the defendant never misstated the law or the State's burden, the court gave the supplemental instruction preemptively, and the court did not contemporaneously instruct the jury that its responsibility was to determine the defendant's guilt beyond a reasonable doubt.[6] 236 Md. App. at 439–40.

[6] We went on to hold that the error in giving the instruction was harmless because the State relied primarily on eyewitness identification—not on forensic evidence—and "fingerprint or DNA evidence, . . . 'would have bolstered [the victim's] testimony, but would have been cumulative and thus not essential in the State's overall case.'" *Taylor*, 236 Md. App. at 444 (*quoting State v. Armstead*, 235 Md. App. at 434–35). Put another way, in that instance the lack of scientific evidence was not critically important to the State's case. *Armstead*, 235 Md. App. at 426 (*citing Evans*, 174 Md. App. at 570 and *Atkins*, 421 Md. at 450); *accord Hall*, 437 Md. at 540–41.

Importantly, anti-CSI effect instructions are inappropriate when they "invade[] the province of the jury and constitute[] commentary on the weight of the evidence . . . ," which deprives a defendant of a fair trial. *Atkins*, 421 Md. at 453. Even if the instruction stated the law accurately, "the 'high and authoritative' position of the trial judge necessitates that the judge be more vigilant and careful in refraining from commenting on inferences to be drawn by the jury." *Id.*; *accord Stabb*, 423 Md. at 472 (holding that anti-CSI effect instruction was improper because "the trial judge injected the pertinent instruction into the jury's calculus" and that the instruction therefore "had more 'force and effect than if merely presented by counsel,' and could have influenced impermissibly the drawing by the jury of inferences regarding the absence of physical evidence") (*quoting Cost v. State*, 417 Md. 360, 381 (2010)).

As we observed in Mr. Green's first direct appeal, his appellate counsel challenged the instruction for precisely the reason identified in anti-CSI effect cases, *i.e.*, because "the trial court 'usurped' the [jury's] exclusive fact-finding role when it instructed the jury, after defense counsel's closing argument, that the investigation and techniques of the police were not their concern." *Darryl Green v. State of Maryland*, No. 1190, Sept. Term, 2007, slip op. at 27 (Md. App. July 29, 2011). We held that that argument was waived, and his successful application for post-conviction relief did not yield another bite at that particular apple. So at this point we will not—because we cannot—consider any arguments grounded in the reasoning in the anti-CSI effect line of cases, including his argument that the supplemental instruction "was not generated by the evidence or arguments of counsel."

Instead, we evaluate the preserved challenge the circuit court granted him the right to pursue, *i.e.*, that the instruction was "was given in isolation and it was given after argument." The circuit court found the objection to be a valid challenge and that Mr. Green was prejudiced by counsel's failure to raise it:

> In this case, the Trial Court, much like the Trial Court in *Cruz*, issued a jury instruction after the parties delivered closing arguments. Also as in *Cruz*, the instruction had the effect of instructing the jury that Trial Counsel's arguments were unsound. Had [Mr. Green] known the Trial Court would deliver the instruction, [Mr. Green] may have delivered a closing argument that did not focus on the performance of the police investigation. Because the deficient act by Appellate counsel [led] to the Court of Special Appeals finding that Petitioner had waived this issue, the deficient act by Appellate Counsel did prejudice [Mr. Green].

And the circuit court granted Mr. Green a belated direct appeal to challenge the timing of the instruction:

> Petitioner's fifth allegation of error succeeds and Petitioner is entitled to the right to file a belated appeal on the grounds preserved by Trial Counsel; that is: "Whether the trial court improperly instructed the jury, after defense counsel's closing argument, that the police investigation and law enforcement techniques 'are simply not your concern'."

B. The Circuit Court Did Not Abuse Its Discretion In Giving The Supplemental Instruction Because Mr. Green Was Not Prejudiced.

Maryland Rule 4-325 governs when and how trial courts give jury instructions. Normally, a trial court instructs the jury *before* closing arguments, but it has the discretion to give supplemental instructions, when appropriate, including after arguments:

> (a) When given. The court shall give instructions to the jury at the conclusion of all the evidence and before closing arguments and may supplement them at a later time when appropriate. In

> its discretion the court may also give opening and interim instructions.

We review the trial court's decision to give a supplemental jury instruction for abuse of discretion. *Stabb*, 423 Md. at 465; *Cruz*, 407 Md. at 210. So too the court's decision to deny a motion for mistrial. *Williams v. State*, 216 Md. App. 235, 257 (2014); *Rutherford v. State*, 160 Md. App. 311, 323 (2004) ("The grant of a mistrial is an extreme sanction that courts generally resort to only when no other remedy will suffice to cure the prejudice." (cleaned up)). An abuse of discretion occurs where no reasonable person would take the view adopted by the trial court, or when the court acts without reference to any guiding rules or principles." *Hajireen v. State*, 203 Md. App. 537, 559 (2012) (cleaned up).

Ordinarily, when we review the propriety of jury instructions, whether general or supplemental, we consider: (1) whether the 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 elsewhere in the jury instructions. *Stabb*, 423 Md. at 465; *Sweeney v. State*, 242 Md. App. 160, 173–74 (2019). But the standard for reviewing supplemental instructions doesn't always involve that analysis, in large part because the "context and timing" of supplemental instructions create "a particular potential for prejudice." *Sweeney*, 242 Md. App. at 177. When supplemental jury instructions prejudice the defense unfairly, by virtue of their timing and context, they may be improper even if they meet all three of the standard requirements. *State v. Bircher*, 446 Md. 458, 472–73 (2016); *Cruz*, 407 Md. at 204, 220; *see also Bircher*, 446 Md. at 484 (Watts, J., dissenting).

Supplemental instructions almost always arise in response to a jury question (as in

Cruz), a context that presents slightly different considerations than here, where the court gave the instruction *sua sponte* immediately after closing arguments. Cases involving jury questions consider whether the trial court responded "in a way that clarifies the confusion evidenced by the query." *Sweeney*, 242 Md. App. at 173 (*quoting State v. Baby*, 404 Md. 220, 263 (2008)). In this case, there was no confusion to resolve, at least none expressed by the jury. But the parties did not cite, and we did not find, any Maryland case finding error from a supplemental *sua sponte* instruction (given either before or after closing arguments) because of its unfair prejudicial effect on the defendant's case. *Cf. United States v. Burgess*, 691 F.2d 1146, 1156–57 (4th Cir. 1982) (**no** prejudice to defendant resulting from trial court's *sua sponte* modification of instruction before closing argument). So despite the difference in posture, the *Cruz* analysis is the closest analog. We also look briefly at another Court of Appeals decision addressing a similar issue, *Bircher*, 446 Md. at 458, and at cases from other jurisdictions upon which the Court of Appeals relied in *Cruz* and *Bircher*.

In *Cruz*, the Court of Appeals held, as a matter of first impression, that a supplemental instruction given in response to a jury question caused unfair prejudice to the defendant sufficient to warrant reversal. 407 Md. at 204. The Court found that the instruction had been generated fairly by the evidence, but otherwise didn't focus on whether the instruction misstated the law or was covered elsewhere in the instructions. *Id.* Instead, the Court examined "whether the juxtaposition of the supplemental instruction *vis a vis* defense closing arguments was prejudicial . . . ." *Id.* at 212.

A closer examination of *Cruz* elucidates the Court's reasoning. Mr. Cruz had been charged with assault. The defense's theory was that two individuals approached Mr. Cruz threateningly, so he grabbed a baseball bat from his friend and chased the two away. One of the individuals fell down during the chase, but Mr. Cruz testified that he did not hit that individual (or the other) with the bat. *Id.* at 206. The individual testified that Mr. Cruz swung the bat at him several times, after which he jumped back, slipped on the snow, and fell. According to him, Mr. Cruz then struck him with the bat. *Id.* at 205. After the close of evidence, the court and the parties discussed jury instructions, and the State expressly elected to pursue only a battery theory of culpability, not an attempted battery theory. *Id.* at 206.

During deliberations, the jury submitted a note asking for clarification on the definition of "intent." In response, the court instructed the jury on the attempted battery theory of culpability for assault, over defense objection. *Id.* at 208. The Court of Appeals reversed Mr. Cruz's battery conviction, holding that he had been prejudiced unfairly because his defense counsel, in reliance on the State's concession, had conceded (strategically) during oral argument that Mr. Cruz "went after" the victim. *Id.* at 209. Had the defense known before closing that the attempted battery theory was in play, counsel could have tailored the argument accordingly:

> We [] hold that the circuit court abused its discretion in giving the jury a supplemental instruction on attempted battery during the jury's deliberations, because the court at the close of evidence indicated that it would only instruct the jury on battery, the sole theory of second degree assault elected by the State. Cruz relied on this theory in tailoring his closing

> argument and suffered actual prejudice from the supplemental attempted battery instruction.

Id. at 220. The court also observed that further argument, even if requested by the defense, could not have cured the prejudice:

> Even in a supplemental closing argument, defense counsel would not eradicate her earlier concession that Cruz "went after" Meza with bat in hand. With these two words, counsel conceded and emphasized the first two of three elements of attempted battery, an offense counsel thought had been withdrawn from consideration.

Id. at 216.

A similar question was at issue in *State v. Bircher*, a case decided after and relying on *Cruz*. But in *Bircher*, the Court of Appeals came out the other way, holding that the supplemental instruction did not prejudice the defendant. 446 Md. at 479. Even though the supplemental instruction there, as in *Cruz*, introduced a new theory of culpability that the State had not initially pursued (*i.e.*, transferred intent), the Court found that Mr. Bircher's defense counsel had not made any damaging concessions during closing argument *and* had the opportunity to make a supplemental closing argument addressing the new theory of culpability. *Id.*

The Court in *Bircher* reviewed the same group of federal and state cases that it reviewed in *Cruz*.[7] And although those cases all involve supplemental instructions that

[7] Those cases, almost all of which involved a jury instruction that introduced an accomplice or aiding-and-abetting theory of liability into the case, included: *United States v. Gaskins*, 849 F.2d 454 (9th Cir. 1988); *United States v. Horton*, 921 F.2d 540 (4th Cir. 1990); *State v. Ransom*, 785 P.2d 469 (Wash. App. Ct. 1990); *People v. Millsap*, 724 N.E.2d 942 (Ill. 2000). The only case in which the supplemental instruction was neither prompted by a jury question nor introduced an accomplice or aiding-and-abetting theory of liability was

introduced a new theory of culpability, we nevertheless can glean certain general principles from them. In *Bircher*, the Court observed that prejudice from a supplemental instruction depends on a variety of factors, including whether the defense "was unfairly prevented from arguing his or her defense" and whether the judge's instructions "repudiate" or "impair the effectiveness" of the defense's argument:

> The takeaways from *Cruz* and the cases upon which it relied are that a supplemental instruction should not be given if the accused was unfairly prevented from arguing his or her defense to the jury or was substantially misled in formulating and presenting arguments. Factors considered in determining prejudice include: when the change in the instructions is substantial, when the judge's instructions repudiate counsel's argument, or when the judge's instructions impair the effectiveness of the attorney's argument.

446 Md. at 472–73 (cleaned up); *accord Cruz*, 407 Md. at 212 (observing that "[f]ederal courts have considered the propriety of a supplemental instruction on a different theory of culpability in response to a jury question and have concluded that reversal is warranted when the defendant was prejudiced because the instruction undermined the closing

People v. Clark, 556 N.W.2d 820, 827 (Mich. 1996). That case involved a supplemental instruction concerning the standard for involuntary manslaughter—the trial court initially instructed the jury that the state was required to prove that the defendant knew her actions would cause death, but, after closing argument, instructed the jury that the state need only prove that she knew her actions would cause serious injury. The court held that the defendant was prejudiced because "[t]he difference between the levels of proof required to meet the reasonable doubt standard under either theory is [] far from insignificant." *Id.*

Although Mr. Green's trial took place before the Court of Appeals decided *Cruz*, the cases on which the Court of Appeals relied in *Cruz* were all decided well before Mr. Green's trial. In addition, the general principles driving a trial court's discretionary decision to grant or deny a motion for a mistrial have not changed.

argument already given by the defense").

A particularly instructive case among those underlying *Bircher* and *Cruz* is *United States v. Horton*, 921 F.2d 540 (4th Cir. 1990), and it adds context to these broader principles. In *Horton*, a murder case, the United States Court of Appeals for the Fourth Circuit held that there was no prejudice where, despite a new theory of culpability introduced by a supplemental instruction, the defendant had an opportunity to offer additional closing argument. *Id.* at 547–48. In addition, the defendant failed to proffer on appeal any different line of argument he would have pursued in light of the new theory of culpability. *Id.* The court also observed that the defense's arguments would have been the same under either a principal or aiding-and-abetting liability theory—the shift in theories didn't alter, or change the strategy around, his arguments that the sole eyewitness was not credible and that the defendant had not committed the crime. *Id.*; *accord United States v. Lopez*, 590 F.3d 1238, 1253–54 (11th Cir. 2009) (supplemental instruction did not repudiate or impair the effectiveness of defendant's closing arguments and did not prejudice defendant's case—the argument the defendant made on appeal in support of reversal was no different than the argument he made in support of acquittal before the court had given the supplemental instruction); *United States v. Mapp*, 170 F.3d 238, 337 (2d Cir. 1999) (defendant's due process rights not violated where court gave supplemental instruction that arguably changed government's theory of liability because defendant was "silent" as to how his defense would have been different); *United States v. Andrade*, 135 F.3d 104, 110–11 (1st Cir. 1998) (defendant was not prejudiced by court's supplemental

instruction introducing new theory of liability where argument would have been the same under either theory); *United States v. Alexander*, 163 F.3d 426, 429 (7th Cir. 1998) (holding that defendant was not prejudiced by supplemental instruction on definition of constructive possession because his theory of the case—"that he did not possess the gun at all, actually or constructively"—was the same under both theories); *United States v. Gill*, 909 F.2d 274, 280–81 (7th Cir. 1990) (holding that defendant was not prejudiced where defense counsel's closing argument did not rely on initial, incorrect instruction).

Now back to this case. Mr. Green analogizes the supplemental instruction here to the instruction in *Cruz* and argues that "the post-argument instructions shifted the legal footings of otherwise lawful closing arguments and left [him] unable to respond,"[8] and that "[h]ad [he] known the court's intention to deliver an anti-CSI [effect] instruction, even if notified during closing arguments, he could have responded and perhaps rephrased his argument so that it would not appear directly at odds with the court's anti-CSI [effect] instruction." But, critically, Mr. Green does not proffer *how* his argument would have changed. His defense theory was that he was not the perpetrator and that he fled because he panicked out of fear that he would be blamed wrongfully. But he had ample opportunity to argue that theory and did argue it. Moreover, in his own testimony, Mr. Green

[8] Mr. Green also argues that "the supplemental instruction was not fairly generated by the evidence and demonstrated a clear bias against Green's defense." In other words, he argues that defense counsel didn't misstate the law or otherwise overreach in his closing argument. But as we observed above, see p. 17, that argument is a variation of the argument attacking the propriety of the instruction based on the reasoning of the anti-CSI-effect-instruction line of cases.

corroborated much of the timeline of the day of the murders, including his disagreements with Ms. Price in the days leading up to the murders, his flight from Baltimore immediately after the murders, and his living under assumed names for thirteen years in Washington, D.C.

Mr. Green suggests that he would not have emphasized the police investigation as much had he known in advance about the supplemental instruction. But that suggestion does not address prejudice, let alone demonstrate prejudice of the kind or degree in *Cruz*, in which counsel effectively conceded the defendant's liability under the abandoned-then-revived attempted battery theory of culpability. Here, the court's instruction did not inject a previously abandoned theory of culpability into the case, and Mr. Green identifies no analogous concession by his defense counsel. The absence of such a concession was central to the Court of Appeals's finding that the defendant in *Bircher* was not prejudiced, even though a new theory *was* raised by the supplemental instruction. If the instruction in *Bircher*, which injected a theory of culpability not argued by the State, didn't cause prejudice, the instruction here didn't either.

Moreover, the rest of the trial court's contemporaneous supplemental instruction lessened any prejudicial impact to Mr. Green. The court could perhaps have worded more artfully its point that "law enforcement or investigative techniques are simply not your concern." But in the very next sentence, the court put that statement into context—it stated explicitly, and correctly, that the jury must determine "whether the evidence which was admitted proved the defendant's guilt beyond a reasonable doubt." The court also told the

jury that it "may consider" the questions about the adequacy of the police investigation and that it should consider "all of the evidence" and the "lack of evidence" in reaching a verdict. Finally, the trial court acknowledged in its second *sua sponte* instruction that Mr. Green's counsel "was quite correct" that the example of drawing the inference that it snowed from snow on the ground was an example of a strong inference, and that other inferences may not be as strong. The court concluded by stating that the jury's job was to determine whether the inferences to be drawn were "clear" or "not clear at all."

In short, the supplemental instruction stated correctly, and even emphasized, that the State bore the burden to prove Mr. Green's guilt beyond a reasonable doubt and that the jury should consider both the evidence presented and the *lack* thereof. Mr. Green identified no concession by his counsel during closing argument that undermined his defense theory to the point of admitting culpability. Although supplemental instructions can be risky, especially when offered *sua sponte*, the trial court in this case did not abuse its discretion in denying the motion for mistrial on the ground that the supplemental instruction was given in isolation and after argument.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. APPELLANT TO PAY COSTS.

The correction notice for this opinion can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/0606s18cn.pdf