Circuit Court for Baltimore County
Case No. 03-K-17-004365

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 629

September Term, 2019

KEVIN TYRONE GLOVER

v.

STATE OF MARYLAND

Reed,
Wells,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: August 10, 2020

A jury for the Circuit Court for Baltimore County, convicted Kevin Glover ("Appellant") of first-degree murder, conspiracy to commit first-degree murder, use of a firearm in the commission of a crime of violence, and possession of a handgun. The Court sentenced Appellant to a total term of life imprisonment, with all but 120 years suspended. In this appeal, Appellant presents five questions for our review:

I. Was the evidence adduced at trial sufficient to sustain the conviction of conspiracy to commit first-degree murder?

II. Did the trial court abuse its discretion in instructing the jury on flight?

III. Did the trial court err in allowing a police officer to narrate a surveillance video?

IV. Did the trial court err in refusing to grant a mistrial after the jury indicated during deliberations that it was having difficulty reaching a unanimous verdict?

V. Did the trial court err in failing to find a discovery violation after two of the State's witnesses testified as to the contents of surveillance video that defense counsel claimed he did not know had been shown to the witnesses prior to trial?

For the reasons that follow, we hold that the evidence was sufficient to sustain Appellant's conviction of conspiracy to commit first-degree murder; the trial court did not abuse its discretion in instructing the jury on flight; the trial court did not err in permitting a police officer to testify to the contents of a surveillance video; the trial court did not abuse its discretion in refusing to grant a mistrial; and the trial court did not err in refusing to find a discovery violation. Accordingly, we affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On March 17, 2017, at approximately 1:30 a.m., an individual, later identified as Appellant, shot and killed Bernie Slater outside of the Windsor Inn, a bar and restaurant located in Baltimore County.[1] Immediately after the shooting, Appellant got into a nearby vehicle driven by Davon Crowner. A third individual, Brandon Jackson, was also in the vehicle at the time. After Appellant entered the vehicle, Mr. Crowner drove away. Appellant was later arrested and charged.

At trial, the State played a recording of an interview that Mr. Jackson had with the police following the shooting. In that recording, Mr. Jackson stated that, on the night of the shooting, he travelled to the Windsor Inn to meet some friends. After having a few drinks, Mr. Jackson left the bar and got in a nearby vehicle with "David," who was in the driver's seat, and an unidentified female, who was sitting in the rear passenger seat, both of whom had exited the Windsor Inn around the same time as Mr. Jackson. Approximately 20 minutes later, a man unfamiliar to Mr. Jackson exited a nearby Mercedes-Benz and entered the Windsor Inn. Shortly thereafter, the man approached the vehicle where Mr. Jackson was sitting, which remained parked outside of the Windsor Inn, and had a conversation with Mr. Crowner. The man then walked back to the Mercedes-Benz and drove away. Shortly after, the man approached the vehicle again where Mr. Jackson was sitting and asked if Mr. Crowner would take him to his car and then left. Mr. Jackson, who was talking on his cellphone at the time, did not interact with the man. At some point, Mr. Jackson

[1] Appellant does not challenge the sufficiency of the evidence as to his conviction of first-degree murder.

asked Mr. Crowner if they were going to leave, but Mr. Crowner did not respond. According to Mr. Jackson, Mr. Crowner did not "seem like he was in any kind of hurry."

Not long after the man asked for a ride to his car, Mr. Jackson "heard shots." According to Mr. Jackson, Mr. Crowner did not seem surprised by the gunshots. The man to whom Mr. Crowner had spoken then got into the vehicle's backseat, and Mr. Crowner drove away. Mr. Jackson noticed that the individual was "mad about something" and was "blurting out stuff." At one point, the man stated, "Y'all gone stop playing with me." Mr. Jackson was then driven to his girlfriend's house, where he exited the vehicle. Mr. Jackson did not know if the driver ever dropped the individual off back at his car.

The State also played video footage from various surveillance cameras located near the Windsor Inn, which captured the events surrounding the shooting. In that footage, a silver Mercedes-Benz registered to Appellant can be seen stopping in front of the Windsor Inn and then driving away. Appellant is then seen walking toward the Windsor Inn from where the Mercedes had driven.[2] A few minutes later, Appellant approaches a vehicle parked near the Windsor Inn. Inside of that vehicle are two men, a driver, later identified as Davon Crowner, and a passenger, later identified as Brandon Jackson, both of whom had been sitting in Mr. Crowner's parked car for approximately 20 minutes after the two had left the Windsor Inn. Upon approaching the vehicle, Appellant appears to interact with Mr. Crowner. Around that same time, the victim, Bernie Slater, can be seen walking out of the Windsor Inn. A few minutes later, Appellant walks over to the victim, who is sitting in

[2] Appellant does not dispute that he is the individual depicted in the footage.

his parked vehicle, and shoots him. Following the shooting, several bystanders quickly disperse, and Appellant then walks back to Mr. Crowner's vehicle, which had not moved, gets inside, and Mr. Crowner drives away.

The jury ultimately convicted Appellant of first-degree murder, conspiracy to commit first-degree murder, use of a firearm in the commission of a crime of violence, and possession of a handgun. Additional facts are incorporated throughout this opinion.

DISCUSSION

I. Conspiracy to Commit First-Degree Murder

Appellant first contends that the evidence adduced at trial was insufficient to sustain his conviction of conspiracy to commit first-degree murder. He argues that there was no evidence of a pre-crime agreement between him and Mr. Crowner; rather, "the State relied on speculation about [his] presence at Mr. Crowner's vehicle to assume that there was a conspiracy to kill Mr. Slater." He argues that, because "it is impossible for a rational trier of fact to find beyond a reasonable doubt, without engaging in speculation, that there was any agreement to engage in the commission of a crime," his conviction for conspiracy must be reversed.

"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) (citing *State v. Coleman*, 423 Md. 666, 672 (2011)). That 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 eye-witnesses 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) (citations and quotations omitted) (emphasis in original). 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 (citing *Cox v. State*, 421 Md. 630, 657 (2011)). Further, "[w]e 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 (citations omitted).

A conspiracy occurs when two or more persons combine or agree "to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means." *Savage v. State*, 226 Md. App. 166, 174 (2015). "When the object of the conspiracy is the commission of another crime, … the specific intent required for the conspiracy is not only the intent required for the agreement but also, pursuant to that agreement, the intent to assist in some way in causing that crime to be committed." *Mitchell v. State*, 363 Md. 130, 146 (2001). The essence of a criminal conspiracy is the unlawful agreement, and the crime "is complete when the agreement to undertake the illegal act is formed." *Savage*, 226 Md. App. at 174. "The agreement need not be formal or spoken, provided there is a meeting of the minds

reflecting a unity of purpose and design." *Townes v. State*, 314 Md. 71, 75 (1988). "A conspiracy may be shown through circumstantial evidence, from which a common scheme may be inferred." *Hall v. State*, 233 Md. App. 118, 138 (2017).

We hold that a reasonable factfinder could have concluded that Appellant and Mr. Crowner conspired to murder the victim, Bernie Slater. When Mr. Crowner left the Windsor Inn and got in his car on the night of the shooting, he did not drive away, but instead remained parked outside of the Windsor Inn for approximately 20 minutes, much to the chagrin of his passenger, Mr. Jackson, who at some point during the wait expressed confusion as to why they had not left. During that time, Appellant drove to the Windsor Inn, parked and exited his vehicle, and then entered the bar. A few minutes later, Appellant exited the bar, approached Mr. Crowner's vehicle, and had a conversation with him. Appellant then went back to his vehicle and drove away, only to return to Mr. Crowner's vehicle a short time later on foot. Appellant then had another conversation with Mr. Crowner, this time asking for a ride to his vehicle. Around that same time, the victim, Bernie Slater, walked out of the Windsor Inn and entered his parked vehicle. After that, Appellant walked over to the victim's vehicle and shot him. Rather than leave immediately, as many of the bystanders did following the shooting, Mr. Crowner remained parked in the same spot and did not seem surprised by the gunfire. After shooting the victim, Appellant walked back to Mr. Crowner's vehicle and got inside, despite the fact that his own vehicle was parked within walking distance. Once Appellant entered the vehicle, Mr. Crowner

drove away. Mr. Crowner did not immediately drive to Appellant's vehicle, as Appellant had requested, but instead drove his passenger, Mr. Jackson, home first.

From these facts, a reasonable inference could be made that Mr. Crowner agreed to wait outside of the Windsor Inn while Appellant shot the victim and to drive Appellant away from the scene following the shooting. In short, Appellant's claim that there was no evidence of a pre-crime agreement is unsupported by the record; rather, there was ample evidence, most notably Appellant's and Mr. Crowner's concerted actions prior to and then following the shooting, from which a rational factfinder could have concluded that the two had conspired, prior to the commission of the crime, to shoot the victim. *See Jones v. State*, 132 Md. App. 657, 660 (2000) ("If two or more persons act in what appears to be a concerted way to perpetrate a crime, we may … infer a prior agreement by them to act in such a way."). Accordingly, the evidence was sufficient to sustain Appellant's conviction of conspiracy to commit first-degree murder.

II. Jury Instruction on Flight

Appellant's next claim of error involves the trial court's decision to propound a "flight" instruction to the jury. At trial, the State requested that the court, as part of its general instructions to the jury prior to closing argument, instruct the jury that Appellant's act of fleeing the scene of the crime following the shooting showed consciousness of guilt. The trial court agreed and, over objection, instructed the jury as follows:

> A person's flight immediately after the commission of a crime or after being accused of committing a crime is not enough by itself to establish guilt, but it is a fact that may be considered by you as evidence of guilt. Flight under these circumstances may be motivated by a variety of factors, some of which

> are fully consistent with innocence. You must first decide if it is evidence of flight. If you decide it is evident of flight, you must then decide whether this flight shows a consciousness of guilt.

Appellant now claims that the trial court erred in giving that instruction. He argues that the evidence did not show "flight" but rather "only mere departure" from the scene of the crime. He asserts that such evidence is insufficient to generate a flight instruction and that, as a result, the court abused its discretion in giving the instruction.

Maryland Rule 4-325(c) states, in relevant part, that 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." "Rule 4-325(c) has been interpreted consistently as requiring the giving of a requested instruction when the following three-part test has been met: (1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given." *Dickey v. State*, 404 Md. 187, 197-98 (2008).

"'The threshold determination of whether the evidence is sufficient to generate the desired instruction is a question of law for the judge.'" *Bazzle v. State*, 426 Md. 541, 550 (2012) (citing *Dishman v. State*, 352 Md. 279, 292-93 (1998)). In reviewing that determination, our task is to assess whether the requesting party "produced the minimum threshold of evidence necessary to establish a *prima facie* case that would allow a jury to rationally conclude that the evidence supports the application of the legal theory desired." *Id.* (citations omitted). "This threshold is low, in that the requesting party must only produce 'some evidence' to support the requested instruction." *Page v. State*, 222 Md. App.

648, 668 (2015). The "some evidence" test is not confined by a specific standard and "calls for no more than what it says – 'some,' as that word is understood in common, everyday usage." *Bazzle*, 426 Md. at 551 (citing *Dykes v. State*, 319 Md. 206, 216-17 (1990)). Moreover, "[u]pon our review of whether there was 'some evidence,' we view the facts in the light most favorable to the requesting party, here being the State." *Page*, 222 Md. App. at 669.

"Under 'appropriate circumstances where the evidence supports an inference of consciousness of guilt,' a trial court may give a flight instruction to a jury in a criminal case." *Hallowell v. State*, 235 Md. App. 484, 510 (2018) (citing *Thompson v. State*, 393 Md. 291, 305 n. 2 (2006)). The Court of Appeals has set forth a four-prong test for determining whether a flight instruction is appropriate under the facts of the case:

> that the behavior of the defendant suggests flight; that the flight suggests a consciousness of guilt; that the consciousness of guilt is related to the crime charged or a closely related crime; and that the consciousness of guilt of the crime charged suggests actual guilt of the crime charged or a closely related crime.

Thompson, 393 Md. at 312 (citations omitted); *see also Wright v. State*, No. 733, SEPT. TERM, 2019, 2020 WL 4381868, at *7 (Md. Ct. Spec. App. July 31, 2020) (explaining when the sole issue at trial is the identity of the criminal actor, a trial court may give a pattern jury instruction on flight provided that it does not imply that the identity issue is settled).

"As to the first inference, '[f]light is defined as an act or instance of fleeing, esp. to evade arrest or prosecution … [a]lso termed *flight from prosecution; flee from justice*.'"

Page, 222 Md. App. at 669 (citing *Hoerauf v. State*, 178 Md. App. 292, 323 (2008)) (emphasis in original). "As to the second inference, the movement also 'must reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt.'" *Id.* (citations omitted). For instance, departure from the scene of a crime, "without any attendant circumstances that reasonably justify an inference that the leaving was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt, does not constitute 'flight,' and thus does not warrant the giving of a flight instruction." *Hoerauf*, 178 Md. App. at 325-26. "'At its most basic, evidence of flight is defined by two factors: first, that the defendant has moved from one location to another; second, some additional proof to suggest that this movement is not simply normal human locomotion.'" *Id.* at 323 (citations omitted).

We hold that the trial court did not err in propounding a flight instruction. When viewed in a light most favorable to the State, the evidence presented at trial established several "attendant circumstances" that reasonably justified an inference that Appellant's departure from the scene following the shooting was not "simply normal human locomotion." Just prior to the shooting, Appellant inexplicably moved his vehicle from its parking spot near the Windsor Inn to a different location that was farther away but still within walking distance to the Windsor Inn. Then, after walking back to the Windsor Inn, speaking with Mr. Crowner, and then shooting the victim, Appellant got in Mr. Crowner's waiting vehicle despite the fact that Appellant's own vehicle was parked within walking

distance. Finally, after the shooting, Appellant did not immediately return to his nearby vehicle but instead accompanied Mr. Crowner as he drove to a different location to drop off Mr. Jackson. From these facts, a reasonable inference can be drawn that Appellant did not simply leave the scene following the shooting, rather, he initiated a prearranged escape plan that involved some deception. We conclude, therefore, that "some evidence" was presented from which the jury could rationally infer that Appellant's departure from the scene of the shooting was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution.

Accordingly, Appellant's reliance on *State v. Shim*, 418 Md. 37 (2011)[3] and *Hoerauf v. State, supra*, is misplaced. In each of those cases, a flight instruction was unwarranted because there was no evidence to show that the defendant's departure from the scene following the crime was indicative of a consciousness of guilt or done to avoid apprehension. *See e.g. Shim*, 418 Md. at 59 (noting that the "rational inferences to be drawn from the evidence demonstrated only that the shooter left the [scene of the crime] after the shooting"); *Hoerauf*, 178 Md. App. at 325-26 (noting that the defendant "simply walked away from the scene of the crime" and that there was "no evidence that [the defendant] attempted to flee the neighborhood or to secrete himself from public view to avoid apprehension"). Here, by contrast, the State adduced some evidence, *i.e.*, Appellant's actions prior to and following the crime, from which a rational inference could be drawn

[3] *Abrogated on other grounds by Pearson v. State*, 437 Md. 350 (2014).

that his leaving the scene following the shooting was more than a "mere departure." Accordingly, the trial court did not err in giving the flight instruction.

III. Testimony on The Surveillance Footage

Appellant's next claim of error involves the testimony of a State's witness, Baltimore County Homicide Detective Daniel Topper, regarding the surveillance footage that captured the shooting. At trial, Detective Topper testified that he investigated the shooting and that, as part of his investigation, he obtained and reviewed video footage from surveillance cameras located near the Windsor Inn. Video footage was pulled from multiple security cameras and showed the events inside and outside the Windsor Inn from the hours of 10:30 p.m. to 1:45 a.m. on the night of the shooting.

During Detective Topper's testimony, the State played, in no particular order, approximately 50 "clips" from the security footage, and Detective Topper was permitted, over objection, to testify as to which portions of the footage he focused on as part of his investigation into the shooting. In so doing, Detective Topper described, among other things, the clothing worn by "the subject" seen entering and exiting a silver Mercedes prior to the shooting; the movements of that "subject" prior to and around the time of the shooting; the victim's movements prior to the shooting; and the movements of Mr. Crowner and Mr. Jackson prior to the shooting. Detective Topper then testified that he used that surveillance footage to obtain the license plate of the silver Mercedes and identify the owner as Appellant. Detective Topper testified that he then obtained Appellant's "MVA photograph" and "compared it to the subject [he] observed in the video operating the

vehicle and inside the Windsor Mill Inn." Detective Topper testified that he also used the surveillance footage to identify Mr. Crowner and Mr. Jackson.

Appellant now claims that the trial court erred in permitting Detective Topper to "narrate" the surveillance footage. Appellant asserts that such narration is improper because it "is an expression of the witness's opinion as to what he or she is observing, when in most instances a jury is every bit as qualified as the witness to draw its own conclusions." Appellant maintains that, by narrating the video, Detective Topper "invaded the province of the jury" and that "the jury was perfectly capable of watching the video and forming its own impressions."

Maryland Rule 5-701 provides that testimony by a lay witness "in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." For instance, lay opinion testimony may be permitted "where it is impossible, difficult, or inefficient to verbalize or communicate the underlying data observed by the witness." *Moreland v. State*, 207 Md. App. 563, 571 (2012) (citations and quotations omitted). Lay opinion testimony may also be permitted "when the lay trier of fact lacks the knowledge or skill to draw the proper inferences from the underlying data." *Id.* The decision to admit lay opinion testimony is reviewed for abuse of discretion. *Paige v. State*, 226 Md. App. 93, 124 (2015). "'A court's decision is an abuse of discretion when it is well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally

acceptable.'" *Walter v. State*, 239 Md. App. 168, 200 (2018) (citing *Moreland*, 207 Md. App. at 569).

We hold that the trial court did not abuse its discretion in allowing Detective Topper to testify as to what he saw in the surveillance footage. Detective Topper's testimony was rationally based on his own observations of the footage. At no time did Detective Topper provide anything other than a factual recitation of what he personally observed as it pertained to his investigation. We note that, Detective Topper was not permitted to opine that the subject depicted in the video was Appellant, thus preserving the sanctity of the jury's ultimate determination as to Appellant's culpability.

Detective Topper's opinions regarding the footage were also helpful to the jury in understanding his testimony and determining the facts at issue. To be sure, the jurors may have been capable of looking at the video evidence and drawing certain conclusions about what they saw, but they would likely not have been able to understand what Detective Topper observed and the significance of those observations as they pertained to his investigation. More to the point, because the video footage consisted of approximately 50, non-sequential clips taken from several different cameras showing various events in different locations over a three-hour period, the jurors likely lacked the knowledge or skill to draw the proper inferences from the footage. Consequently, Detective Topper, who investigated the shooting and, in so doing, became intimately familiar with the footage and camera placement, was in a unique position to comment on the significance of his observations and to provide guidance to the jurors in understanding what they were seeing

in the various clips. *See Moreland, supra*, 207 Md. App. at 572-73 (holding that the trial court did not err in permitting a lay witness to identify the defendant in a video recording where the witness was familiar with the defendant and had intimate knowledge of his appearance).

In sum, Detective Topper's testimony regarding the contents of the footage was permissible lay opinion testimony, as it was rationally based on his perceptions and helpful to the jury in understanding his testimony and the facts at issue. *See Paige*, 226 Md. App. at 130 (holding that lay witness's opinions about events in surveillance video were permissible, as they were "rationally based on [her] perceptions and were helpful to the jury to understand the facts at issue"). Accordingly, the trial court did not abuse its discretion in permitting that testimony.

IV. Motion for Mistrial

Appellant's next claim of error concerns the trial court's denial of his motion for a mistrial. By way of background, the evidentiary portion of Appellant's trial lasted six days and included 23 witnesses and 35 exhibits, one of which consisted of the 50 video clips shown during Detective Topper's testimony. At the conclusion of the sixth day of trial, the trial court excused the jurors for the day and instructed that they report back to court the following morning to begin deliberations.

The following day, after deliberating for approximately four-and-one-half hours, the jury submitted a note to the court that read, "What happens if we can't reach a unanimous decision on any of the counts?" The court instructed the jury to keep deliberating. Both

parties agreed with that instruction. Approximately one hour later, the jury submitted another note, which read, "We have reached a deadlock. We would like to be declared a hung jury." The court, noting the late hour, decided to excuse the jurors for the day and instruct them to return to court on Monday morning to resume deliberations. Again, both parties agreed with the court's decision.

The jurors thereafter reported back to court that Monday morning and resumed deliberations, which continued without incident until the end of the day, at which point the jurors were excused and told to report back the following morning.[4] That following morning, after deliberating for approximately two hours, the jury submitted a note to the court that read, "We are hopelessly a hung jury and will not reach a unanimous decision. The environment is becoming extremely hostile." The court responded by giving the jury a "modified Allen charge"[5] and dismissing the jurors for lunch. Both parties agreed with the court's decision.

After returning from lunch and continuing deliberations for the next several hours, the jury submitted a note to the trial court that read, "We are still deliberating and have made progress, would like to try again Wednesday. Can we please break for the evening?"

[4] It appears that defense counsel may have moved for a mistrial at the conclusion of the eighth day of trial, although it is unclear from the record whether counsel was serious in making that motion. Nevertheless, the trial court denied the motion. Mr. Glover does not, however, claim that that decision was erroneous. Thus, we need not address it.

[5] A "modified Allen charge" refers to Maryland Criminal Pattern Jury Instruction 2:01, which is titled "Jury's Duty to Deliberate." The Court of Appeals has generally approved of the giving of a modified Allen charge in situations where the jury has indicated that it is unable to reach a unanimous verdict. *Nash v. State*, 439 Md. 53, 90-94 (2014).

When the court shared that note with the parties, defense counsel asked for a mistrial, citing "some of the other notes they've sent" and the fact that "they've been out a long time." Defense counsel also expressed concern about his ability to appear in court for a different trial that was supposed to start the following morning. After the court discussed defense counsel's options regarding his upcoming trial, the court asked defense counsel if he wanted to "be heard." Defense counsel responded in the negative, stating that he had "no other reason other than the other notes and length of time." Defense counsel then added that "it's been quite long" for "a relatively simple case." Ultimately, the trial court denied defense counsel's motion:

> All right. By my count they have been at this now over 17 hours, about 17 and three quarter hours, but they want to keep going. They've told me in this note they would like to try again tomorrow. "Can we please," they're almost – I don't think they're begging me, but they are asking permission to come back – break for the evening and come back. So, I can't – there is no grounds I see for a mistrial[.]

The trial court thereafter excused the jurors for the day. The jurors returned to court the following day, and, after deliberating for several hours without incident, the jury returned a verdict of guilty on all charges.

Appellant now claims that the trial court erred in not granting a mistrial. He asserts that a mistrial was necessary because the case was not unduly complex and because the jury had twice informed the court that it was unable to reach a verdict. Appellant also asserts that the court's act of "continually refusing to accept the jury's pronouncement that it was deadlocked" was "potentially coercive" and "caused jurors to compromise their

positions, believing a hung jury would not be acceptable." Appellant argues, therefore, that declaration of a mistrial was manifestly necessary.

As a preliminary matter, Appellant's argument regarding the "coercive" effect of the trial court's actions was either unpreserved or waived. Each time the trial court responded to a jury note indicating that it was deadlocked, defense counsel affirmatively agreed with the court's actions. *See Simms v. State*, 240 Md. App. 606, 617 (2019) ("[W]here a party acquiesces in a court's ruling, there is no basis for appeal from that ruling."). Then, when defense counsel moved for a mistrial after the jury indicated that it had made progress, he did not argue that the court's actions had been coercive; rather, he simply cited the jury's "other notes" and argued that it had been "quite long" for "a relatively simple case." *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any [non-jurisdictional] issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]").

Regardless, there was nothing coercive about the trial court's actions. When the jury first informed the court that it had "reached a deadlock" and wanted to "be declared a hung jury," the court simply excused the jurors for the day and instructed them to return to court on Monday morning to resume deliberations, which the jurors did without incident. Then, when the jury later indicated that it was "hopelessly a hung jury" and that the environment was "becoming extremely hostile," the court gave the modified Allen charge. At no point did the court say or do anything that could reasonably be construed as "coercive." *See Holmes v. State*, 209 Md. App. 427, 451-52 (2013) (holding that trial court's instruction to

a seemingly deadlocked jury was not coercive where the court "made it clear that the jury was to simply continue its deliberations"); *Compare to Smoot v. State*, 31 Md. App. 138, 148 (1976) (holding that trial court's instruction was "indubitably coercive" where the jury informed the court that it could not reach a verdict and the court responded that it would "not accept that" and that it "propose[d] to require [the jury] to go back and do some more deliberating").

Finally, we hold that the trial court did not err in denying Appellant's mistrial request. Ordinarily, "[a] genuinely deadlocked jury is considered the prototypical example of a manifest necessity for a mistrial." *State v. Fennell*, 431 Md. 500, 516 (2013). "The term 'genuinely deadlocked' suggests, however, 'more than an impasse; it invokes a moment where, if deliberations were to continue, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors.'" *Id.* at 516-17 (citing *United States v. Razmilovic*, 507 F.3d 130, 137 (2nd Cir. 2007)). "[T]he determination of whether there is manifest necessity for a mistrial … is a fact-specific inquiry not reducible to 'a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge.'" *Id.* at 517 (citing *Arizona v. Washington*, 434 U.S. 497, 505-06 (1978)). "In the context of a hung jury, [] the trial court must determine ordinarily that genuine jury deadlock exists, such that further deliberations are unlikely to be productive." *Id.* at 519-20. "The reasonableness of the deliberation period depends on such factors as the length of the trial, the nature or complexity of the case, the volume and nature of the evidence, the presence of multiple

counts or multiple defendants, and the jurors' statements to the court concerning the probability of agreement." *Thomas v. State*, 113 Md. App. 1, 11 (1996) (citations omitted). "[T]he determination to have a jury continue deliberating or to declare a mistrial is a matter largely within a trial judge's discretion." *Holmes v. State*, 209 Md. App. 427, 449 (2013).

Here, when Appellant made his mistrial request, the jury had been deliberating for approximately 17 hours, which is not an insignificant time. That said, the case was fairly complex, with the evidentiary portion of trial lasting six days and consisting of 23 witnesses and 35 exhibits, one of which was the security footage, which was comprised of 50 video clips. Importantly, just prior to Appellant's mistrial request, the jury indicated that it was "still deliberating" and had "made progress" and that it "would like to try again" the following day. Although the jury had previously indicated that it was deadlocked, it is clear that the jury was not deadlocked and wished to keep deliberating at the time of the mistrial request. Under the circumstances, we cannot say that the trial court abused its discretion in refusing to grant a mistrial.

V. Discovery Violation

Appellant's final contention concerns an alleged discovery violation by the State. At trial, one of the State's witnesses, Renita Wilson, testified that she was at the Windsor Inn on the night of the shooting. During that testimony, the State attempted to show Ms. Wilson part of the security footage from the night of the shooting. Defense counsel objected, arguing that the video had not been admitted into evidence. The following colloquy ensued:

THE COURT: So, your objection is that it's not in evidence and you want –

[DEFENSE]: It's not in evidence, and I have no idea that she was gonna do this. I mean, I don't know what this witness is gonna say.

THE COURT: All right.

[DEFENSE]: I have a full report, and there's nothing in here that would show –

THE COURT: Are you gonna object to it being admitted into evidence – are you gonna object to the Blu-ray being admitted into evidence?

[DEFENSE]: Just probably, I didn't.

THE COURT: Probably based on what?

[DEFENSE]: Just based on I don't think it should come in. I don't think it's been authenticated enough, that's all. My problem with this aspect is I have a report that was written with a statement that they had from her, and that's the only thing I can go on. They give me written statements as to what these people are gonna testify to, and I was never told that she was gonna testify as to the video, that she was in the bar and point it out. The only evidence that I have is that she saw the victim outside the bar with – I don't know. You know, I'm just not prepared, that's all. I just wasn't ready for it, and I think that they have to tell me what the witnesses are gonna do.

[STATE]: I know there was a subsequent report or confidential [sic] done by the detectives that was forwarded to previous counsel. I certainly could find that report and make it –

[DEFENSE]: I would like to see that.

[STATE]: I know that –

[DEFENSE]: I have no idea.

[STATE]: - it was forwarded to the previous attorney.

THE COURT: All right. I'm gonna overrule the objection.

Ms. Wilson was thereafter shown the surveillance footage, and she identified herself and the victim, Mr. Slater, in the footage. The next day, the State attempted to show the surveillance footage to another witness, Tyra Johnson, who was the general manager of the Windsor Inn on the night of the shooting. Defense counsel objected, citing "the same grounds [] indicated yesterday." The trial court overruled the objection and stated that the record was preserved. Ms. Johnson thereafter identified herself in the video footage.

Appellant now claims that the trial court erred in permitting Ms. Wilson and Ms. Johnson to testify as to what they saw in the surveillance footage. Appellant maintains that "defense counsel had never been informed by the State that Ms. Wilson and Ms. Johnson had been shown the surveillance video and would be describing what was shown on the surveillance video." Appellant contends that the State's failure to disclose that information was a violation of the discovery rules, namely, Maryland Rules 4-263(d)(7)(B) and 4-263(d)(9).

Maryland Rule 4-263 governs "discovery and inspection in a circuit court." Md. Rule 4-263(a). The Rule expressly identifies certain material and information that must be provided by the State to the defense prior to trial and without the necessity of a request. Maryland Rule 4-263(d). Maryland Rule 4-263(d)(7)(B) requires the State to provide to the defense "[a]ll relevant material or information regarding … pretrial identification of

the defendant by a State's witness[.]" Maryland Rule 4-263(d)(9) requires the State to provide to the defense "[t]he opportunity to inspect, copy, and photograph all documents, computer-generated evidence as defined in Rule 2-504.3(a), recordings, photographs, or other tangible things that the State's Attorney intends to use at a hearing or at trial[.]" Maryland Rule 4-263 also states that the parties are "under a continuing obligation to produce discoverable material" and that, when further material information is obtained, such material must be disclosed "promptly." Md. Rule 4-263(j). "[T]he purpose of the discovery rules 'is to give a defendant the necessary time to prepare a full and adequate defense.'" *Raynor v. State*, 201 Md. App. 209, 228 (2011) (quoting *Ross v. State*, 78 Md. App. 275, 286 (1989)). "[T]he question whether a discovery violation occurred under the Maryland Rules is reviewed *de novo*." *Thomas v. State*, 213 Md. App. 388, 402 (2013).

In the event that a court finds that the State failed to comply with its discovery obligations, "the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances." Md. Rule 4-263(n). Under that Rule, "the presiding judge has the discretion to select an appropriate sanction, but also has the discretion to decide whether any sanction is at all necessary." *Thomas v. State*, 397 Md. 557, 570 (2007). "[I]n exercising its discretion regarding sanctions for discovery violations, 'a trial court should consider: (1) the reasons why the disclosure was not made; (2) the existence and amount of any prejudice to the

opposing party; (3) the feasibility of curing any prejudice with a continuance; and (4) any other relevant circumstances.'" *Raynor*, 201 Md. App. at 228 (quoting *Thomas*, 397 Md. at 570-71).

We hold that the State did not violate the rules of discovery regarding Ms. Wilson and Ms. Johnson's testimony as to the surveillance video. To begin with, the record is unclear as to whether the State actually failed to disclose the fact that Ms. Wilson and Ms. Johnson had been shown the surveillance video prior to trial and would be describing what they saw. When Ms. Wilson testified, the State proffered that it had disclosed the information to Appellant's prior counsel, and neither defense counsel nor Appellant disputed that proffer. Then, when Ms. Johnson testified, defense counsel simply objected on "the same grounds." He did not claim that the State had failed to disclose the information as it pertained to Ms. Johnson, nor did he dispute the State's prior claim regarding Ms. Wilson's testimony.

Regardless, even if the State had failed to disclose the information, there was no discovery violation. Neither of the Rules cited by Appellant required the State to disclose the fact that Ms. Wilson and Ms. Johnson had been shown the footage, that Ms. Wilson would be identifying herself and the victim in the video, or that Ms. Johnson would be identifying herself in the video. *See* Maryland Rule 4-263(d)(7)(B) (requiring the State to provide to the defense information regarding "pretrial identification of the *defendant* by a State's witness") (emphasis added); Maryland Rule 4-263(d)(9) (requiring the State to disclose "recordings, photographs, or other tangible things"). In fact, none of the other

relevant portions of Maryland Rule 4-263(d) required disclosure either.[6] Thus, Appellant's claim of a discovery violation is without merit. *See Cole v. State*, 378 Md. 42, 57-58 (2003) ("'[T]he right to pretrial discovery is strictly limited to that which is permitted by statute or court rule or mandated by constitutional guarantees.'") (citing *Tharp v. State*, 362 Md. 77, 115 (2000)); *See also Williams v. State*, 364 Md. 160, 171 (2001) ("[W]hen determining whether a discovery violation exists, we first look to the plain meaning of the rule.").

Assuming, *arguendo*, that the State failed to disclose the information and the failure constituted a discovery violation, the trial court did not err in refusing to exclude the witnesses' testimony. "The most accepted view of discovery sanctions is that in fashioning a sanction, the court should impose the least severe sanction that is consistent with the purpose of the discovery rules." *Thomas*, 397 Md. at 571. When a court is faced with a discovery violation, "the proper focus and inquiry is whether [the other party] was prejudiced, and if so, whether he was entitled to have the evidence excluded." *Id.* at 572. "Under Rule 4-263, a defendant is prejudiced only when he is unduly surprised and lacks adequate opportunity to prepare a defense, or when the violation substantially influences the jury. The prejudice that is contemplated is the harm resulting from the nondisclosure." *Id.* at 574. In cases involving bad faith on the part of the prosecution or a discovery

[6] *See e.g.* Md. Rule 4-263(d)(1) (requiring disclosure of statements made by a defendant); Md. Rule 4-263(2) (requiring disclosure of defendant's criminal record); Md. Rule 4-263(d)(3) (requiring disclosure of a witness's name, address, telephone number, and any written statements related to the offense charged); Md. Rule 4-263(d)(4) (requiring disclosure of prior bad acts by defendant); Md. Rule 4-263(d)(5) (requiring disclosure of exculpatory information); Md. Rule 4-263(d)(6) (requiring disclosure of impeachment information); Md. Rule 4-263(d)(8) (requiring disclosure of information regarding expert witnesses); Md. Rule 4-263(d)(10) (requiring disclosure of defendant's property).

violation that irreparably prejudices a defendant, an extreme sanction, such as the exclusion of evidence, may be justified, or even required. *Raynor*, 201 Md. App. at 228. Because, however, "the exclusion of prosecution evidence as a discovery sanction may result in a windfall to the defense, exclusion of evidence should be ordered only in extreme cases." *Thomas*, 397 Md. at 573.

Here, we are not persuaded that Appellant was prejudiced by the alleged nondisclosure. There does not appear to be any dispute as to the identification of Ms. Wilson, Ms. Johnson, or the victim in the video, nor is there any indication that Ms. Wilson's or Ms. Johnson's testimony as to those facts substantially influenced the jury. Moreover, Appellant offers no argument as to how his ability to prepare a defense was compromised by the State's alleged discovery violation. Thus, the trial court did not err in refusing the extreme sanction of exclusion.

CONCLUSION

Accordingly, we find no err or abuse and we affirm the circuit court's judgment.

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