UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1184

September Term, 2014

VAILES KNOX

v.

STATE OF MARYLAND

Wright,
Arthur,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: December 28, 2015

Vailes Knox was convicted of assault in the second degree and reckless endangerment. In this appeal, he presents two questions for our review, which we have rephrased as follows:[1]

> 1. Did the trial court abuse its discretion in permitting the State to play to the jury a recording admitted previously into evidence in the State's case in chief?
>
> 2. Did the trial court abuse its discretion in responding to a note from the jury during deliberations?

We shall answer both questions in the negative and affirm.

Appellant was indicted in the Circuit Court for Baltimore City with two counts of attempted murder in the first and second degree, two counts of assault in the first and second degree, reckless endangerment and related firearm violations. A jury convicted appellant of two counts of assault in the second degree and two counts of reckless endangerment and acquitted him of the other charges.

[1]Appellant phrased the questions presented as follows:

> "1. Did the trial court commit reversible error by admitting the State's rebuttal evidence on an issue manufactured by the State during cross examination?
>
> 2. Did the trial court commit reversible error by providing a supplemental jury instruction on a new theory of culpability during jury deliberations?"

I.

Two people, Gary Jackson and Dwayne Cutchember, also known as "Shaky", were shot on May 15, 2012, in the 600 block of Brisbane Road in Baltimore City. Although both survived their injuries, neither cooperated with the police investigation into the shooting.

At trial, Walter Thompson testified that he knew appellant from the neighborhood as Knox would walk past Thompson's house every morning on the way to work. Thompson testified that he spoke with Knox "all the time." On the night in question, Thompson was helping his wife by carrying groceries into their house when he saw Knox and three other men walking down the alley beside Thompson's house. A car, a champagne colored Chevrolet Malibu, came around the corner. Thompson spoke briefly with the driver, a man known as "Little Will." Knox approached Thompson to ask if "Shaky" was driving the car, and Thompson said "no, it was Little Will." Knox then walked away.

Ten minutes later, while Thompson was again removing groceries from his wife's car, Knox and three other men walked down the alley beside Thompson's house then stood on the corner of Brisbane Road. About three minutes later, Thompson went again to retrieve groceries from the car. He then witnessed the shooting, which he described as follows:

> "At that time the champagne color Malibu was making a right turn into the alley off of Brisbane, got about six feet in the alley and that's when it all came—it all happened, gunfire, I mean, everywhere, I mean, just boom, boom, boom, you know, that's when it all happened, while these defendants were standing right

> there and I mean, I seen it when it happened, you know what I mean, because I was looking right there at it."

He said Mr. Cutchember ("Shaky") was the driver of the champagne colored Malibu when it returned and the shooting happened.

Crime Lab Technician Teresa Kelley testified about her recovering twenty spent shell casings from the crime scene at Brisbane Road. Lab Technician Kelley also recovered two bullet fragments from underneath the champagne colored Malibu, which the victims drove to the Emergency Room at St. Agnes Hospital after the shooting. Victor Meinhardt, a Police Firearms Examiner, testified based on his microscopic examination of the recovered bullet casings and bullet fragments. He concluded that at least two and as many as four firearms were used in the shooting.

When police canvassed the area following the shooting Thompson did not volunteer any information. Thompson testified that after discovering bullet holes in his home and his neighbor's home, he decided to come forward to police. He testified that although he did not know Knox's name before the shooting, he identified Knox as one of the four shooters from a photo array administered by Detective Kimberly Starr. Detective Starr confirmed Thompson's having confidently and correctly identified Knox in the photo array. Thompson informed Detective Starr of where to find Knox. Appellant was subsequently arrested.

While appellant was in custody, he made a statement to the police, which the State played to the jury at trial. Appellant told the police that he was at work on the day of the shooting until around 2:30 p.m., and he then went to a class that was over at 7:45 p.m., after which he took the bus to his friend Troy's house, arriving at about 8:30 p.m. He was not sure when he left Troy's house, but estimated it to be up until about 11:30 that night or "around midnight." He said that he walked to 39 Upmanor Road, where his cousin, Sharon Rock, lived. He told the police that he spent the night at Ms. Rock's house, got her granddaughter off to school in the morning and then he left for work.

As to whether Thompson saw Knox fire a gun, Thompson testified as follows: "Truthfully, it was so much gunfire, I mean, I seen three to four guns down there, there was four people down there." When asked by the prosecutor if he saw all four people use a gun, Thompson said: "[y]eah, I seen them all, I mean, the muzzle flashes, you know, I mean, I mean, just—I saw it but after it started firing, I just ducked down." On cross-examination, Thompson agreed that he had "admitted that [he] couldn't say for sure that Mr. Knox was one of the people doing the shooting."

A primary issue on appeal revolves around a jailhouse recording of appellant's telephone conversation while he was in custody pending trial. In the phone call, appellant told the other party to the call that he was going to need people to come to court and to testify

on his behalf that he was at someone's house at the time of the shooting. The caller replied that " . . . Sharon [Rock] already said that she would testify saying that she was at her house."

The State first broached the plan to introduce the self-authenticating jailhouse recording during the direct examination of Detective Kimberly Starr on February 27, 2014. During a bench conference on the question of introducing the recording, the court considered defense counsel's objection on two bases: relevancy under Maryland Rule 5-402, and danger of unfair prejudice under Rule 5-403. Over defense counsel's objection, the trial court received the recording into evidence, see State's Exhibit 12.

The State attempted to play the jailhouse recording but experienced technical difficulties. The State resumed its examination and finished questioning Detective Starr. Defense counsel cross examined the Detective. After the court excused Detective Starr, the State offered to play State's Exhibit 12, the jailhouse recording. The court declined and adjourned for the evening.

The following morning of February 28, 2014, the State recalled Detective Starr to the witness stand. After briefly questioning Detective Starr, the State rested its case-in-chief. Appellant called one witness in his case-in-chief—his cousin, Sharon Rock. Defense counsel elicited testimony about Ms. Rock's work shift from midnight to 8:00 a.m., and appellant's typical fulfillment of babysitting duties during her shifts for the weeks and months preceding appellant's arrest—when Ms. Rock first learned of the shooting. Ms. Rock did not testify

on direct examination to account for where appellant was on the specific night of the shooting.

During cross examination the State impeached Ms. Rock as an alibi witness. The State began by asking Ms. Rock how she could possibly have actual knowledge of where appellant was at all times of the day and night during the month of May 2012 leading up to his arrest. The State established that Ms. Rock did not know where appellant was during the days and for large parts of the nights while Ms. Rock was at work. Despite this, Ms. Rock then testified on cross examination, responding with a definitive "[y]es," when asked, "[d]o you know where [appellant] was on May 15, 2012?" The State attempted to impeach Ms. Rock's certainty with further questioning. Ms. Rock later explained that she could not give an exact time when appellant arrived at her house on the night of the shooting. She recalled that appellant generally came to her house in time frames from 7:00 p.m. to 11:30 p.m., dictated mostly by appellant's work and class schedule. Ms. Rock did not know that the evening of May 15, 2012 was noteworthy until about ten days later when appellant was arrested and did not report for babysitting duty. The State's cross examination ended with a colloquy that sums up the impeachment as follows:

> "THE STATE: And even now, you are saying that you know exactly where Mr. Knox was on May 15th?
>
> ROCK: Yes, I am saying I do.

THE STATE: And that's after—do you have any information about the shooting at all, what time it happened?

ROCK: No, the only thing I know is what—

THE STATE: Okay. Let me stop you.

ROCK: Okay.

THE STATE: What location?

ROCK: Not in the beginning?

THE STATE: Okay. And you're saying that Mr. Knox wasn't there, he was with you?

ROCK: He was with me.

THE STATE: Regardless of not knowing the location and the time of the shooting?

ROCK: Yes, he was with me.

THE STATE: No further questions, Your Honor."

The defense conducted brief redirect examination, then rested its case following Ms. Rock's testimony.

Given the opportunity for rebuttal the State again proposed playing the jailhouse recording for the jury. At the bench, the court inquired of the State how the jail call would rebut the defense case. The State proffered that the jailhouse recording would impeach Ms. Rock's credibility as an alibi witness because the recording " . . . indicates Mr. Knox

indicates he needs anybody to say that he was at somebody's house and [the other party to the call] says Sharon [Rock] will say that you were there." Defense counsel responded that he did not see how the recording would rebut evidence the defense presented. The court ruled that the State could play the recording, reasoning as follows:

> "THE COURT: Well, the credibility of the witness is now—the credibility of Ms. Rock, the witness, is now an issue as the alibi defense has been set up. [The State] as the Assistant State's Attorney and prosecutor in this matter is now able to attack her credibility through the defendant's own statements where he apparently in their reading of the statement, indicates he is fishing for an alibi witness to provide exactly the type of testimony that Ms. Rock has provided. I think there is an inference—having heard the statement, there is an inference to be argued in front of the jury whether they swallow it or not is another matter all together, but be that as it may, what the ultimate ruling is, that it is relevant at this time as to the credibility of this individual's testimony, and I will allow it. Thank you."

The defense reasserted its Rule 5-403 objection and in response to the court's request for a specific statement of the objection, defense counsel raised two bases of prejudice that it sought to prevent. First, that even in the abridged form that was admitted into evidence as State's Exhibit 12, the recording is a jailhouse call giving rise to an inference that appellant was incarcerated before trial. Second, that the recording made appellant sound like a desperate man making a plea while strained under the pressure of facing a serious charge. The court disagreed that the latter basis was prejudicial as it was already established that

appellant had been arrested on the serious charges before the court. On the former point, the court reminded the parties that State's Exhibit 12 was abridged *in limine* to remove references that might indicate that appellant was incarcerated at the time of the call. The court offered defense counsel an opportunity to further revised the call recording but counsel declined to do so, reiterating only its objection to the overall tenor of the call as certainly giving rise to such an inference. The court disagreed, offered to stop the recording if such a tenor were to become apparent and either to give proper instructions or entertain other motions if the need arose. The State played the jailhouse recording.

At the conclusion of all of the testimony, the court held a jury instruction conference. The State requested an aiding and abetting instruction suggesting that an aiding and abetting instruction was applicable in addressing Mr. Thompson's testimony about three other persons with appellant during the shooting. The defense objected " . . . because those are the barest of allegations at this point since there is only one defendant and it seems to unnecessarily spread everything out when the jury should be focused on what they actually heard." The court agreed with the defense that there was not " . . . any theory where the defendant was anything other than a principle [sic] in the first degree," and declined to instruct the jury on aiding and abetting before the jury began to deliberate.

After deliberating for about two hours, the jury sent two notes to the court. The first question was unrelated to this appeal, and the court easily dispensed with it. The second

query led the court to answer the question with a supplemental instruction on aiding and abetting.[2] The jury note read as follows:

> "The second question reads, 'With the charge of first degree assault, is it necessary that the offender be the person brandishing the firearm or can he be with the 'group' with the intention of discharging the firearm without actually carrying the firearm himself?'"

The court, harkening back to the State's initial request for an aiding and abetting instruction, recognized its earlier error and gave the jury the supplemental instruction on aiding and abetting, ruling as follows:[3]

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[2]The trial court instructed the jury on aiding and abetting from the Maryland State Bar Pattern Jury Instructions, (1st ed., 1991). The content of the instruction is not an issue in this appeal.

[3]The court interpreted the note as raising an aiding and abetting theory of liability, and the following colloquy ensued:

> "THE STATE: Your Honor, I believe just like aiding and abetting, there is an instruction in reference to principal.
> THE COURT: I am sorry?
> THE STATE: There is an instruction in reference to principal.
> THE COURT: Uh-huh. Right, there is an instruction in reference to principal but what they seem to be indicating, as I read it, is that perhaps inartfully indicating that he can be with a group, some of whom have a firearm, he himself does not have a firearm, and still be criminally liable for an assault in the first degree on the theory that it's an assault that is—
> THE STATE: With intent—
> THE COURT: Well, with intent to seriously injure and there's a firearm or handgun involved in the assault. Is that your reading of it, [the State]? [Defense Counsel] while she's looking?

(continued...)

[3](...continued)

> [DEFENSE COUNSEL]: I would tend to interpret this a little more straightforwardly, Your Honor, in that it might be the sort of thing that is begging the question of whether conspiracy counts should have been submitted to the jury, but I would—
> THE COURT: Well, it wasn't charged thought, was it?
> [DEFENSE COUNSEL]: No, no.
> THE STATE: No, no. But, your Honor, I read it more how you're interpreting it in terms of can, does he have to be the one brandishing the firearm or can he be with the group with the intention stated, so they already have that there's an intention to discharge the firearm, and would that just be enough for assault. Because they say, or can he be with the group with the intention of discharging the firearm without actually doing it.
> THE COURT: Well—
> THE STATE: Will that equal first degree, and that would, because we do mention in first degree, we can read—
> THE COURT: Well, here's what the first degree instruction reads. 'The defendant is also charged with the crime of first degree assault. In order to convict the defendant of first degree assault. In order to convict the defendant of first degree assault, the State must prove all of the elements of second degree assault and additionally must prove that (a), the defendant used a firearm to commit the assault or (b), the defendant intended to cause serious physical injury in the commission of the assault.' So they seem to my mind to have gleamed [sic] onto that first sort of flavor of first degree assault and that is that the defendant used a firearm to commit an assault.
> THE STATE: And when you go to assault second, you can use a firearm to scare someone, just merely pointing it elevates it to first degree assault so—
> THE COURT: But their question is pointedly in a first degree assault, do you have to be the person with the weapon.
> THE STATE: I thought it said do you have to be the person

(continued...)

[3](...continued)

discharging the weapon.
THE COURT: No, it says—
THE STATE: Oh, okay.
[DEFENSE COUNSEL]: Brandishing.
THE COURT: Well, you would have to—to discharge the weapon, you would have to have it.
THE STATE: Right, but it says either or, it says, it is necessary the defendant be the person brandishing a weapon or discharging a weapon, uh—
THE COURT: Right, well, the person, yes, he can be the person brandishing the firearm, so the answer to that is yes, the part that gives me pause is, or can he be with the group with the intention of discharging the firearm without actually carrying the firearm himself. So it seems what they are asking is if the group which he's a part of, intends to discharge a firearm, does he actually have to be the individual brandishing, using or otherwise using the firearm or can he be guilty of first degree assault if he's with a group that intends to brandish a firearm.
THE STATE: And the State's answer would be yes, that or no, he does not need to be the person discharging the firearm. Under the principal theory, he just has to be a part of the group.
THE COURT: [Defense Counsel]?
[DEFENSE COUNSEL]: Your Honor, the question agency seems to be invoked here and I think it does bear upon the definition of first degree assault. I would argue that the answer to the question is no.
THE STATE: And I guess we both agree that agency should be something submitted to the jury.
THE COURT: Well, right. The way I read it is that he cannot be the principal in the first degree of an assault in the first degree—of assault in the first degree unless he actually brandishes the weapon or otherwise uses the weapon. He could be an aider or abetter to an assault in the first degree if he meets

(continued...)

> "So my—I think [Defense Counsel] is right, in this regard, under a principal in a first degree theory of criminal liability, if under the scenario that they are, the hypothetical they are giving us, the defendant cannot be guilty; however, an aiding and abetting—and aider and abetter is a lesser included offense to any substantive counts. There was a request by the State that that particular theory of criminal liability be given to the jurors. I did not foresee that being an issue and I apologize for that; however, now it seems to me that they are asking precisely that question and I intend to instruct them on aider and abetter liability as soon as I find it."

The defense objected, stating as a basis only the following:

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[3](...continued)

> the definitional section of what an aider and abetter is without actually having brandished the weapon. It would be something along the—it would be something along the lines of a—if we three got together and decided to knock off a bank and I know as the driver of the getaway car that you two are going into the bank to rob it using a gun, I could be guilty of a robbery with a dangerous and deadly weapon as an aider and abetter thereto. I am not the principal in the first degree, however, because I didn't actually physically rob the bank and I would not be a principal in the first degree to use of a handgun in commission of a felony because I didn't actually brandish it but I would be an aider and abetter, I would not be guilty as a principal in the first degree to the use, carrying of a firearm in furtherance of a violent crime because I didn't actually—a principal in the first degree is the person who actually commits the crime. And aider and abetter is somebody who consciously assists in the commission of the crime.
>
> THE STATE: And that was my concern when I asked for that—
>
> THE COURT: I understand now."

> "We are—it was—although the Court now says it was considering it and did not foresee this circumstance, I don't think the fact that we have arrived in new waters merits going back and giving an instruction that was contemplated and then not issued."

Notably, defense counsel did not object to the substance of the instruction, nor did he ask for the opportunity to present additional or supplemental closing argument. The jury deliberated further for about forty minutes before returning a verdict.

As indicated, the jury convicted appellant of two counts of assault in the second degree and two counts of reckless endangerment and acquitted him of the other charges. The court sentenced appellant to a term of incarceration of ten years for each charge of assault in the second degree, to be served concurrently, merging for sentencing purposes the two charges of reckless endangerment with the assault in the second degree.

This timely appeal followed.

II.

Before this Court, appellant presents two claims. First, he argues that the trial court erred by permitting the State to play to the jury the jailhouse recording in rebuttal. Appellant argues that "[u]nder the guise of rebuttal evidence, the State unleashed its most damaging exhibit just prior to jury deliberations: a jailhouse recording that seemingly captured Mr. Knox, as the court put it, 'fishing for an alibi witness.'" Appellant maintains that the Court

erred because, in admitting the recording as rebuttal to alibi evidence, the Court was wrong because appellant never introduced alibi testimony. Second, appellant argues that the trial court erred in instructing the jury during deliberations with a supplemental jury instruction, *i.e.*, aiding and abetting, a new theory of culpability.

The State's argument as to the recording issue has two prongs. First, the State points out that appellant misstates the evidentiary issue in that the recording was not *admitted* into evidence in the State's rebuttal but only published to the jury, or in other words, the recording which had been admitted previously into evidence in the State's case-in-chief merely was played to the jury in rebuttal. According to the State, this departure from the ordinary trial mode was within the trial court's discretion. Moreover, if error, the error was harmless. Second, the State rebuts appellant's argument that it "manufactured" an alibi defense in order to introduce the recording, pointing out that the only relevance of Ms. Rock's testimony was the alibi. As to the supplemental jury instruction on aiding and abetting, the State maintains that the court acted within its discretion in responding to the jury note.

III.

We address the recording issue first. We agree with the State and hold that the trial court did not abuse its discretion in permitting the State to play the recorded jail phone call, which had been admitted into evidence during the State's case-in-chief, to the jury during the

State's rebuttal. And any alteration to the traditional order of proof was harmless. First, the call did rebut Ms. Rock's testimony that appellant was at her house every evening to babysit her grandchild because it was subject to the argument that Ms. Rock was testifying falsely in response to appellant's plea for witnesses. Second, the jury was entitled to hear the recording that had been admitted into evidence, and the prosecutor could have played it to the jury in closing argument, or requested that the jury be provided with a disc player to enable it to listen to the recording in the jury room during deliberations.

The only relevance of Ms. Rock's testimony was alibi evidence. Barring that, her testimony had no relevancy. Appellant's jail house call looking for witnesses impeaches inferentially the credibility of Ms. Rock. Even though the court ruled that the recording was proper rebuttal evidence, appellant is wrong when he claims that the recording was *admitted* improperly during rebuttal because it had been admitted previously, only published later.

IV.

We turn next to the supplemental jury instruction on aiding and abetting. Maryland Rule 4-325 governs jury instructions in criminal cases. Rule 4-325(a) provides as follows:

> "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 provide supplemental jury instructions under an abuse of discretion standard. *Hall v. State*, 437 Md. 534, 539 (2014). It is within the trial court's discretion whether to give a jury supplemental instructions in criminal cases. *Lovell v. State*, 347 Md. 623, 657 (1997). This discretion, of course, is not boundless. We have held that trial courts "must respond to a question from a deliberating jury in a way that clarifies the confusion evidenced by the query when the question involves an issue central to the case." *State v. Baby*, 404 Md. 220, 263 (2008).

After reviewing the facts and circumstances surrounding this supplemental jury instruction, we hold that the trial court exercised its discretion properly in responding to the jury note about aiding and abetting and in giving the jury a supplemental jury instruction on that issue. The prosecutor requested initially such an instruction and never withdrew that request. The evidence did support an instruction on aiding and abetting. The jury, in submitting the question on the subject, expressed confusion. It was the obligation of the court to answer the jury question and instruct appropriately.

The court did not deprive appellant of an opportunity to address theories of culpability under which he may be convicted because appellant never asked the trial court for supplemental closing argument.

It appears that appellant does not argue that the court lacked discretion to answer the jury's query but instead, he seems to be arguing before us that he was deprived of the opportunity to address this new theory of culpability. Before the trial court, he argued one basis for his objection: that the jury's question did not warrant a supplemental instruction that the court had considered previously but declined to give. Appellant never mentioned additional closing argument or proffered any prejudice. Now he claims that he was deprived of the opportunity to address a new theory of culpability.

Before this Court, appellant relies on *Cruz v. State*, 407 Md. 202 (2009), as support for his position. In *Cruz* the Court of Appeals did not focus on whether the supplemental instruction was warranted by the evidence but rather addressed the question of whether the juxtaposition of the supplemental instruction *vis-à-vis* the defense closing argument was prejudicial under the circumstances. *Id.* at 212. Lacking Maryland authority on the issue, the Court looked to federal cases, and particularly those cases where the defendant was prejudiced because the instruction undermined the closing argument given earlier by defense counsel. *Id.* at 212-16. Although Cruz did not request supplemental closing argument, the decision turned not on whether counsel requested closing argument but rather on the fact that Cruz was prejudiced in the timing of the instruction and that no further closing argument could cure the prejudice. In closing argument, Cruz's counsel had conceded that Cruz had committed the assault under the theory of attempted battery. *Id.* at 216. Once the court later

instructed the jury on the new theory of aiding and abetting, the Court found that no additional argument could lift the taint of that concession.

The Court of Appeals, looking to federal cases for guidance, explained as follows:

> "We agree with the reasoning of these decisions, and 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.

Again, federal cases are instructive. The United States Court of Appeals for the Fourth Circuit considered whether the district court properly responded to jury inquiries by instructing on aiding and abetting in *United States v. Horton*, 921 F.2d 540 (4th Cir. 1990).[4] Horton argued that giving the supplemental aiding and abetting instruction was impermissible because, *inter alia*, the government argued during the trial that Horton was the principal and did not advance a theory of aiding and abetting. *Id.* at 543. The *Horton* court held that giving the supplemental aiding and abetting instruction was proper because,

[4] The United States Court of Appeals for the Fourth Circuit also held that the district court had not denied the defendant's right to a unanimous verdict where it was possible that some jurors found defendant guilty as a principal and some found him guilty as an aider and abettor. *Horton*, 921 F.2d at 541. This issue is not on appeal here.

although "when a party chooses not to advance a particular theory, it is not *entitled* to an instruction on that theory even if there is evidentiary support for the theory in the record, the court is not precluded from giving any instruction for which there is evidentiary support." *Id.* at 544. The court further held that the supplemental instruction did not prejudice defendant, even though defense counsel was only afforded three minutes during which to argue against the aiding and abetting theory, because "all points essential to the defendant's case were made in the initial closing argument . . . ." *Id.* at 547. The crucial difference between *Horton* and the case on appeal is that Horton's defense "complained that it had not had an opportunity to argue to the jury that there was insufficient evidence to convict Horton of aiding and abetting." *Id.* at 543. *See also United States v. Andrade*, 135 F.3d 104, 110 (1st Cir. 1998) (Dismissing argument by reasoning that while "refusal to permit further argument by made necessary by a supplemental instruction could amount to error . . . it is enough to say that no such request to make further closing argument after the supplemental instruction was made in this case.") Appellant did not ask for the opportunity to present additional or supplemental closing argument.

Horton's principles and reasoning have been adopted and applied by several federal courts. *See e.g.*, *United States v. Fontenot*, 14 F.3d 1364, 1368-69 (9th Cir. 1994), *cert. denied*, 513 U.S. 966, 115 S. Ct. 431 (1994), and *United States v. James*, 998 F.2d 74 (2d Cir. 1993), *cert. denied*, 510 U.S. 958, 114 S. Ct. 415 (1993). In *James*, the United States

Court of Appeals for the Second Circuit, noting that the defendant did not request additional argument after the supplemental instruction, found that the trial court was deprived of an opportunity to correct any error and thus, James's argument that he was never given a chance to reargue was meritless, and did not constitute plain error. *Id.* at 79. In addition, citing *Horton*, the court pointed out that appellant showed no prejudice in that he did not argue that his closing argument would have been different had he been afforded additional time. *Id.*

An appellant must present the prejudice suffered from a supplemental jury instruction to merit reversal. In *United States v. Burgess*, 691 F.2d 1146 (4th Cir. 1982), the United States Court of Appeals for the Fourth Circuit considered whether the District Court committed reversible error by giving a modified jury instruction, changed *sua sponte* and without giving notice before closing arguments. The United States Court of Appeals for the Fourth Circuit took into consideration the following interpretation of Federal Rule of Criminal Procedure 30 (requiring trial court to "inform the parties before closing arguments how it intends to rule on the requested instructions"), advanced by its sister Seventh Circuit Court:

> "' . . . [U]nder Rule 30 . . . we think counsel should be informed of all instructions that will be given to the jury and to read Rule 30 as being applicable only to instructions proposed by counsel would emasculate its purpose which is in part to allow counsel, knowing the instructions to be given, to effectively argue his case to the jury.'"

Id. at 1156 (quoting *United States v. Bass*, 425 F.2d 161, 162-63 (7th Cir. 1970)). Even taking into account this relatively strict interpretation of Rule 30, not shared by several other Circuits, the *Burgess* court held that a remand would not be called for. *Id.* at 1156. The circuits that had confronted Rule 30 issues, including the Seventh Circuit, all required a showing of prejudice to reverse an error. *Id. See also United States v. Lyles*, 593 F.2d 182, 186 (2d Cir. 1979) (" . . . it is settled law in this Circuit that reversal is appropriate only when a defendant can demonstrate that a Rule 30 lapse has resulted in prejudice."); *United States v. Conlin*, 551 F.2d 534, 539 (2d Cir. 1977) (Despite district court not disclosing rulings on proposed jury instructions prior to the summations, defendant's inability to demonstrate any resulting prejudice, and failure to object at the time, indicates harmless error); *United States v. Newson*, 531 F.2d 979, 983 (10th Cir. 1976) ("even if the instruction as given were to be held to violate the letter of Rule 30, no reversal on the conviction would be warranted," as no prejudice resulted.). Burgess's defense argued the point relevant to the supplemental instruction sufficiently in closing that Burgess suffered no prejudice. *Burgess*, 691 F.2d at 1156. *See also United States v. Gill*, 909 F.2d 274, 280-81 (7th Cir. 1990) (Defendant not prejudiced by trial court's decision to change jury instruction after closing arguments—from charging two theft crimes conjunctively to charging them disjunctively—as defendant's arguments throughout trial were consistent with defense against disjoined charges.); *United States v. Lopez*, 590 F.3d 1238, 1253-54 (11th Cir. 2009) (Defendant not prejudiced by

supplemental jury instruction as argument on appeal did not change from that made at closing argument preceding district court's supplemental jury instruction.); *Andrade*, 135 F.3d at 110-11 (Defendant not prejudiced by supplemental jury instruction when defense argument to jury on principal liability theory would be the same as for supplemental liability theory—procuring another to perform a criminal act.); *United States v. Alexander*, 163 F.3d 426, 429 (7th Cir. 1998) (Defendant not prejudiced by supplemental jury instruction as argument to jury would have not differed.).

We distill from all these cases that it is the better practice following supplemental jury instructions for the trial court to permit sufficient time for additional closing argument. The remedy for the trial court's failure to do so, whether requested below or not, turns on whether the defendant was prejudiced. In the case *sub judice*, like the defendant in *Horton*, Knox has failed to demonstrate actual prejudice. Specifically, he has failed to show that his argument would have been different had he been permitted additional argument. As in *Horton*, the "factual predicates of [Knox] as principal and of [Knox] as aider and abettor are so similar that the argument to be made against guilt are essentially the same under both theories." *Horton*, 921 F.2d at 547. Knox's defense and hence, his counsel's closing argument, in no way hinged on a distinction between principal and accessory. His only defenses were that Thompson was not credible and that Knox was not present at the crime. He argued that Thompson was not believable because he was too far away from the shooting to have been

able to identify any of the perpetrators and that he lied to the jury and to the police when he said that he saw Knox shoot. He presented Ms. Rock as an alibi witness. He has proffered no prejudice, we find no prejudice and he is entitled to no relief.

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