Circuit Court for Baltimore City
Case Nos. 118324012, 118324011

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1922
September Term, 2019

No. 971
September Term, 2020

STEVEN BOWMAN
v.
STATE OF MARYLAND

ERIC BOWMAN
v.
STATE OF MARYLAND

Berger,
Friedman,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: July 6, 2021

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

Following a jury trial in the Circuit Court for Baltimore City, Steven Bowman ("Steven") and Eric Bowman ("Eric"), appellants and brothers, were convicted of first degree murder; use of a firearm in the commission of a crime of violence; illegally wearing, carrying, and transporting a handgun; and possessing a regulated firearm after having been disqualified by a prior conviction.[1] Steven[2] and Eric[3] each present three issues for our

[1] Due to both Appellants having the same last name, for clarity, and in no means of disrespect, this Court will refer to Steven Bowman as "Steven" and to Eric Bowman as "Eric."

[2] Steven's original questions presented are as follows:

1. Whether the circuit court erred in denying the request for mistrial following Julie Freeland's testimony regarding a "threat" made by appellant to the victim via Facebook Messenger shortly before the shooting?

2. Whether the trial court erred in admitting body-worn camera footage of a police officer trying to resuscitate a homicide victim?

3. Whether the trial court erred in instructing the jury regarding aiding and abetting to first and second degree murder?

[3] Eric's original questions presented are as follows:

1. Did the trial court err or abuse its discretion in admitting irrelevant or otherwise highly inflammatory and overly-prejudicial body-worn camera footage from Officer Johnson?

2. Did the trial court err or abuse its discretion in instructing the jury on accomplice liability?

3. Did the trial court err in relying upon impermissible considerations at sentencing?

consideration on appeal, which we have consolidated, reordered, and rephrased for clarity as follows:

> I. Whether the trial court erred in admitting body-worn camera footage containing scenes of a police officer attempting to resuscitate a homicide victim.
>
> II. Whether the trial court abused its discretion by instructing the jury regarding aiding and abetting to first- and second-degree murder.
>
> III. Whether the trial court abused its discretion in denying Steven's request for a mistrial following a witness' testimony regarding a message sent by Steven.
>
> IV. Whether the trial court erroneously relied on impermissible considerations during Eric's sentencing.

For the reasons stated herein, we shall vacate Eric's sentence and remand his case to the Circuit Court for Baltimore City for resentencing. We shall affirm the judgments of the circuit court in all other respects.

FACTS AND PROCEEDINGS

On September 30, 2018, Randall J. Finney, Jr. ("Finney") was shot and killed in the 4000 block of Balfern Avenue in Baltimore City, Maryland. A grand jury in the Circuit Court for Baltimore City indicted Steven and Eric on charges of first degree murder; use of a firearm in the commission of a crime of violence; illegally wearing, carrying, and transporting a handgun; conspiracy to commit first degree murder; and possessing a regulated firearm after having been disqualified by a prior conviction. Eric and Steven were tried jointly.

The joint jury trial began on September 18, 2019 and continued for five days. During the trial, the State called crime laboratory technician Lisa Garner ("Garner") to testify. Garner testified that she arrived on the scene at 12:15 p.m., where she sketched the crime scene, collected evidence, and took photographs. The State also called Dr. Russell Alexander ("Dr. Alexander"), a medical examiner, to testify as to Finney's cause of death. Dr. Alexander testified that Finney died of multiple gunshot wounds, describing all four wounds as "collectively fatal." Dr. Alexander further described an area known as "stippling" around the right temple head wound, indicating that the shot had been fired at close range.

The State also called Angela Pearson ("Pearson"), Finney's mother, to testify. Pearson testified that she knew Julie Freeland ("Freeland") and described her as "like a daughter." Pearson further testified that Finney had a son, Randall Finney, III and that he was known as "Jay." Pearson also testified that Freeman and Steven were dating and had a child together. Pearson testified that on September 30, 2018, she received a call from her grandson, Jay. Pearson stated that during the call Jay said, "Steven just shot my daddy, grandma come, come now." On cross-examination, Pearson added that Jay was crying when he made the statement. Pearson then testified that Jay called her a second time to confirm that she was on her way.

Officer Jamal Johnson ("Officer Johnson") testified that he arrived on the scene shortly after 11:30 a.m. and that he was the first officer there. Officer Johnson stated that he saw an unresponsive person lying on the ground and that he immediately began

performing CPR. Over objections from both Steven and Eric, the trial court admitted footage from Officer Johnson's body-worn camera, without sound. The footage included scenes of Officer Johnson performing CPR on Finney. Further, a 911 telephone call placed by Jay was played for the jury. During the phone call, Jay told the operator that his "mother's boyfriend" and "his brother" shot Jay's father, Finney. The operator asked Jay who had the gun and Jay did not respond.

Jay then took the stand to testify. Jay was thirteen years old at the time of the trial. Jay identified Steven as his mother's boyfriend and Eric, "Bones," as Steven's brother. Jay testified that he was upstairs in his bedroom on the morning of September 30, 2018, when he woke up around 11:00 a.m. to the sound of his father's motorcycle. At this time, Jay stated that he looked out the window and proceeded to tell his mother, Freeland, that Finney was outside. Jay testified that he returned to the window and saw his father get off of the motorcycle and record a video with his telephone. Jay stated that Finney walked up to the house and talked to Freeland but remained outside. Jay then testified that he heard "Steven yell something." Jay then heard shots fired and saw Eric run towards Finney, stand over him, and shoot him. Jay stated that he walked away from the window and called 911 and placed a call to his grandmother. When asked if he ever saw a gun, Jay said "no."

A neighbor who lived across the street from Freeland, Quinton Fizer ("Fizer"), testified that he heard gunshots. Fizer stated that he heard multiple gunshots which sounded like different types of guns. Fizer further testified that he saw "one guy run to the car and there was another gentleman [who] started shooting."

Finally, the State called Freeland to testify. Freeland testified that she and Steven had a child together but that they no longer lived together because they "constantly fought." Freeland stated that she moved two doors down from Steven's mother because she often helped with childcare. Freeland testified about an incident that occurred between her and Steven earlier in the morning on September 30, 2018. Freeland explained that she and Steven had been arguing outside about him not helping with their child and Steven proceeded to kick her. Freeland stated that she then called the police.

Subsequent to this altercation, Freeland went into her home. Freeland stated that she saw a text message from Steven. The State asked Freeland about a screenshot of a text message and Freeland testified that it was a screenshot of a message between Steven and Finney. Steven's counsel objected, the trial court sustained the objection, granted the motion to strike, instructed the jury to disregard the statement, and excused the jury from the courtroom. The State then explained to the court that it planned to ask Freeland to read the contents of the message to the jury. The trial court sustained Steven's objection. The jury was brought back into the courtroom and the State proceeded with its direct examination of Freeland. Freeland testified that she received a screenshot of a Facebook message that Steven had sent to Finney. The State showed Freeland a copy of the screenshot and asked: "without saying it what it said on there, what is that piece of paper that I placed in front of you[?]," to which Freeland replied "[a] threat." Steven's counsel objected, the trial court sustained the objection, and instructed the jury to disregard Freeland's comment.

Steven's counsel then moved for a mistrial based on the statement that the message sent to Finney was a "threat." The trial court denied the motion. The trial court then admonished Freeland and instructed her not to "walk on the edge." Following another incident while Freeland was on the stand, the trial court excused the jury and instructed the State to speak with Freeland in the hallway and admonish her to follow the court's orders concerning her testimony surrounding the "threat." After being escorted to the hallway, Freeland returned to the witness stand and continued her testimony.

Freeland testified that she saw Finney walk up to her porch and sit his helmet down. Freeland stated she then saw a black car travel down the street and stop at the alley. At this time, Freeland stated that she saw Steven get out of the car, stand behind the passenger door, and fire a gun. Freeland then witnessed Finney drop to the ground. Freeland stated she then saw Eric walk up to Finney from his home a few doors away and point a gun at Finney's upper body. Freeland went inside, heard two gunshots, and called 911. During the call, Freeland stated that her baby's father "shot [her] other baby's father."

Steven was found not guilty of the conspiracy charge, but he was found guilty of the four remaining charges. On November 18, 2019, the trial court sentenced Steven to life imprisonment for the first-degree murder charge and a consecutive twenty-five years for the related handgun charges. That same day, Steven filed this timely notice of appeal.

Eric was found not guilty of the conspiracy charge, but he was found guilty of the four remaining charges. On November 18, 2019, the trial court sentenced Eric to life imprisonment for the first degree murder conviction; a consecutive twenty years'

imprisonment on the use of a handgun conviction; a consecutive ten years for possession of a regulated firearm after having been disqualified by a prior conviction; and a concurrent three years on the conviction for illegal wearing, carrying, and transporting a handgun. Eric filed a notice of appeal on November 21, 2020.

On April 1, 2021, the State filed a motion to consolidate Steven and Eric's appeals before this Court. The motion was unopposed. We granted the State's motion on April 6, 2021.

DISCUSSION

Standard of Review

"Trial judges generally have 'wide discretion' when weighing the relevancy of evidence." *State v. Simms*, 420 Md. 705, 724 (2011) (quoting *Young v. State*, 370 Md. 686, 720 (2002)). Nevertheless, "trial judges do not have discretion to admit irrelevant evidence." *Id.* (internal citation omitted); *see also* Md. Rule 5-402. We apply a *de novo* standard of review when reviewing the trial judge's conclusion of law that the evidence at issue "'is [or is not] of consequence to the determination of the action.'" *Montague v. State*, 471 Md. 657, 673 (2020) (quoting Md. Rule 5-401). "After determining whether the evidence in question is relevant, we consider whether the trial court abused its discretion by admitting relevant evidence which should have been excluded as unfairly prejudicial." *Id.* Accordingly, we review the trial judge's decision on admissibility under Maryland Rule 5-403 under an abuse of discretion standard. *Id.* at 673–74. We will generally not reverse a trial court under this standard "unless the evidence is plainly inadmissible under

a specific rule or principle law or there is a clear showing of an abuse of discretion." *Id.* (internal citations omitted).

Maryland Rule 4-325(c) provides that a trial court "may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." "The Rule requires the trial court to give a requested instruction when '(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.'" *Wright v. State*, 247 Md. App. 216, 229 (2020) (quoting *Dickey v. State*, 404 Md. 187, 197–98 (2008)). "Our task as the reviewing court" in reviewing if an instruction is applicable to the facts of the case is "to determine whether the proponent 'produced that 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.'" *Molina v. State*, 244 Md. App. 67, 148 (2019) (quoting *Bazzle v. State*, 426 Md. 541, 550–51 (2012)). "Because this 'threshold determination of whether the evidence [wa]s sufficient to generate the desired instruction is a question of law for the judge[,]' our review is without deference." *Id.* (quoting *Bazzle*, *supra*, 426 Md. at 550). In our determination of whether there is "some evidence" to support a jury instruction, we must view the facts in the light most favorable to the requesting party. *Page v. State*, 222 Md. App. 648, 668–69 (2015).

"Appellate review of a decision to deny a mistrial is conducted 'under the abuse of discretion standard.'" *Vaise v. State*, 246 Md. App. 188, 239 (2020) (quoting *Nash v. State*,

439 Md. 53, 66–67 (2014)). We afford "a wide berth" to a trial judge's decision to deny a mistrial. *Id.* "[D]eclaring a mistrial is an extreme remedy not to be ordered lightly." *Nash*, *supra*, 439 Md. at 69. We will not reverse the trial court unless "it is clear that there has been prejudice to the defendant." *Guesfeird v. State*, 300 Md. 653, 658 (1984) (internal quotation and citation omitted). The "trial judge is ordinarily in a uniquely superior position to gauge the potential for prejudice in a particular case, and therefore to determine whether a mistrial is appropriate or required." *Watters v. State*, 328 Md. 38, 50 (1992).

"A trial court 'may exercise wide discretion in fashioning a defendant's sentence.'" *Sharp v. State*, 446 Md. 669, 685 (2016) (quoting *McGlone v. State*, 406 Md. 545, 557 (2008)). Accordingly, we generally "review for abuse of discretion a trial court's decision as to a defendant's sentence." *Id.* (internal citation omitted). We must look to determine if the trial court considered impermissible considerations in its sentencing determination. *Id.* at 685–86. Indeed,

> where a defendant alleges that a trial court was motivated by an impermissible consideration during sentencing, an appellate court must read the trial court's statements "in the context of the entire sentencing proceeding" to determine whether the trial court's statements "could lead a reasonable person to infer that the [trial] court might have been motivated by an impermissible consideration."

Id. at 689 (quoting *Abdul-Maleek v. State*, 426 Md. 59, 73–74 (2012)).

I. The trial court did not err in admitting body-worn camera footage showing the victim immediately after the shooting because the footage was relevant to show the location of the body, the crime scene, and the victim's injuries.

At trial, over the objection of counsel for both Steven and Eric, the State introduced the entirety of the footage from Officer Johnson's body-worn camera. The body-worn camera footage depicted Finney immediately after the shooting and showed Officer Johnson administering CPR. Officer Johnson was the first officer on the scene, and he testified that, upon his arrival, he was directed to an unresponsive gentleman in the middle of the street, and he then performed CPR. Steven's counsel objected, arguing that the entire footage was not admissible as it was not relevant to show who shot and killed Finney and that the footage was "prejudicial, emotional, [and] upsetting." Eric's counsel also objected, arguing that showing the video was not necessary and the position of Finney's body could be shown using a still photo. Further, Eric argued that the sound included in the video of Freeland yelling "save him" was not relevant. In response, the State argued that the body-worn camera footage was relevant to show the exact position of Finney's body immediately after Officer Johnson arrived on the scene. The trial court admitted the footage without sound and allowed the recording to be played for the jury, finding that it was relevant to show the placement of the body when the police arrived.

On appeal, Steven and Eric contend that the trial court erred by admitting the body-worn camera footage depicting Officer Johnson administering CPR on Finney. Specifically, Steven and Eric argue that the footage was irrelevant. Alternatively, Steven

and Eric argue that the evidence should have been excluded because any probative value was substantially outweighed by the danger of unfair prejudice.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. Generally, "all relevant evidence is admissible" and "[e]vidence that is not relevant is not admissible." Md. Rule 5-402. This standard is "a very low bar to meet." *Montague*, *supra*, 471 Md. at 674 (internal quotation and citation omitted).

Relevant evidence may be excluded if the trial court finds that "its probative value is substantially outweighed by the danger of unfair prejudice or other countervailing concerns." *Id.* (citing Md. Rule 5-403). "[P]robative value is substantially outweighed by unfair prejudice when the evidence 'tends to have some adverse effect . . . beyond tending to prove the fact or issue that justified its admission.'" *Id.* at 674 (quoting *State v. Heath*, 464 Md. 445, 464 (2019)). We entrust this balancing task to the trial court, first and foremost. *Id.* at 674–75, 696 n.13.

The use of body-worn cameras in law enforcement is a relatively recent development, and, therefore, the case law on its admissibility in this specific context is scarce. Nevertheless, the Court of Appeals has considered the admissibility of photogrpahs in this context and has consistently held

> the general rule regarding admission of photographs is that their prejudicial effect must not substantially outweigh their probative value . . . Photographs must also be relevant to be admissible. We have found crime scene and autopsy

> photographs of homicide victims to be relevant to a broad range of issues, including the type of wounds, the attacker's intent, and the modus operandi.

State v. Broberg, 342 Md. 544, 552–53 (1996) (internal quotations and citations omitted).[4] Our courts have "permitted the reception into evidence of photographs depicting the condition of the victim and the location of injuries upon the deceased[,] the position of the victim's body at the murder site[,] and the wounds of the victim." *Johnson v. State*, 303 Md. 487, 502 (1985) (internal citations omitted). Further, the Court of Appeals has upheld the admission of photographs allowing the fact-finder to "visualize the atrociousness of the crime[,]" particularly when it is necessary to determine the degree of murder. *Id.* at 502–03. Critically, "photographs do not lack probative value merely because they illustrate a point that is uncontested." *Broberg*, *supra*, 342 Md. at 554 (internal citation omitted).

The body-worn camera footage admitted at trial depicting Finney's body immediately after being shot and Officer Johnson attempting CPR was relevant because it tended to make a fact of consequence "more probable or less probable than it would be without the evidence." Md. Rule 5-401. The footage was relevant to show the exact location and position of the body when the police arrived on the scene. *See Johnson*, *supra*,

[4] Although Maryland courts have yet to consider the admissibility of body-worn camera footage in this context, other state courts have upheld its admissibility. *See Robinson v. State*, 842 S.E.2d 54, 62 (Ga. 2020) (holding that a portion of a video showing a murder victim lying in his home was relevant to show the location of the body, the condition of the victim immediately after the shooting, and to corroborate the witness' testimony); *see also Commonwealth v. Patterson*, 91 A.3d 55, 67–68 (Pa. 2014), *abrogated on other grounds by Commonwealth v. Yale*, No. 9 MAP 2020, 2021 WL 1681926 (Pa. Apr. 29, 2021) (holding that footage from a body-worn camera, despite the gruesome nature, was relevant to show the jury a view of the crime scene).

303 Md. at 502 (noting that crime scene photographs are admissible to show the "position of the victim's body at the murder site"). As Steven and Eric were both charged with first- and second-degree murder, the video depicting the injuries and severity of the crime was relevant to show Steven and Eric's intent. *See id.* (noting that photographs have been admitted to help the jury determine the degree of murder). Further, Steven and Eric were charged with conspiracy to commit murder. The body-worn camera footage showed the proximity between the two homes on Balfern Avenue and the alley from which the vehicle Steven arrived in. In our view, the body-worn camera was relevant to the jury's determinations and the trial court did not err in its determination regarding relevancy.

Further, we agree with the State that the trial court properly exercised its discretion in concluding that the prejudicial effect of the video did not substantially outweigh the probative value of the video. One element of the body-worn camera footage that Steven and Eric objected to was the sound on the footage of Freeland screaming "save him." The trial court struck a balance between the admission of the video and the admission of the video of the sound. *See Montague*, *supra*, 471 Md. at 674–75. Though the testimony of the officer provided his description of the location of the victim and his injuries, the probative value of the footage is its ability to present the information more clearly. *See Broberg*, *supra*, 342 Md. at 553–54 (quoting *Reid v. State*, 305 Md. 9, 21 (1985)) (stating that the rational for allowing photographs or videos is that photographs present more clearly than words from a witness). Accordingly, we hold that the footage from Officer Johnson's body-worn camera was relevant, its prejudicial effect did not outweigh its

probative value, and the trial court did not abuse its discretion in admitting the footage without sound.

II. The trial court did not abuse its discretion in instructing the jury regarding aiding and abetting because the State presented evidence supporting the instruction.

At trial, after the close of the evidence, the State asked the trial court to instruct the jury as to accomplice liability. Steven and Eric both objected to the jury instruction. Both Steven and Eric argued that it was not possible for either of them to be an accomplice to the other under the facts of this case as the State insisted that both brothers were principals in the first degree. In response, the State argued that there are varying forms of accomplice liability and it was possible, under the State's theory, that Steven was the primary actor and that Eric knowingly aided, counseled, commanded, or encouraged him. The trial court found that there was sufficient evidence presented to warrant the accomplice liability instruction and instructed the jury accordingly.[5]

[5] The trial court instructed the jury on accomplice liability as follows:

> The Defendant may be guilty of murder in the first degree or murder in the second degree as an accomplice even though the Defendant did not personally commit the acts that constitute the – that crime. In order to convict either Defendant of first degree murder or second degree murder as an accomplice the State must prove that first degree or second degree murder occurred and that the Defendant, with the intent to make the crime happen, knowingly aided, counseled, commanded, or encouraged the commission of the crime, or communicated to a participant in the crime that he was ready, willing, and able to lend support if needed.

Under Maryland Rule 4-325(c), "[t]he 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." "Trial courts give jury instructions to 'direct the jury's attention to the legal principles that apply to the facts of the case.'" *Molina*, *supra*, 244 Md. App. at 147 (quoting *General v. State*, 367 Md. 475, 485 (2002)). Any jury instruction given must be applicable to the facts of the case. *Wright*, *supra*, 247 Md. App. at 229. When the evidence presented at trial does not support an instruction, "[t]he jury should be limited in its deliberations to the issues and evidence presented to it." *Brogden v. State*, 384 Md. 631, 644 (2005).

The threshold question is "whether the proponent of a jury instruction (here, the State) generated the instruction factually by adducing 'some evidence.'" *Molina*, *supra*, 244 Md. App. at 148. "Some evidence is 'a fairly low hurdle.'" *Id.* (quoting *Arthur v. State*, 420 Md. 512, 526 (2011)). "It calls for no more than what it says – 'some,' as that word is understood in common, everyday usage. It need not rise to the level of 'beyond reasonable doubt' or 'clear and convincing' or 'preponderance.'" *Arthur*, *supra*, 420 Md. at 526 (internal citation omitted).

> A person need not be physically present at the time and place of the commission of a crime in order to act as an accomplice. The mere presence of the Defendant at the time and place of the commission of the crime is not enough to prove that the Defendant is an accomplice. If presence at the scene of the crime is proven, that fact may be considered along with all of the surrounding circumstances in determining whether the Defendant intended to aid a participant and communicated that willingness to a participant.

A criminal conspiracy "may be shown by circumstantial evidence, from which a common design may be inferred." *Mitchell v. State*, 363 Md. 130, 145 (2001). An accomplice is one "who knowingly, voluntarily, and with common interest with the principal offender, participates in the commission of a crime." *Woods v. State*, 315 Md. 591, 615 n.10 (1989) (internal quotation and citation omitted). Indeed, "when two or more persons participate in a criminal offense, each is responsible for the commission of the offense." *Diggs & Allen v. State*, 213 Md. App. 28, 90 (2013) (internal quotation and citation omitted).

In *Perry v. State*, 150 Md. App. 403 (2002), we encountered a similar situation to the instant case. At the defendant's trial in *Perry*, the State pursued the theory that the defendant was the principal in the first degree, but also pursued a theory of accomplice liability and conspiracy. *Id.* at 420–21. During jury instructions, the trial court gave a supplemental instruction on accomplice liability identical to the instruction given in the instant case. *Id.* at 422. In upholding the trial court's decision to instruct the jury on accomplice liability, we held that "[i]t is never an escape from a lesser guilt or lesser involvement to prove or to argue a greater guilt or involvement." *Id.* at 428. Namely, the defendant could not avoid an accomplice liability jury instruction implicating him as a principal in the second degree by insisting he was only a principal in the first degree. *See id.* Further, we held that just because a party advances one theory, it does not preclude the trial court from giving a jury instruction on another theory so long as the evidence generated the instruction. *Id.* at 430. Specifically, in holding that the facts presented at

trial generated the accomplice liability jury instruction, we held that the defendant's involvement in the crimes was a certainty, but the jury could have reasonably debated his level of involvement. *Id.* at 430–31.

We agree with the State that the jury instruction regarding accomplice liability was supported by the evidence presented in this case. Steven and Eric were both charged with conspiracy to commit first-degree murder. Throughout the trial, the State argued the theory of conspiracy to the jury. Specifically, the State argued that there were two shooters and that both of their actions killed Finney. Further, there was testimony presented that the parties lived together, interacted less than an hour prior to the murder, and that there was only a second between Steven firing his weapon and Eric firing his. *See Molina*, *supra*, 244 Md. App. at 148–49 (holding that circumstantial evidence of communications between the defendants supports an inference of accomplice liability).

Similar to the appellant's argument in *Perry*, Steven and Eric contend that because the State pursued the theory that both brothers were principals in the first degree, the trial court erred in instructing the jury as to accomplice liability. We disagree for the same reasons we noted in *Perry*. "The fact that a party did not pursue a particular theory does not preclude the trial judge from giving an instruction on that theory where it deems such an instruction to be appropriate." *Perry*, *supra*, 150 Md. App. at 430 (internal quotation and citation omitted). "Just as it would have been reasonable for the jury to have concluded that [Steven and Eric] acted [individually], it was also conceivable that" they could have acted together in a conspiracy. *Id.* at 431. While the commission of the crime of murder

of Finney was not in doubt, there was uncertainty as to the level of each brother's participation. *See id.* at 432. Therefore, we hold that the evidence presented at trial was factually generated to support the accomplice liability jury instruction and the trial court did not abuse its discretion in instructing the jury accordingly.

III. The trial court did not abuse its discretion in denying Steven's motion for a mistrial as the witness's statement was appropriately remedied by a curative instruction to the jury.

After the trial court ruled that the contents of a screenshot sent to Freeland by Steven were not admissible, Freeland continued to testify as to the events that occurred. During her testimony, the State asked Freeland what the text message was, to which Freeland replied "[a] threat." The trial court struck the answer and instructed the jury to disregard Freeland's statement. Steven's counsel moved for a mistrial, which the trial court denied. The trial court reiterated that it had struck the answer and issued a curative instruction to the jury. Further, the trial court stated that it would reiterate a curative instruction during jury instructions at the close of the evidence. On appeal, Steven argues that the trial court should have granted his request for a mistrial because the harm caused by Freeland's statement could not be cured by an instruction. We disagree.

"The declaration of a mistrial is an extraordinary act which should only be granted if necessary to serve the ends of justice." *Simmons v. State*, 208 Md. App. 677, 690 (2012) (internal quotation and citation omitted). To be sure, "[a] request for a mistrial in a criminal case is addressed to the sound discretion of the trial court." *Cooley v. State*, 385 Md. 165, 173 (2005) (internal quotation and citation omitted). As such, "[w]e review the trial

judge's refusal to grant a mistrial for an abuse of discretion[,]" *Wilder v. State*, 191 Md. App. 319, 335 (2010) (citing *Miles v. State,* 365 Md. 488, 569 (2001)), and "will not reverse a trial court's denial of a motion for mistrial unless it is clear that there has been prejudice to the defendant." *Molter v. State*, 201 Md. App. 155, 178 (2011) (internal quotation and citation omitted). Procedurally, "[i]n assessing the prejudice to the defendant, the trial judge first determines whether the prejudice can be cured by instruction." *Kosh v. State*, 382 Md. 218, 226 (2004). Granting a mistrial is an extreme sanction only "resorted to when such overwhelming prejudice has occurred that no other remedy will suffice to cure the prejudice." *Jordan v. State*, 246 Md. App. 561, 598 (2020) (internal quotation and citation omitted).

In *Rainville v. State*, 328 Md. 398 (1992), the Court of Appeals discussed a number of factors that we may take into consideration when deciding whether the trial court committed an abuse of discretion in refusing to grant a mistrial. *Id.* at 408. "These factors are not exclusive and do not themselves comprise the test." *Id.* (internal quotation and citation omitted). Rather the factors are used to guide us in determining whether the damage of the statement transcended the curative effect of an instruction. *See Guesfeird*, *supra*, 300 Md. at 659. Some of the factors we consider include: whether the reference to the inadmissible evidence was repeated or whether it was a single, isolated incident; whether the reference was solicited by counsel, or was an unresponsive statement; whether the witness making the reference to the inadmissible evidence is the principal witness; and whether other evidence exists. *See id.*; *see also Rainville*, *supra*, 328 Md. at 398.

Here, our consideration of the factors outlined in *Rainville* and *Guesfeird* weigh in favor of the conclusion that the trial court properly denied Steven's motion for a mistrial. First, Freeland's comment was not solicited by the State at trial. Rather, the State consciously sought and asked questions in such a way to avoid any reference to the specific contents of the Facebook message. Specifically, in prefacing the question, the State asked "[a]nd without saying what it said on there." There is no indication that the State purposefully attempted to have Freeland state the contents of the message, and, generally, "inadvertent presentation of inadmissible information may be 'cured by withdrawal of it and an instruction to the jury to disregard it.'" *Vaise*, *supra*, 246 Md. App. at 244 (quoting *Cooley*, *supra*, 385 Md. at 174. Further, the comment was isolated and was only comprised by a single word. The word itself, "threat," did not reveal any of the information contained in the Facebook message. Third, although Freeland was an important witness to the State's case, she was not the only witness. Both Jay and Fizer testified to their witnessing the shooting as well, and Jay identified both Steven and Eric.[6]

[6] The facts of this case differ markedly from that of *Rainville*. In *Rainville*, the defendant was accused of sexually assaulting both a seven-year-old girl and her nine-year-old brother. *Rainville*, *supra*, 328 Md. at 399–400. During trial, the girl's mother included in her testimony that the defendant was in jail for sexually assaulting the boy. *Id.* at 401. The defendant moved for a mistrial and the court denied the motion, opting instead to give a curative instruction. *Id.* at 401–02. The defendant was convicted, and he appealed. *Id.* at 402. The Court of Appeals reversed, holding that the motion for mistrial should have been granted. *Id.* at 407, 411. The Court noted that the prior conviction mentioned by the witness was similar to the crime that the defendant was on trial for and "suggest[ed] to the jury that if the defendant did it before he probably did it this time." *Id.* at 407 (internal quotation and citation omitted). The witness' comment in *Rainville* was far more

Notably, the trial court immediately gave a curative instruction to the jury to disregard Freeland's statement. During jury instructions, the trial court renewed its curative instruction.[7] The Court of Appeals has repeatedly held that we presume that juries follow the court's instructions, especially when there is no evidence in the record to indicate the opposite. *Donaldson v. State*, 416 Md. 467, 499 (2020). Indeed, when a trial court gives a curative instruction, we will "generally presume[ ] that the jury can and will follow [it]." *Simmons v. State*, 436 Md. 202, 222 (2013) (internal quotation and citation omitted). There is no indication in the record that Freeland's comment prejudiced Steven's trial to the point that the trial court's curative instructions were ineffective.[8] Accordingly, we hold that this case was not one of those rare cases where "the bell [could not] be unrung[,]" and, therefore, the trial court did not abuse its discretion in denying Steven's motion for a mistrial. *Vaise*, *supra*, 246 Md. App. at 240.

inflammatory than Freeland's statement in this case. Further, the State's case in *Rainville* relied almost entirely upon the testimony of the seven-year-old girl. *Id.* at 409–10.

[7] Specifically, the trial court instructed:

> When I did not permit the witness to answer a question you must not speculate as to the possible answer. If after an answer was given[,] I ordered that the answer be stricken, you must disregard both the question and the answer.

[8] Arguably, the jury's split verdict demonstrates that Steven was not unduly prejudiced by Freeland's remark. *See Degren v. State*, 352 Md. 400, 435 (1999). Specifically, Steven was found not guilty of conspiracy to commit first-degree murder. *See id.*

IV. The trial court abused its discretion in making remarks immediately following the sentencing of Eric which could lead a reasonable person to infer that the trial court impermissibly considered Eric's decision to exercise his right to go to trial in fashioning its sentence.

During this case, prior to the beginning of trial, the State offered a plea deal to Eric of a guilty plea to count I (first-degree murder), with a sentence of life, suspend all but fifty years; and to count II (use of a handgun), with a sentence of five years without parole, to run concurrently to the sentence for count I. Eric declined this plea deal offer and exercised his right to a jury trial. At Eric's sentencing hearing, Eric's counsel explicitly asked the court in her argument at sentencing not to consider the fact that Eric exercised his constitutional right to a trial. Specifically, Eric's counsel stated: "[s]o while that plea was rejected, and [Eric] exercised his right to a trial, again [ ] my position with the [c]ourt is don't punish him for exercising that right, and I guess I'm asking Your Honor to consider the life, all but fifty years [sentence]."

After hearing arguments from both sides, the trial court sentenced Eric to a total of life imprisonment plus thirty-five years. There was no explanation given prior to the sentencing. Immediately after announcing the sentence, however, the trial court reasoned:

> The Court, sir, is not punishing you for exercising your rights to have a trial at all. One of the reasons why this sentence was given is because the Court had to look at the witnesses, and the witnesses had to recount that morning and that day to the Court. This man's son had to take the stand and tell strangers, and this Court had to watch the pain and the difficulty he had in recounting the viewing of you killing his father. Mr. Finney suffered four gunshot wounds to the head and three to the rest of the body. That's the reason for this sentence.

On appeal, Eric contends that the trial court impermissibly considered Eric's decision to exercise his right to a trial in fashioning its sentence by punishing him for doing so. Specifically, Eric contends that the trial court's statements immediately after imposing its sentence obviously implied that Eric's decision to stand trial forced the witnesses to relive the day of Finney's murder and no other explanation for its sentence was given. The State argues that Eric's claim is unpreserved because Eric did not explicitly object immediately after the trial court read its sentencing determination. Further, the State contends that we are required to read the trial court's statements in the context of the entire sentencing proceeding, and, in doing so, we must hold that the trial court's statement was merely in response to Eric's counsel's argument. We agree with Eric.

Eric contends that he preserved for appellate review the issue of whether the circuit court impermissibly considering during sentencing his decision not to plead guilty because, during the sentencing proceeding, his trial counsel explicitly stated to the court that her position was that the trial court should not penalize Eric for his decision to stand trial. The State responds that Eric's counsel failed to preserve the issue for appellate review because the statement made during the sentencing proceeding was not an explicit objection to the trial court's sentence.

"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." Md. Rule 8-131(a). "In a criminal case, '[f]or purposes of review by the trial court or on appeal of any [ ] ruling or order [other than the admission of evidence], it is sufficient that a party,

at the time the ruling or order is made or sought, makes known to the [trial] court . . . the objection to the action of the trial court.'" Md. Rule 4-323(c).

Pursuant to Maryland Rule 8-131(a), "a defendant must object to preserve for appellate review an issue as to a trial court's impermissible considerations during a sentencing proceeding." *Sharp*, *supra*, 446 Md. at 683 (citing *Abdul-Maleek*, *supra*, 426 Md. at 69). "Accordingly, in *Abdul-Maleek* . . . , th[e] Court [of Appeals] held that, by failing to object, a defendant failed to preserve for appellate review an issue as to a trial court's impermissible considerations during a sentencing proceeding." *Id.*[9]

Here, we agree with Eric that the issue of whether the circuit court impermissibly considered during sentencing his decision to not to plead guilty is preserved for appellate review. Eric's counsel explicitly requested that the trial court impose the sentence that was offered as part of the plea agreement. Eric's counsel then stated her position that the trial court should not punish Eric for exercising his right to go to trial. "[Eric's] counsel's statement was sufficient to 'make[ ] known to the [circuit] court[,]' . . . that [Eric] took issue with what his counsel characterized as the circuit court's 'punishing [Eric] for wanting to go to trial.'" *Id.* at 683–84. In other words, in our view, Eric's counsel's statements during the sentencing hearing made known his objection to the trial court's allegedly penalizing Eric for declining the State's plea offer. *See id.*

[9] In *Abdul-Maleek*, the Court of Appeals exercised its discretion under Maryland Rule 8-131(a) to address the unpreserved issue as to the trial court's impermissible considerations during sentencing. *Abdul-Maleek*, *supra*, 426 Md. at 70.

Having concluded that Eric preserved the issue of impermissible considerations at sentencing for appellate review, we now turn to the merits. Maryland law is well settled that a sentencing court "may exercise wide discretion in fashioning a defendant's sentence." *Sharp*, *supra*, 446 Md. at 685 (internal quotation and citation omitted). "There are 'only three grounds for appellate review of [a] sentence[ ] . . . : (1) whether the sentence constitutes cruel and unusual punishment or violates other constitutional requirements; (2) whether the [trial court] was motivated by ill-will, prejudice[,] or other impermissible considerations; and (3) whether the sentence is within statutory limits.'" *Id.* at 685–86 (quoting *Jones v. State*, 414 Md. 686, 693 (2010)).

"This case involves the second ground for appellate review of a sentence–namely, alleged impermissible considerations by a trial court during sentencing." *Id.* at 686. Indeed,

> [u]nder the Self-Incrimination Clauses of the Fifth Amendment to the United States Constitution and Article 22 of the Maryland Declaration of Rights, the Trial Clauses of the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution, a trial court may not consider during sentencing a defendant's decision not to plead guilty.

Id. (internal citations omitted).

In *Johnson v. State*, 274 Md. 536, 539 (1975), the Court of Appeals reviewed a trial court's comments explicitly referencing a defendant's decision not to plead guilty and to exercise his right to a trial. At the sentencing hearing, the trial court explained "[i]f you had come in here with a plea of guilty . . . you would have probably gotten a modest

sentence." *Id.* at 543. This language indicated to the Court that the trial court, "at least to some degree, punished Johnson more severely because he failed to plead guilty and, instead, stood trial." *Id.* In reviewing the trial court's comments in full, we held that the statement by the trial court "manifest[ed] that an impermissible consideration may well have been employed." *Id.* Critically, we held that any doubt in that regard must be resolved in favor of the defendant. *Id.*

Similarly, in *Abdul-Maleek*, the Court of Appeals vacated the defendant's sentence and remanded it for sentencing. *Abdul-Maleek*, *supra*, 446 Md. at 74. In that case, the trial court, during sentencing, stated:

> You have every right to go to trial in this case, which you did– not once, but twice. [The victim] was victimized, and then she had to . . . testify . . . [twice], and she had to do that because you have every right to have all of those opportunities to put forth your position.

Id. at 73. The Court held that although it did not conclude that "the sentencing court *actually considered* the fact" that the defendant exercised his right to trial, the judge's comments could lead a reasonable person to infer that the court might have been motivated by that impermissible consideration. *Id.* at 73–74 (emphasis in original) (citing *Jackson v. State*, 364 Md. 192, 207 (2001)).

In the instant case, when reading the trial court's statement "in the context of the entire sentencing proceeding . . . we do not conclude that the sentencing court *actually considered* the fact of [Eric's] exercise of his right to [stand trial] and imposed a more severe sentence as punishment for having done so." *Id.* at 73 (emphasis in original).

Critically, we are aware of the longstanding presumption that judges know and properly apply the law, and we believe the trial court did so here. *See Medley v. State*, 386 Md. 3, 7 (2005).

"All that said, we are constrained nonetheless to remand this case for resentencing." *Abdul-Maleek*, *supra*, 426 Md. at 74. The trial court's reference to Eric's decision to stand trial and the impact of that choice on the witnesses could "lead a reasonable person to infer that [the trial court] might have been motivated" by an impermissible consideration. *Jackson*, *supra*, 364 Md. at 207. Under these circumstances, we are bound to resolve any doubt in favor of Eric. *Johnson*, *supra*, 274 Md. at 543.

SENTENCE OF THE CIRCUIT COURT FOR BALTIMORE CITY AS TO ERIC BOWMAN IS VACATED; CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO RE-SENTENCE ERIC BOWMAN IN CONFORMANCE WITH THIS OPINION; ALL OTHER JUDGMENTS OF THE CIRCUIT COURT AFFIRMED. COSTS TO BE PAID ¾ BY APPELLANTS AND ¼ BY APPELLEE.