UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1357

September Term, 2015

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NICOLAOS TRINTIS

v.

STATE OF MARYLAND

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Eyler, Deborah S.,
Meredith,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

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Opinion by Eyler, Deborah S., J.

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Filed: June 23, 2016

A jury in the Circuit Court for Baltimore City convicted Nicolaos Trintis, the appellant, of four counts of child sexual abuse, sixteen counts of second-degree assault, and sixteen counts of third-degree sex offense, all against victim A.C.[1] The court imposed sentences of twelve years in prison, suspend all but five years, for each child sexual abuse conviction, to run concurrently. It merged the other convictions for sentencing.

The appellant presents five issues, which we have reordered and rephrased as follows:

I. Did the trial court abuse its discretion by admitting certain hearsay evidence?

II. Did the trial court abuse its discretion by denying the appellant's requested "missing witness" instruction?

III. Did the trial court abuse its discretion by denying the appellant's requested "missing evidence" instruction?

IV. Did the trial court err by finding that the State did not commit a *Jencks* violation?[2]

V. Did the trial court abuse its discretion by denying the appellant's motion for a mistrial?[3]

[1] We have chosen to use the victim's initials instead of her name.

[2] *Jencks v. United States*, 353 U.S. 657 (1957).

[3] The appellant worded his questions presented as follows:

I. Did the trial court err in allowing impermissible and prejudicial hearsay – statements that the victim's siblings saw her with [the appellant] – into evidence?

(Continued…)

For the following reasons, we shall affirm the judgments of the circuit court.

## FACTS AND PROCEEDINGS

The following facts were adduced at trial, which commenced on April 21, 2015, and concluded on April 24, 2015.

In 1979, A.C. was 10 years old. She, her mother, Marian Jones ("Jones"), and her younger sister and brother were living in an apartment above Bill's Café, at 6701 Holabird Avenue. The appellant and his brother were co-owners of the bar and the apartment. The appellant managed the bar. Jones worked there as a bartender. She and the appellant were romantically involved.

Jones worked the night shift from around 5:00 p.m. to 2:00 a.m. While she was at work, she would leave the three children in the apartment, unsupervised. The appellant, who had a key to the apartment, would take them food and check on them.

(…continued)

II. Did the trial court abuse its discretion in failing to give a missing evidence instruction about evidence the Baltimore Police Department admittedly lost?

III. Did the trial court abuse its discretion in failing to give a missing witness instruction relating to the lack of testimony from the alleged victim's brother and/or sister?

IV. Did the trial court err by failing to dismiss the charges against the Defendant based on a failure of the State to provide a prior statement of one or more of its witnesses?

V. Did the trial court abuse its discretion in not granting a mistrial after a State's witness – the lead Detective – stated to the jury that the Defendant asked for an attorney?

A.C. testified that on dates that occurred between January of 1979 and December of 1982, the appellant touched her sexually approximately "200 and 250 times." The acts of abuse all took place in the apartment, at night, when Jones was working.

According to A.C., the first instances of abuse happened when the appellant came to the apartment to give her a bath. He touched her on her "chest," "breasts," "between [her] legs," and in her "vagina area," and "he would slide his hands up between the crack of [her] buttocks[.]" As he touched her, he told her he was teaching her how to bathe, but warned her to "keep it to [her]self," and to "keep it secret" "because no one would believe it was him teaching [her] this." A.C. testified that these acts of abuse in the bathroom happened "often."

Later, the location of the abuse changed to A.C.'s bedroom. At first, the appellant would rub her "hair, probably once or twice a week." He then started "having sexual contact" with her. He would "pull down [her] blanket," "lift up [her] nightgown" and "touch [her] vagina area." Over time, he engaged A.C. in vaginal, oral, and anal intercourse. Sometimes the appellant would leave money on A.C.'s bed stand, "depending on what it was that he had [her] do." If A.C. screamed or cried, the appellant told her "it won't take long, be quiet," and "[t]hey're not going to . . . believe you over me." One time, the appellant ripped a pair of A.C.'s underpants and A.C. hid them in a drawer.

One day in 1983, when she was 14 years old, A.C. called her grandmother and asked her to come to the apartment and pick her up. Her grandmother did so, and they

went to the grandmother's house. A.C.'s three aunts, Mary Nevins, Margaret Riechert, and Stephanie Sullivan-Manyon, were there. A.C. told them about the abuse. A.C. then called her mother at the bar and told her. According to A.C., her mother did not believe her. A.C. moved in with her grandmother. No one reported the abuse to the police at that time.

In 1987, A.C. and Sullivan-Manyon got into an argument that A.C. claimed triggered memories of the sexual abuse. Jones testified that during the argument, A.C. "got upset, started shaking and crying." Shortly thereafter, A.C. and Jones went to the Central Sex Unit of the Baltimore City Police Department ("BCPD"), Southeastern precinct, and reported the abuse to a Detective McIntyre.[4] They did not follow up on the investigation, however.

Jones's testimony conflicted with A.C.'s testimony in some respects. She testified that when she learned about the abuse in 1983, she contacted social services and moved her children out of the apartment and in with her mother. She denied not believing A.C. when she first disclosed the abuse. She said she did not know why she did not follow-up with the BCPD after reporting the abuse in 1987.

Nevins confirmed that she was present when A.C. disclosed the abuse in 1983. She testified that A.C.'s grandmother is deceased.

[4] The detective's first name is not in the record.

Riechert lived at A.C.'s grandmother's house from the late 1970s through the "late 80s." At the relevant time, she, like Jones, was working at Bill's Café. Riechert saw the appellant leave the bar and go up to the apartment on several occasions. One time, Riechart visited Jones at the apartment and saw a pair of A.C.'s underpants that were torn. Jones said their dog must have ripped them. Riechert corroborated that she was present when A.C. disclosed the abuse in 1983 and that in 1987 A.C. and Sullivan-Manyon got into an argument that prompted A.C. and Jones to report the abuse to the BCPD.

Sullivan-Manyon testified consistent with Riechert and A.C. She further stated that on one occasion, she was taking a bath in Jones's apartment and the appellant walked in on her and commented on her bra size.

In 2012, A.C. became aware of an incident involving her own granddaughter that prompted her to again report her abuse to the BCPD.[5] On May 1, 2012, Detective Mohammed Ali received a call from an officer "in the Southeast district stating that he had two women who were reporting that one of them was a rape victim from 30 plus years ago." That same day, he interviewed A.C. and Nevins. In the interview, A.C. said that her mother (Jones) had told her that she (A.C.) had reported the abuse to someone in

[5] A.C. testified at trial that she reported the abuse in 2011. Detective Ali wrote in his application for statement of charges that he met with A.C. for the first time on May 1, 2012, however.

the 1980s, but then had recanted her statement. She told Detective Ali that she did not recall ever recanting her story.

Because of the amount of time that had passed since the incidents of abuse, Detective Ali did not collect any DNA evidence. Later, he interviewed Jones and A.C.'s brother and sister. After discussing his investigation with members of the State's Attorney's Office, Detective Ali obtained an arrest warrant for the appellant.

On June 12, 2012, Detective Ali contacted the appellant and "told him there was an allegation that was made against him that [they] needed to talk about." The appellant went to the Southeastern precinct and Detective Ali advised him of his *Miranda* rights.[6] He signed a BCPD "Explanation and Waiver of Rights" form. Detective Ali told him about A.C.'s allegations. According to Detective Ali, the appellant had "a shocked look about his face" and said, "I dealt with this back then." He denied the allegations and said "he couldn't believe that [A.C.] was bringing it up again." He said he would only go "upstairs [to the apartment] to check on the kids or bring them food." Detective Ali described the appellant's demeanor as "nervous." At one point, the appellant asked Detective Ali, "Why are you looking at me that way?"

The appellant testified on his own behalf. He remembered A.C. and that he had been romantically involved with A.C.'s mother (Jones). He acknowledged that when

[6] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Jones was working at the bar, he took food up to the apartment for A.C. and her siblings. He denied engaging in any sexual act or contact with A.C.

We shall include additional facts as pertinent to the issues.

## DISCUSSION

### I.

### (a)

As noted, A.C. testified on direct examination that the appellant touched her sexually "200 and 250" times, between January 1, 1979, and December 31, 1982. On cross-examination, defense counsel established that the apartment over the bar was very small and the common area and the sleeping areas were only divided by hanging beads. He then questioned A.C. as follows:

> [DEFENSE COUNSEL]: And all of that time . . . ***your younger sister, your younger brother, your mother, anybody that was staying there in the apartment never indicated to you that they were awakened, that they were disturbed, that what was going on, why were you crying, why were you screaming*****?**
>
> [A.C.]: ***I'm not allowed to say that because they're not here. I can't repeat their testimony.***
>
> [DEFENSE COUNSEL]: I'm not talking about their testimony. ***My question to you was did anybody indicate to you in terms of the people that I named --***
>
> [A.C.]: Okay.
>
> [DEFENSE COUNSEL]: ***-- that they heard, saw --***
>
> [A.C.]: ***My brother saw him come out of my -- come out of my bathroom.***
>
> [DEFENSE COUNSEL]: ***Okay. Did he --***

THE COURT: Excuse me. There is someone --

[DEFENSE COUNSEL]: But your brother --

[A.C.]: ***He heard me crying in my bedroom.***

THE COURT: Excuse me a minute.

[DEFENSE COUNSEL]: No. I didn't ask you that, ma'am.

THE COURT: Someone just came into the courtroom. Is that a witness?

[THE STATE]: No, Your Honor.

THE COURT: All right. Continue.

[A.C.]: That was your question.

[DEFENSE COUNSEL]: No. My question to you, ma'am, of those 200 some times did your mother ever interrupt you --

[A.C.]: My mother was --

[DEFENSE COUNSEL]: -- or stumble onto --

[A.C.]: -- never home. No.

[DEFENSE COUNSEL]: Okay. Did your sister ever come into your room or --

[A.C.]: No.

[DEFENSE COUNSEL]: -- interrupt you? Did your brother ever come into your room or the bathroom and interrupt you? That's my question, not -- not what he told you, what --

THE COURT: All right.

[DEFENSE COUNSEL]: -- he did.

THE COURT: That's the question.

[A.C.]: No.

[DEFENSE COUNSEL]: Okay.

(Emphasis added.)

On redirect examination, the prosecutor followed up on this line of questioning:

[THE STATE]: [Defense counsel] asked a question, did anyone hear you crying.

[A.C.]: Right.

[THE STATE]: Since he asked it, tell us who heard you crying in that room.

Defense counsel objected, and the following took place at the bench:

THE COURT: What's the question?

[THE STATE]: [Defense counsel] asked the question did anyone -- was anyone in the house to hear you crying and screaming, and then when she started to . . . answer the question he . . . stopped her and then he said, was your mother there, which she wasn't. But --

THE COURT: All right. What's your question?

[THE STATE]: My question did anyone hear you crying --

THE COURT: You can't ask that question.

[THE STATE]: Your Honor, he asked the question so he opened up the door.

THE COURT: He asked many questions.

[THE STATE]: That's --

THE COURT: And you didn't object. He's objecting to your --

[THE STATE]: I did object.

> THE COURT: Well, he's objecting to the question, did anybody hear you. She doesn't know if anybody heard her. She can answer the question whether anybody told her . . . they heard her, but she can't be telling what they heard.
>
> [THE STATE]: Okay. Thank you.

The prosecutor resumed redirect examination, asking, "[W]ho was there and saw you and the defendant together?" The court brought counsel back to the bench and told the prosecutor, "[Y]ou can ask the question whether they reported to her that they heard her. . . . But you can't ask her whether they heard her or not." The prosecutor continued redirect examination:

> [THE STATE]: So, [A.C.], who told you that they saw -- who told you that they heard you with [the appellant]?
>
> [A.C.]: Both my brother and my sister.
>
> [THE STATE]: And what did they tell you?

Defense counsel objected, prompting another bench conference.

> [DEFENSE COUNSEL]: It's clearly hearsay, Your Honor. Those witnesses are here to testify, but --
>
> THE COURT: Well --
>
> [DEFENSE COUNSEL]: -- they can testify.
>
> [THE STATE]: He opened the door, Your Honor. He --
>
> [DEFENSE COUNSEL]: I didn't open the door to that question.
>
> *** * ***
>
> THE COURT: Wait. Wait. Wait a minute. Are these witnesses available?

[THE STATE]: No.

THE COURT: Are they going to be called? Oh, they're not going to be called?

[THE STATE]: And he --

THE COURT: All right.

[THE STATE]: -- he --

[DEFENSE COUNSEL]: They were listed as witnesses.

[THE STATE]: [A.C.'s brother,] Tommy Owens -- because they could possibly -- their names --

THE COURT: Talk to me.

[THE STATE]: Their names had been mentioned. But she was told by me that she could not go into this and then [defense counsel] brings it up. And she reminds him that she was told she couldn't go into --

THE COURT: He never asked what did anybody tell you.

The bench conference continued, and the prosecutor argued that she should be permitted to ask who reported hearing the abuse to A.C. because defense counsel had asked that question on cross-examination. She explained that A.C.'s brother and sister were living in West Virginia and Florida, respectively, and would not be testifying at trial. Defense counsel acknowledged that he "didn't know whether [the State] brought them in or did not." Upon further discussion, the following took place:

[THE STATE]: Okay. So I'll just get out the fact that they saw -- they were there.

THE COURT: It's already on the record. Didn't she say -- or maybe she didn't. You can get out the fact that they reported to her --

[THE STATE]: Yes.

THE COURT: -- that they heard something, not a problem. And I think she's -- you already asked that question, but if you think you didn't you can ask it again. But they can't -- she can't testify as to what they said to her --

[THE STATE]: Okay.

THE COURT: -- unless, of course, you've got some foundation that's going to --

[THE STATE]: (Indiscernible). Thank you, Your Honor.

THE COURT: All right.

[DEFENSE COUNSEL]: Thank you.

(Counsel returned to trial tables and the following occurred in open court:)

THE COURT: Go on, please.

[THE STATE]: So I'll ask the question again. Did anyone report to you that they -- that they heard you scream?

[A.C.]: Yes.

[DEFENSE COUNSEL]: Objection. Leading.

THE COURT: Overruled.

[THE STATE]: ***Did anyone report to you that they saw you with [the appellant]?***

[A.C.]: ***Yes.***

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[THE STATE]: ***And who reported it?***

[A.C.]: ***My sister and --***

[THE STATE]: And where is --

[A.C.]: ***-- my brother.***

[THE STATE]: and where is your sister today?

[A.C.]: My sister is in Florida.

[THE STATE]: And where is your brother today?

[A.C.]: West Virginia.

(Emphasis added.)

**(b)**

The appellant contends the court erred by allowing A.C. to testify on redirect examination "that her brother and/or her sister told her that they saw her with [the appellant]." His contention is based on a single exchange on redirect:

> [THE STATE]: Did anyone report to you that they saw you with [the appellant]?
>
> [A.C.]: Yes.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [THE STATE]: And who reported it?
>
> [A.C.]: My sister and . . . my brother.

He asserts that this testimony by A.C., that her sister and brother told her they saw her with the appellant, was hearsay in that it consisted of out-of-court statements by the sister and brother that were offered for their truth, *i.e.*, that they in fact told A.C. they had

seen her with the appellant. *See* Md. Rule 5-801(c) (defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"). The appellant maintains that there is no exception to the rule against hearsay that would allow this evidence to be admitted. He also maintains that the court's error in admitting this hearsay evidence was not harmless beyond a reasonable doubt because "the hearsay was the only independent corroboration of [A.C.] and [the appellant] being together in an inappropriate or unordinary way."

The State responds that the trial court properly limited A.C.'s testimony on redirect "to precisely the information which defense counsel had begun to elicit with his own questions." It argues that the evidence was admissible under the doctrine of "curative admissibility." Alternatively, it argues that any error was harmless beyond a reasonable doubt because the same information already had been elicited by defense counsel.

**(c)**

The doctrine of curative admissibility "'permit[s] rebuttal by means of otherwise inadmissible evidence only if the evidence originally submitted [by the opponent] created significant prejudice and there is a need for a corrective that the counterpuncher may provide by inadmissible evidence of his own.'" *Clark v. State*, 332 Md. 77, 88 (1993) (alterations in original) (quoting 1 *Wigmore on Evidence* § 15, at 741 (3d ed. 1940)). Otherwise inadmissible and incompetent evidence is admissible "'only to the extent

necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence,'" *id.* at 90 (quoting *United States v. Winston*, 447 F.2d 1236, 1240 (D.C. Cir. 1971)), and requires a party to first show that the original evidence was "highly prejudicial and a motion to strike the previously admitted evidence and a cautionary instruction would not cure its prejudicial effect[.]" *Id.* at 91.

The doctrine of curative admissibility does not apply here. The evidence adduced by defense counsel on cross-examination of A.C.—that her brother saw the appellant come out of her bathroom and heard her crying in her bedroom—was not prejudicial to the State. Indeed, it was beneficial to the State.

A doctrine that is more closely allied with the State's position on appeal is "invited error."

> Under the "invited error" doctrine, which is a "shorthand term for the concept that a defendant who himself invites or creates error cannot obtain a benefit—mistrial or reversal—from that error," [*State v. Rich*, 415 Md. 567, 575 (2010)] (quoting *Klauenberg v. State*, 355 Md. 528, 544 (1999)), "[i]f the defendant has both invited the error, and relinquished a known right, then the error is waived and therefore unreviewable." *Id.* at 580 (quoting [*United States v.*] *Perez*, 116 F.3d [840,] 845 [(9th Cir. 1997)]).

*Olson v. State*, 208 Md. App. 309, 365 (2012) (second alteration in original) (parallel citations omitted).

In *Murdock v. State*, 175 Md. App. 267 (2007), a detective investigating a carjacking received an anonymous tip that the defendant was the perpetrator. The detective used the tip to assemble a photographic array, from which the two victims selected the defendant's picture. Before trial, the defense moved to exclude any

reference to the anonymous tip, on hearsay grounds. The court granted the motion. During trial, on cross-examination of the detective, defense counsel asked how and why he had chosen the photographs for the array. The detective responded that he had included the defendant's photo in the array because he was a "target" of the investigation. Defense counsel did not object. On appeal, the defendant argued that the trial court erred by permitting the detective to so testify, in violation of its pre-trial ruling. Although we concluded that the issue was not preserved, we observed that "almost all of the challenged testimony was elicited by defense counsel during cross-examination" and the defendant could not now "'benefit' on appeal from an error he invited." *Id.* at 294 n.8.

We return to the case at bar. The testimony by A.C. that the appellant complains was improperly admitted on redirect—that her brother and sister told her they saw her with the appellant—is nearly identical to the testimony *defense counsel* already had elicited from A.C. on cross-examination. Defense counsel asked A.C. whether anyone—specifically A.C.'s mother, sister, or brother—"*indicated to* [A.C.] that they were awakened, that they were disturbed, that what was going on, why [was A.C.] crying, why [A.C. was] screaming[.]" (Emphasis added.) When, apparently in compliance with instructions from the prosecutor, A.C. answered that she was not supposed to say what others had told her, defense counsel repeated the question, asking "*did anybody indicate to you* in terms of the people that [defense counsel] named . . . that they heard" or saw her with the appellant. (Emphasis added.) A.C. answered that her brother had seen the appellant come out of her bathroom and had heard her crying in her bedroom.

This testimony is in all meaningful respects identical to the testimony A.C. then gave on redirect that the appellant complains about, *i.e.*, that her brother and sister told her that they saw her with the appellant. On cross, in response to the question whether any of the people who lived in the apartment "indicated to" her that they had seen her with the appellant or heard her cry or scream, A.C. testified that her brother saw her with the appellant and heard her crying. Given the question, it was implicit in A.C.'s answer that she knew her brother had seen her with the appellant and had heard her crying because he had "indicated" that to her. Her testimony on redirect, that her brother and sister had told her that they saw her with the appellant, was the same as the testimony she had given on cross.[7]

Because the appellant was responsible for eliciting the testimony he now complains about, in the first instance, he cannot now "obtain a benefit—[*i.e.*,] reversal—from that error." *Ruth v. State*, 133 Md. App. 358, 373 (2000) (citing *Allen v. State*, 89 Md. App. 25, 43 (1992)).

"The trial judge's discretion in permitting inquiry on redirect examination is wide, particularly where the inquiry is directed toward developing facts made relevant during cross-examination or explaining away discrediting facts." *Bailey v. State*, 16 Md. App. 83, 110–11 (1972) (citing *Mills v. State*, 12 Md. App. 449, 461 (1971)); *see also Daniel v. State*, 132 Md. App. 576, 583 (2000). That defense counsel asked questions that

[7] A.C. gave no specific information about what her sister saw or heard.

turned out to be, as appellant states, "bad for the defense" is irrelevant. Under the circumstances, the court did not abuse its discretion by permitting A.C. to testify on redirect examination to the same facts she testified to on cross-examination.

**(d)**

For much the same reasons, even if the court abused its discretion in allowing the testimony on redirect that the appellant complains about, its error was harmless beyond a reasonable doubt. "An error is harmless when a reviewing court is 'satisfied that there is no reasonable possibility that the evidence complained of—whether erroneously admitted or excluded—may have contributed to the rendition of the guilty verdict.'" *Clark v. State*, 218 Md. App. 230, 241–42 (2014) (quoting *Dionas v. State*, 436 Md. 97, 108 (2013) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976))).

"In considering whether an error was harmless, we . . . consider whether the evidence presented in error was cumulative evidence." *Dove v. State*, 415 Md. 727, 743 (2010). Evidence is cumulative beyond a reasonable doubt when we are convinced that "there was sufficient evidence, independent of the [evidence] complained of, to support the appellant['s] conviction" and when the improperly admitted evidence has a "demonstrably minute impact." *Richardson v. State*, 7 Md. App. 334, 343 (1969). "The essence of this test is the determination whether the cumulative effect of the properly admitted evidence so outweighs the prejudicial nature of the evidence erroneously admitted that there is no reasonable possibility that the decision of the finder of fact

would have been different had the tainted evidence been excluded." *Ross v. State*, 276 Md. 664, 674 (1976).

A.C.'s testimony on redirect examination was cumulative of what she had already testified to on cross-examination. Because A.C.'s testimony on redirect proved "the same point" as her testimony on cross-examination, any error in admitting the evidence on redirect was harmless beyond a reasonable doubt. *Dove*, 415 Md. at 744.

**II.**

The appellant contends if A.C.'s testimony about what her brother and sister saw and heard was properly admitted, the trial court abused its discretion by denying his request for a missing witness instruction pertaining to them.

"A 'missing witness' instruction informs the jury that the failure of a party to call a material witness permits the jury to infer that the testimony would have been unfavorable to the party who failed to call such a witness." *Dansbury v. State*, 193 Md. App. 718, 741 (2010). *See also Robinson v. State*, 315 Md. 309, 314–15 (1989). "'[T]he missing witness rule applies where (1) there is a witness, (2) who is peculiarly available to one side and not the other, (3) whose testimony is important and non-cumulative and will elucidate the transaction, and (4) who is not called to testify.'" *Dansbury*, 193 Md. App. at 742 (quoting *Wilson v. State*, 148 Md. App. 601, 654 n.22 (2003)). The "adverse inference cannot be drawn 'when the witness is not available, or where his testimony is unimportant or cumulative, or where he is equally available to both sides.'" *Id.* (Quoting *Robinson*, 315 Md. at 321.) Whether an unfavorable inference may be drawn in the

circumstances of the case is a question of fact. *Keyes v. Lerman*, 191 Md. App. 533, 546 (2010).

If the prerequisites for a missing witness instruction are shown, it is within the discretion of the trial judge to grant or deny the instruction. *Robinson*, 315 Md. at 319 n.7.

The appellant argues that A.C.'s siblings were "peculiarly available" to the State because they were identified as potential witnesses by the prosecution before trial, and the brother was identified as a potential witness during *voir dire*. In his reply brief, the appellant states: "Once a witness has been brought up in *voir dire* at the request of one party, that witness becomes peculiarly within that party's power and control." We disagree.

In *Yuen v. State*, 43 Md. App. 109 (1979), the State indicted the defendants on extortion charges, identifying a particular woman as the subject of their threats in order to extort their intended victim. The woman refused to speak to defense counsel. The defense could have subpoenaed her for trial, but chose not to, "presumably relying upon the fact that the State had indicated that she would be a witness." *Id.* at 112. However, during the trial, the State elected not to call her. The trial court denied the defendants' request for a missing witness instruction. On appeal, they argued that this was error. We disagreed, holding that the witness "was available to [the defendants] by subpoena," and they could not "excuse their failure to subpoena her by claiming to have relied on the State's indication that she would be called." *Id.* (Emphasis omitted.) Moreover, the

witness was presumed to be equally available to the defendants "unless [they] showed the court below that they had exhausted the avenues available to them to produce [the witness]." *Id.*

Likewise, in *Southern Management Corp. v. Mariner*, 144 Md. App. 188 (2002), we held that an expert witness designated pre-trial and named during *voir dire* as a potential witness for the plaintiff was not peculiarly available to the plaintiff. When the plaintiff opted not to call the expert at trial, the defendant requested a missing witness instruction, which the trial court denied. We affirmed. Relying on *Yuen*, we concluded that the witness was "not peculiarly available to one side or the other[.]" *Id.* at 200–01.

These two cases make clear that the mere fact that one party identifies a witness before trial and further identifies the witness during *voir dire* as a person who may be called to testify, does not establish that that witness is "peculiarly available" to that party.

There was no showing that either A.C.'s brother or sister had "the type of relationship with the [State] that pragmatically renders [their] testimony unavailable to" the appellant. *Dansbury*, 193 Md. App. at 746 (citations omitted). "The mere possibility that a witness personally may favor one side over the other does not make that witness peculiarly unavailable to the other side." *Bereano v. State Ethics Comm.*, 403 Md. 716, 744 (2008) (citations omitted). Moreover, the appellant did not make a showing that he had "exhausted the avenues available" to him to secure A.C.'s brother's or sister's attendance at trial. Although they both live out of state, he could have attempted to have them summoned to testify at trial in Maryland, under Md. Code (1973, 2013 Repl. Vol.),

section 9-303 of the Courts and Judicial Proceedings Article ("CJP"), upon a showing that they were material witnesses.[8] He did not do so.

On the record in this case, the appellant did not make a showing that A.C.'s brother or sister were peculiarly available to the State. Accordingly, the court did not abuse its discretion by declining to give a missing witness instruction. Indeed, granting a missing witness instruction would have been an abuse of discretion.

We note, in addition, that although the missing witness instruction was not given, and properly so, defense counsel nevertheless was permitted to argue an adverse inference, and did:

> [T]he State could have brought the brother and the sister in here, but they didn't. The people who were right there in the next room with no doors, no curtains in an open apartment, they could have come in and said, I heard this. I heard my sister crying. I heard my sister screaming. I saw [the appellant] coming up there one night. I saw him coming up -- none of that. Nothing from the folks who were right there for three years[.]
>
> * * *
>
> But those people are alive and [the State] didn't bring them and they have the burden to do that. They didn't bring the sister. They didn't bring the brother.

[8] Given that the events at issue happened more than 30 years before trial, and that when A.C. was ten her brother would have been nine and her sister would have been seven or eight, it is questionable whether material witness status could be shown. We do not know whether either sibling has a present memory of what happened. A.C.'s testimony about her siblings "reporting" to her what they saw did not specify whether they told her what they saw years ago or recently.

**III.**

As mentioned, on June 12, 2012, Detective Ali interviewed the appellant. The interview was video recorded by the BCPD's i-record system. In discovery, defense counsel requested a copy of the video recording. By letter dated July 18, 2014, the prosecutor responded that Detective Ali had discovered later, after the interview, that the "i-record system used to record the interview malfunctioned," resulting in the appellant's interview not being saved.

The next day, defense counsel wrote seeking an "update" on the State's "continued search" for information recovered regarding the interview and "recovery of the metadata."

By letter dated September 26, 2014, the prosecutor wrote:

> I met with Detective Mohammed Ali again on Wednesday[,] September 24. . . . During the course of our meeting, I discussed the i-record interview conducted on your client. Detective Ali further asserted that the system had malfunctioned over a course of time and your client's interview, along with several other defendant and victim interviews, were lost and are not recoverable, despite efforts from the Baltimore City Police Department.

On cross-examination, Detective Ali testified that his interview of the appellant had been recorded, but that the "system at the time that [the BCPD] had it back then . . . was preprogrammed to automatically delete videos after a certain time. We didn't know at the time."

At the close of the evidence, the appellant asked the trial court to give a "missing evidence" instruction, which the court denied.[9] The court told defense counsel that he could argue an adverse inference in closing. Defense counsel did not make reference to the missing recording in his summation.

The appellant contends the court abused its discretion by denying his request for a "missing evidence" instruction. He argues that the recorded interview "was highly relevant," that it was "intentionally destroyed," and that there "is no question that this evidence was crucial to the merits of the case." (Footnote omitted.) He maintains that his "impressions, state of mind, and non-verbal actions are vital pieces of evidence" and that because the jury was not able to draw its own inferences from the video, "[a] missing evidence instruction was necessary to protect" his rights.

The State responds that the evidence did not generate a missing evidence instruction; the recorded interview only was collaterally relevant, to show the appellant's demeanor during the interview; and any error by the court was harmless beyond a

[9] The requested instruction followed Maryland Pattern Criminal Jury Instruction ("MPJI-Cr") 3:29 and reads:

> You have heard testimony about a video interview of [the appellant] taken by Detective Ali, which was not presented as evidence in this trial. If a video interview could have given important evidence on an issue in this case and if the video interview was peculiarly within the power of the State to produce, but was not produced by the State and the absence of that video interview was not sufficiently accounted for or explained, then you may decide that the content of that video interview would have been unfavorable to the State.

reasonable doubt because the appellant testified in his own defense, so the jurors could assess his demeanor, and he did not rebut Detective Ali's testimony that he appeared "shocked" during the interview.

Generally, "a missing evidence instruction . . . need not be given[.]" *Patterson v. State*, 356 Md. 677, 688 (1999). In *Patterson*, officers searching the defendant's vehicle found a jacket containing a large Ziploc baggie with thirty individually packaged bags of crack cocaine inside. They photographed the jacket, but did not keep it. At trial, the photographs were moved into evidence. The defendant sought a "missing evidence" instruction regarding the jacket, arguing that from the size of the jacket jurors could have found that the jacket did not fit him and therefore the drugs were not his. The court declined to give the instruction.

The case reached the Court of Appeals, which affirmed. It explained that a "missing evidence" instruction "is not based on a legal standard but on the individual facts from which inferences can be drawn and, in many instances, several inferences may be made from the same set of facts. A determination as to the presence of such inferences does not normally support a jury instruction." *Id.* at 685. The Court held that because the defendant was able to: "(a) present testimony that he was not seen wearing the jacket and that it was not his style; (b) question the police officer as to what happened to the jacket; and (c) argue to the jury to draw the adverse inference on their own based on the evidence in the case," the trial court did not abuse its discretion by denying the request for a "missing evidence" instruction. *Id.* at 690.

Eleven years later, in *Cost v. State*, 417 Md. 360 (2010), upon which the appellant relies, the Court of Appeals examined circumstances in which a "missing evidence instruction" should have been given. The defendant was charged with reckless endangerment in the stabbing of a fellow inmate. Photographs of the victim's cell showed blood stains on the floor and on towels he had used to stop the bleeding. The facility's protocol required that the cell be processed, including collection of evidence, by a member of the Department of Public Safety and Correctional Service's Internal Investigative Unit ("IIU"). An IIU officer was not contacted until five days after the attack, by which time the cell had been cleaned, thus destroying all physical evidence. Moreover, the victim's clothing that had been collected on the night of the stabbing was "not accepted by IIU's crime lab 'because of the age and the lack of chain of custody.'" *Id.* at 367. At trial, the defendant requested a "missing evidence" instruction, which the trial court denied. The defendant was convicted and his case reached the Court of Appeals, which reversed.

Observing that "the unusual facts here stand in stark contrast to those in *Patterson*," the Court emphasized that the State had control and custody over the missing evidence; the "blood-stained linens and clothing, and dried blood on the floor, certainly would contain highly relevant evidence with respect to the crime for which [the defendant] was charged, which normally would be collected and analyzed"; and "the missing items were actually held as evidence, completely within State custody." *Id.* at 380. Also, what evidence had been retained had not been properly preserved and could

not be examined. The Court held that under the circumstances the trial court abused its discretion by denying Cost's request for a "missing evidence" instruction.

In the instant case, the evidence adduced at trial about the recording of the appellant's interview did not generate, much less necessitate, a "missing evidence" instruction. For a period of time that included the date on which the appellant was interviewed, the i-record system was programmed, mistakenly, to record over prior recordings. Detective Ali did not know that that problem existed when he interviewed the appellant and could not have anticipated that the recording of the interview would become lost. Recordings of other interviews became lost in the same way. At some point and in some way not elicited by the evidence, the problem became known and was corrected.

Unlike in *Cost*, where evidence specific to the defendant's case was destroyed intentionally, in this case the recorded interviews of the appellant and others were lost mistakenly. Moreover, the recorded interview was not "highly relevant." The appellant did not argue that Detective Ali's testimony and notes about the interview were inconsistent with what he actually said. And defense counsel was afforded an opportunity to argue in closing argument the relevance and inferences that could be drawn from the missing recorded interview. On these facts, the trial court did not abuse its discretion by denying the appellant's request for a "missing evidence" instruction.

## IV.

Discovery provided by the State on February 24, 2014, included audio recordings of Detective Ali's interviews of A.C. and Jones. In her interview, Jones said that in 1987 she had reported the abuse to a Detective McIntyre.

On March 26, 2014, defense counsel wrote to the prosecutor asking the State to furnish "Complete investigation files for all previous investigations." (Emphasis in original.) By letter of July 18, 2014, the prosecutor responded:

> This letter is in response to your request for additional discovery. The State has provided your office wi[th] the entire discovery that exists in this case.
>
> As stated to you prior, concerning any "previous investigations", the victim alleges that during the time of abuse, which occurred between 1979–1982, she reported same to her mother. Her mother, who is a listed witness in the case, did not believe her daughter's allegations. ***Furthermore, while the victim recalls that she may have been taken to speak with someone regarding the abuse, she cannot remember whether this person was a police officer, counselor, social worker, or other. She recalls that when presented to this person, she felt a need to recant due to her mother's insistence and did so. Nothing further was conducted***. Therefore, I do not have dates of a previous investigation, files of such investigation, nor direction or conclusion of such investigation. Additionally, I do not have names, addresses or phone numbers of social workers interviewed in previous investigations, nor training materials of alleged social workers or dates, times, and agencies of said social workers. Additionally, Detective Ali searched through the police database in an attempt to locate any police reports from 1979–1982 regarding this incident and his search provided negative results.

(Emphasis added.)

On October 27, 2014, defense counsel filed a document captioned "Supplemental Demand for Bill of Particulars/Demand to Compel Discovery." It included the following:

> With respect to all investigations regarding these allegations the defense again demands the State:
>
> a. Provide all names, phone numbers, ranks and contact information for all investigators in this matter. Including, but not limited to, the referenced Sgt. McIntire [sic] identified in Detective Ali's interview notes. And, all person's [sic] investigated in this matter.
> b. Beginning and conclusion dates of said investigation(s).
> c. Identification of all persons involved in said investigations.
> d. All pictures, drawings, sketches, photos and diagrams (no matter how stored) of the alleged offense scene. Including, but not limited to, all pictures, drawings, sketches, photos and diagrams generated and/or referenced during Detective Ali's video interview with the complaining witness.

(Emphasis in original.)

On April 20, 2015, immediately prior to trial, the court held a hearing on the appellant's pending motion to dismiss the indictment for insufficiency of the charging document, pre-indictment delay, and violation of the *Hicks* rule.[10] In response to defense counsel's argument that the indictment did not allege facts specific enough to permit the charges to be prosecuted, the prosecutor argued, among other things, that specific information had been provided to the defense in discovery. Defense counsel disagreed, and in the course of explaining why brought up the prosecutor's July 18, 2014 letter and complained that the defense had not been given any information about the investigation of the 1987 complaint and A.C.'s "recantation." The prosecutor responded that "[e]verything in this case was handed over to [defense counsel]"; that it "did its due diligence and provided everything in this case"; that the reference to A.C.'s "recantation"

[10] *State v. Hicks*, 285 Md. 310 (1979).

in the July 18, 2014 letter was to A.C.'s recorded interview with Detective Ali, which was previously produced to defense counsel in discovery; that the State did not possess any statement by A.C. in which she recanted her accusations; that she never "recanted once when the State started its investigation"; and that any investigatory files from Detective McIntyre no longer existed due to the lengthy passage of time. At the conclusion of the argument, defense counsel asked the court to dismiss the indictment. There was no request that the court rule on the "Supplemental Demand for Bill of Particulars/Demand to Compel Discovery." The court denied the motion to dismiss the indictment.

The appellant contends the July 18, 2014 letter established that "there is a prior statement [made by A.C.] that included a recantation," which the State failed to produce, and that that failure violated the State's discovery obligation under *Jencks v. United States*, 353 U.S. 657 (1957), and *Carr v. State*, 284 Md. 455 (1979). He also argues that the July 18, 2014 letter did not satisfy the State's burden to produce A.C.'s prior statement in accordance with *Brady v. Maryland*, 373 U.S. 83 (1963).[11]

The State counters that this issue is not preserved for review in that the appellant did not seek a remedy for these supposed violations. And, even if he did, the July 18, 2014 letter "does not establish that any *Jencks* statement exists, nor does it establish that

[11] The appellant makes no argument that Detective McIntyre's investigative file was improperly withheld, except to the extent that the investigative file may include a prior statement by A.C. in which she recanted.

it is now (or ever was) possessed by the State[.]" With respect to the alleged *Brady* violation, the State responds that the appellant did not raise this issue below; "there is no factual record to support the claim"; and there is "no ruling from the trial court" below to support a finding of reversible error.

Under *Jencks–Carr*, a defendant is entitled to a witness's prior statement bearing on a material issue in the case when "the statement is, or may be, inconsistent with the witness's trial testimony." *Leonard v. State*, 46 Md. App. 631, 637–38 (1980). "[A]ccess to the prior statements of a State's witness under *Jencks–Carr* principles is contingent on the fact that the [State] possesses the statement." *Blair v. State*, 130 Md. App. 571, 613 (2000) (citations omitted). *See also Robinson v. State*, 354 Md. 287, 297 (1999) ("[A] defendant is entitled to production of a witness' prior statement if, *inter alia*, the prosecution or the prosecutorial arm of government is in 'possession' of the statement." (internal citations and quotation marks omitted)); *Jencks*, 353 U.S. at 672; *Carr*, 284 Md. at 467; *Leonard*, 46 Md. App. at 637–38; Md. Rule 4-263(d)(3).

The State is correct that the appellant did not seek a remedy relating to any *Jencks–Carr* violation. As explained, the topic of A.C.'s supposed recantation came up tangentially in the context of argument on the appellant's motion to dismiss the indictment for insufficient allegations of fact. There was no allegation of a *Jencks–Carr* violation and no request for relief based on a *Jencks–Carr* violation. Accordingly, this issue is not preserved for our review.

Even if there had been such a request, the evidence could not have supported a violation finding. The reference to a "recantation" by A.C. in the prosecutor's July 18, 2014 letter is based solely on A.C.'s May 1, 2012 interview with Detective Ali. The letter summarizes that in that interview, A.C. told Detective Ali that after she disclosed the abuse to Jones in 1983, she "recall[ed] that she may have been taken to speak with someone regarding the abuse," but "she cannot remember whether this person was a police officer, counselor, social worker, or other" and "when presented to this person, she felt a need to recant due to her mother's insistence and did so." The record does not show when the recantation was made, to whom, under what circumstances, or whether it was put in writing. The appellant's mere speculation that a written statement exists is insufficient to support his contention that the State committed a *Jencks–Carr* violation. Moreover, the State maintained that it had searched all available records and had found no document constituting or referring to a recantation, and that it did "not have dates of a previous investigation, files of such investigation, nor direction or conclusion of such investigation." This was consistent with the evidence that department policy only requires investigation records to be kept for 10 years.

In short, the appellant did not allege a *Jencks–Carr* violation or seek a remedy for such a violation; there was no evidence that documentation of a recantation even existed; and if it ever did exist, there was no evidence that the State had it in its possession or could have obtained it.

A *Brady* violation will be found if there is evidence favorable to the defendant that the State suppressed, willfully or inadvertently, to the prejudice of the defendant. *Yearby v. State*, 414 Md. 708, 717 (2010); *accord Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). We agree with the State that the appellant did not raise a *Brady* challenge below, and therefore the issue is not preserved. Even if it had been raised, the issue lacks merit because there was no evidence that a recantation document existed and therefore that it could have been suppressed. *See Diallo v. State*, 413 Md. 678, 706–07 (2010).

**V.**

During Detective Ali's interview of the appellant, the appellant mentioned that he was willing to take a lie detector test. Detective Ali responded that that was a possibility. The appellant then asked to speak to an attorney. At that point, the interview ended.

Before trial, the appellant moved to prohibit the State from eliciting from Detective Ali any reference to the exchange about the lie detector test. The court granted the motion.

On direct examination, Detective Ali summarized his interview with the appellant. He did not say anything about a lie detector test. The prosecutor posed a general wrap-up question, asking: "Did anything – was that basically the conclusion or the sum – the summary of your interview with [the appellant]?" Detective Ali replied: "Pretty much. As soon as he said he wanted to get his attorney I concluded the interview."

Defense counsel moved for a mistrial, arguing that the court's ruling prohibiting Detective Ali from mentioning the lie detector conversation also prohibited Detective Ali

from mentioning that the appellant had said he wanted to speak to a lawyer. Defense counsel further argued that, in any event, Detective Ali's testimony that the appellant had asked to speak to a lawyer was highly "inflammatory" in that it implied that the appellant was guilty. The court denied the motion.

The next day, the prosecutor brought up the subject of Detective Ali having said that the interview ended when the appellant asked for a lawyer, saying the jurors should be instructed that they should disregard that testimony. The court stated that it already had done that, and the prosecutor said: "I believe so." The defense said nothing. In fact, such an instruction had not been given.

The appellant contends the trial court abused its discretion by denying his mistrial motion. He argues that Detective Ali's testimony that the appellant asked to speak to a lawyer was "[e]vidence of post arrest silence, after *Miranda* warnings [were] given" and, quoting *Grier v. State*, was "'inadmissible for any purpose, including impeachment.'" 351 Md. 241, 258 (1998) (citations omitted). The State counters that when "the issue giving rise to the mistrial request is the allegedly improper statement of a witness, '[t]he question is whether the prejudice to the defendant was so substantial that he was deprived of a fair trial[.]'" (Quoting *Kosmas v. State*, 316 Md. 587, 594–95 (1989)). It argues that a mistrial was not an appropriate remedy under the circumstances.

> Whether to declare a mistrial or not is a matter which is committed to the sound discretion of the trial court. Ordinarily, the exercise of that discretion will not be disturbed upon appeal absent a showing of prejudice to the accused. In order to warrant a mistrial, the prejudice to the accused must be real and substantial; a mistrial should never be declared for light or transitory reasons.

*Wilson v. State*, 148 Md. App. 601, 666 (2002) (citations omitted).

A witness's "abrupt and inadvertent nonresponsive statement . . . during his or her testimony" is a "blurt." *Washington v. State*, 191 Md. App. 48, 100 (2010) (citing *State v. Hawkins*, 326 Md. 270, 277 (1992)). The following factors are relevant in deciding whether a witness's "blurt" warrants a mistrial:

> "[1] whether [the blurt] was repeated or whether it was a single, isolated statement; [2] whether the reference was solicited by counsel, or was an inadvertent and unresponsive statement; [3] whether the witness making the reference is the principal witness upon whom the entire prosecution depends; [4] whether credibility is a crucial issue; [5] whether a great deal of other evidence exists[.]"

*Rainville v. State*, 328 Md. 398, 408 (1992) (quoting *Guesfeird v. State*, 300 Md. 653, 659 (1984)).

Detective Ali's testimony was a "blurt." It was given in response to the prosecutor's asking "was that basically the conclusion or the sum – the summary of your interview with [the appellant]?" The testimony was not responsive to that question, was not solicited by the prosecutor, and was inadvertent in that the detective did not realize he was saying anything inappropriate. Detective Ali was the only witness to reference the appellant's request for an attorney; and he did so only once. Moreover, he was not the "principal witness" for the prosecution. His testimony came after A.C., Jones, and A.C.'s aunts already had testified about the appellant's sexual abuse of A.C. Although his credibility was important to establish that he conducted the investigation, it was not

crucial to whether the appellant sexually abused A.C. Under the circumstances, the trial court did not abuse its discretion in denying the motion for mistrial.

We note that ordinarily any prejudicial effect of a witness's "blurt" may be neutralized by a curative instruction. *See Spain v. State*, 386 Md. 145, 160 (2005) ("Maryland courts long have subscribed to the presumption that juries are able to follow the instructions given to them by the trial judge, particularly where the record reveals no overt act on the jury's part to the contrary." (citations omitted)). Here, the appellant did not request such an instruction, did not join in the State's later request for such an instruction, and stood mute when the court stated, mistakenly, that it already had instructed the jury to disregard the testimony. When a defendant does "not request . . . any remedy other than a mistrial" "the court [does] not abuse its discretion in declining, on the record before it, to take the 'extraordinary act' of declaring a mistrial." *Raynor v. State*, 201 Md. App. 209, 231–32 (2011).

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