UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1764

September Term, 2015

ELVIS G. BAUTISTA

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Nazarian,
Davis, Arrie W.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: November 3, 2016

A jury in the Circuit Court for Montgomery County convicted Elvis Geovan Bautista, the appellant, of attempted first degree murder, attempted second degree murder, first degree assault, conspiracy to commit first degree assault, robbery with a dangerous weapon, use of a handgun in commission of a felony or crime of violence, conspiracy to use a handgun in commission of a felony or crime of violence, retaliation for a testimony, conspiracy to retaliate for a testimony, and possession of a firearm by a person under the age of 21. The court sentenced him to an aggregate term of 95 years in prison, all but 50 years suspended, and five years' supervised probation upon release.

On appeal, the appellant presents five questions for review, which we have combined and reworded:

I. Did the trial court err by permitting the State to introduce as substantive evidence a copy of the State's proffer signed by co-defendant Isaac Quinteros and the recording of Quinteros's plea hearing?

II. Did the trial court fail to exercise or abuse its discretion by denying the appellant's motion for mistrial?

III. Did the trial court abuse its discretion by refusing to give a jury instruction on accessories after the fact?

IV. Did the trial court commit plain error by instructing the jury that the appellant could be liable as an accomplice to misdemeanors?

For the following reasons, we shall affirm the judgments.

FACTS AND PROCEEDINGS

At around 3:00 a.m. on July 30, 2014, Erilena Liriano returned home from work to her mother's house on Douglas Avenue, in Wheaton. She asked Dejah Townsend, a friend of her sister who was staying over for the night, to "Kik" message Isaac Quinteros

and ask to purchase marijuana from him.[1] Townsend did so and Quinteros responded, telling Townsend to meet him at the Best Buy at Wheaton Mall. Townsend, Liriano, Liriano's sister, and another friend left the house and walked to meet Quinteros.

Liriano then began messaging Quinteros from her own Kik account. After he failed to appear at the Best Buy and two other locations they discussed, the girls decided to walk back home. At a street corner a block from Liriano's mother's house, a white SUV pulled up behind them and Quinteros jumped out. He approached Liriano, pointed a gun at her face, and demanded her belongings. When she refused, he shot her five times in the back and left arm. He took her phone and purse and fled the scene. Liriano survived her injuries.

Quinteros, Eber Umanzor, and the appellant all were indicted on numerous offenses, including attempted first degree murder of Liriano. Quinteros and Umanzor pled guilty. As part of his plea agreement, Quinteros signed a proffer of facts prepared by the State. The proffered facts included that Quinteros had given a statement to the police in which he had identified Umanzor as the driver of the white SUV on the night of the shooting, and had stated that a third person, later identified as the appellant, was riding in the back seat of the white SUV at the time of the shooting. The proffer further stipulated that Quinteros had told the police that he first met Umanzor "two to three

[1] Kik is a type of messaging app for iPhones that allows the user to send text messages to other individuals who have installed the Kik app.

weeks" before the shooting. Umanzor had told him that Liriano "had been talking to the Feds" and that "motivated [Quinteros] to kill [Liriano]."[2]

The appellant's jury trial commenced on May 4, 2015. The State called Quinteros to the stand. He testified that late on July 29, 2014, Umanzor picked up him and the appellant in his white SUV. Umanzor dropped the appellant off at home before Townsend contacted him in the early morning hours on July 30. When the prosecutor confronted Quinteros with his proffer, he claimed he could not "recall" ever telling the police that the appellant was in the white SUV and claimed that when he signed the proffer he did not realize he was implicating anyone but himself as "the one who shot [Liriano.]" On motion of the State, the court admitted Quinteros's proffer into evidence.

On cross-examination, Quinteros testified that he had not had an opportunity to read the proffer before his plea hearing and that his lawyer had not fully described the terms of the plea agreement to him. In response, after calling several other witnesses, the prosecutor sought to admit and play for the jury the audio recording of Quinteros's plea hearing. Defense counsel objected on the ground that the recording was not relevant. The court overruled the objection and admitted the recording.

[2] Liriano had testified as a witness in a 2012 criminal trial against members of the local "Little R" gang for assault. Although the proffer stipulated that Umanzor told Quinteros about Liriano's cooperation with the prosecutors in the 2012 case, Quinteros testified at the appellant's trial that he already knew that Liriano was "talking about people," because "[e]verybody in Maryland" knew that.

After the audio recording of Quinteros's plea hearing was played for the jury, the appellant moved for a mistrial. He argued that the State had failed to redact "highly prejudicial" portions of the recording, citing portions of it in which there were discussions of Quinteros's sentencing and statements made by Quinteros's defense attorney suggesting that the appellant and Umanzor encouraged Quinteros to kill Liriano. The court denied the motion, finding that the appellant already had "brought out the issue of" Quinteros's sentence and plea agreement on cross-examination.

At the close of all the evidence, the appellant requested a jury instruction on accessory after the fact. The court ruled the instruction was not warranted because the State had not charged the appellant with being an accessory after the fact. The court did, however, allow defense counsel to argue in closing that the evidence was not sufficient to prove any offense other than that of being an accessory after the fact.

Additional facts will be included in our discussion, as necessary.

DISCUSSION

I.

The appellant contends the trial court erred by admitting as substantive evidence Quinteros's signed proffer and the recording of his plea hearing. He argues that neither one was sufficiently reliable to satisfy the prior inconsistent statement exception to the rule against hearsay, under Rule 5-802.1. The appellant maintains that Quinteros did not adopt any facts in the proffer that implicated him, because those facts were "superfluous" to Quinteros's guilty plea and Quinteros had no "incentive to correct the proffer as to [the

appellant's] involvement." For the same reasons, the appellant argues that the recording of Quinteros's plea hearing, at which the prosecutor read the proffer into evidence and Quinteros signed it, also was not reliable.

The State counters that the appellant either forfeited or waived his right to dispute the admissibility of either item of evidence. It argues that, at the very least, the appellant failed to object when the proffer was admitted in evidence, and therefore has not preserved the issue for review. It also argues that the appellant objected to the admission of the recording of Quinteros's plea hearing on the specific ground that it was irrelevant, and consequently "waived all other grounds, including [the appellant's] appellate argument." The State maintains that, even if these issues are properly before this Court on appeal, they lack merit.

After the prosecutor offered Quinteros's proffer (Exhibit 16) into evidence, the following exchange took place:

> **[Prosecutor]**: Your Honor, at this time State would seek to move State's Exhibit 15 and 16 into evidence….*16 is the prior inconsistent statement under penalties of perjury by this defendant*…
>
> **The Court**: Okay. Defense?
>
> **[Defense Counsel]**: I haven't seen them. They haven't been presented.
>
> ***
>
> **The Court**: All right. I'm going to receive No. 17. What about 15 and 16?
>
> **[Defense Counsel]**: *16 was prepared totally by the State. I can use it for cross-examination. I'm sure you're going to let it in.*
>
> **The Court**: You guessed right. Okay, No. 16 will be received into evidence.

(Emphasis added.) Defense counsel's prediction that the court would admit the proffer and his suggestion that he could use it for cross-examination were not objections to the proffer's admission. Indeed, they were acknowledgements that the proffer was admissible. Accordingly, the appellant did not preserve for review the issue of the admissibility of the proffer and in fact waived it.

Even if the issue were properly before us, it lacks merit. The proffer was properly admitted, substantively, as a prior inconsistent statement, under Rule 5-802.1(a). That rule excludes from the rule against hearsay statements made by a witness/declarant who "testifies at the trial or hearing" and is "subject to cross-examination" if:

> [The statement] is inconsistent with the declarant's testimony…was (1) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (2) reduced to writing and was signed by the declarant; or (3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement[.]

The proffer satisfies each element of Rule 5-802.1(a). Quinteros testified at trial and was subject to cross-examination. The proffer was in writing and signed by Quinteros under oath at his plea hearing. It included facts that directly contradicted Quinteros' testimony at trial that the appellant was not in Umanzor's vehicle when Quinteros robbed and shot Liriano. Accordingly, the proffer was admissible as substantive evidence without any further proof of reliability. Contrary to the appellant's argument, Rule 5-802.1(a), unlike the former testimony and statement against interest hearsay exceptions in Rules 5-804(b)(1) and (b)(3), does not include elements related to the circumstantial reliability of the declarant's statement. That is because a statement

only may be admitted under Rule 5-804(b)(1) or (b)(3) when the declarant is *unavailable* to testify, whereas Rule 5-802.1(a) requires that the declarant be available and actually testify at trial. Additional indicia of reliability is not an element of Rule 5-802.1(a) and need not be demonstrated for a prior inconsistent statement to be admissible as substantive evidence.

The appellant also may not challenge the court's ruling admitting the audio recording of Quinteros's plea hearing on the ground that it failed to satisfy Rule 5-802.1(a) because he did not make that argument below. At trial, he objected to the admission of the recording on the ground that it was "not relevant" because the proffer already had been admitted. He cannot challenge the court's ruling on different grounds on appeal. *See Colvin-el v. State,* 332 Md. 144, 169 (1993) ("Appellate review of an evidentiary ruling, when a specific objection was made, is limited to the ground assigned.").

In any event, to the extent the trial court rejected the appellant's "relevancy" objection, which really was an objection that the recording was needlessly cumulative, the court did not abuse its discretion.[3] The recording rebutted Quinteros's testimony that "he didn't understand basically any of the terms or conditions of [his] plea agreement[.]" It served a different evidentiary purpose than did the proffer, which the State offered to

[3] Defense counsel's stated ground for objecting to the recording was: "It's not relevant. You've got the proffer there that he says was read, and the document speaks for itself. The jury has the complete proffer."

show that Quinteros previously had recounted the events of July 30, 2014, differently. The State offered the recording of Quinteros's plea to show why Quinteros's previous statements were truthful and reliable.

II.

The appellant contends the trial court abused its discretion by declining to grant a mistrial after the prosecutor failed to redact prejudicial portions of the recording of Quinteros's plea hearing before it was played for the jury.[4] He argues that certain

[4] The appellant makes an alternative contention that the court failed to exercise its discretion in denying the motion for mistrial because it "improperly concluded that the defense opened the door to the portions of the plea hearing concerning Quinteros's anticipated sentence and his attorney's opinions about [the appellant's] culpability." The doctrine of "opening the door" "authorizes admitting evidence which otherwise would have been irrelevant in order to respond to (1) admissible evidence which generates an issue, or (2) inadmissible evidence admitted by the court over objection." *Clark v. State,* 332 Md. 77, 84-85 (1993). The doctrine is "based on principles of fairness." *Little v. Schneider,* 434 Md. 150, 157 (2013).

On cross examination, defense counsel asked Quinteros about what his lawyer had told him about his plea agreement, whether he read or understood the proffer, whether he had "comprehend[ed] what [the prosecutor] was saying when she was reading [the proffer] to the Court" at his plea hearing, and whether signing the proffer was necessary to "get this plea, to cap [Quinteros's sentence] at 20 years[.]" In response, Quinteros testified that his lawyer did not explain the proffer to him, that he did not comprehend the contents of the proffer, and that his potential sentence would be capped "at 20 years" in exchange for pleading guilty. Thus, through the actions of his counsel, the appellant raised the issue of the terms of Quinteros's plea agreement, including the sentence bargained for, and whether Quinteros knowingly signed the proffer. The court properly recognized that it would be unfair to prevent the State from introducing evidence on the same issue. Accordingly, it did not fail to exercise discretion. In any event, as we will explain, the appellant waived his right to a finding of error in the court's denial of his mistrial motion on grounds that the portions of the recording which discussed Quinteros's sentence and included statements of Quinteros's attorney about Umanzor and the appellant's culpability were prejudicial.

segments of the recording in which the applicable sentencing guidelines were discussed, including statements by Quinteros's lawyer suggesting that the appellant had influenced Quinteros to shoot Liriano, were "highly prejudicial" and "had nothing to do with the State's professed goal of introducing Quinteros's acceptance of the proffered facts as a prior inconsistent statement."

The State responds that the court did not abuse its discretion by denying the mistrial motion because the appellant did not object to the recording being played on the ground of prejudice and, even though defense counsel "had listened to the recording and was aware of its contents," he "did not request any redactions be made [to the recording] before the recording was played for the jury." We agree with the State.

We review the court's decision to deny a motion for mistrial for abuse of discretion. *Cooley v. State,* 385 Md. 165, 173 (2005) (quoting *Wilhelm v. State,* 272 Md. 404, 429 (1974)) ("A request for a mistrial in a criminal case is addressed to the sound discretion of the trial court.").

Before the recording was played, the court recessed and the prosecutor reviewed the recording with defense counsel. Defense counsel was aware of the recording's contents but did not object to its admission on the ground of prejudice or request that any redactions be made before the recording was played, when the court was in a position to

prevent any prejudice the recording might cause.[5] He therefore waived the right to a finding of error on those grounds. *See Cantine v. State,* 160 Md. App. 391, 407 (2004) (citing *Hill v. State,* 355 Md. 206, 229 (1999)) ("When counsel fails to object, or request curative action, the alleged error ordinarily is waived."); *State v. Jones,* 138 Md. App. 178, 218 (2001) (quoting *Hall v. State,* 119 Md. App. 377, 389 (1998)) ("[P]roper objection is required so that the proponent of the evidence has an opportunity to 'rephrase the question or proffer so as to remove any objectionable defects, if possible.'").

In any event, a trial court may deny a motion for mistrial "made too late for the court to conveniently give [a curative] instruction" that "would have sufficed to cure any error or prejudice[.]" *Hill*, 355 Md. at 220. Moreover, the actions of defense counsel treaded close to the "doctrine of invited error," under which 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)) (additional citations omitted). The court did not abuse its discretion by denying the appellant's motion for mistrial after he failed to object to the recording on the basis that it was prejudicial or to request redaction of the prejudicial portions, depriving the court of the opportunity to consider the offending material and consequently inviting its introduction to the jury.

[5] In addition, defense counsel did not request a curative instruction after the recording was played.

III.

Defense counsel requested jury instructions for the crimes of accessory before the fact *and* accessory after the fact. The prosecutor objected on the ground that accessory before the fact is included in the accomplice liability instruction, which the court had agreed to give, and accessory after the fact must be charged separately, and was not. The court agreed, and denied the requested instruction on those grounds:

> As to the instructions, where we left off yesterday, [the appellant] had asked for an accessory instruction. And I reviewed that request and, in essence, find that, you know, largely the doctrine that has to do with culpability or distinction between principals and accessories in Maryland has, in essence, been changed so that the accessories before the fact in [sic] aiders and abettors…have now been…incorporated into the, I guess it's the final instruction we will be giving here, which is [Maryland Criminal Pattern Jury Instruction] 6.0, having to do with accomplice liability, *and I think the State's observation that if this were an accessory after the fact, contention by the State, that would have to be specifically charged and separately charged*.
>
> So, I think that the pattern instruction which deals with accomplice liability, encompasses nowadays the request that defense has made, so I am going to decline to give any separate instruction in that regard.

(Emphasis added.)

On appeal, the appellant contends the trial court failed to exercise any discretion by refusing to give a jury instruction on accessory after the fact. He argues that the court operated on the mistaken belief that the jury instruction for accomplice liability encompasses the concept of accessory after the fact. Alternatively, he argues that the trial court abused its discretion because the evidence generated an instruction on accessory after the fact and, therefore, the instruction should have been given. He acknowledges

that defense counsel "was allowed to argue in closing that, at worst, [the appellant] was an accessory after the fact" but complains that this did not "mitigate" the court's failure to give the instruction.

The State responds that the court properly exercised its discretion in ruling that the State would have to separately charge the appellant with being an accessory after the fact for an instruction on that offense to be generated.

We will not disturb the jury instructions given by the trial court "so long as the law is fairly covered by [those] instructions[.]" *Farley v. Allstate Ins.,* 355 Md. 34, 46 (1999). When a trial court has refused to give a requested jury instruction, we must determine "whether the requested instruction was a correct exposition of the law, whether that law was applicable in light of the evidence before the jury, and finally whether the substance of the requested instruction was fairly covered by the instruction actually given." *Id*. at 47 (citing *Wegad v. Howard Street Jewelers,* 326 Md. 409, 414 (1992)).

It is clear from the colloquy among the court and counsel that the court refused to give an instruction on accessory after the fact because the State had not charged the appellant with that offense, not—as the appellant would suggest—because the court thought the jury instruction for accomplice liability encompasses accessory after the fact. The court invoked that rationale to deny the appellant's separate request for an instruction on accessory *before* the fact. Accordingly, there is no merit in the appellant's argument that the court failed to exercise its discretion.

Moreover, the court's ruling was correct. Accessory after the fact to a felony is a felony offense punishable by up to 5 years in prison or a "penalty not exceeding the maximum penalty provided by law for committing the underlying felony." Md. Code (2002, 2012 Repl. Vol.), § 1-301(a)(2) of the Criminal Law Article ("C.L."). It is a crime distinct from the underlying crime and must be separately charged. *Tharp v. State,* 129 Md. App. 319, 331-32 (1999); Maryland Criminal Pattern Jury Instruction 6:01, Notes on Use ("Use this instruction when the defendant is charged with being an accessory after the fact. Give the instruction for the crime alleged immediately prior to this instruction."). *See also Dishman v. State,* 352 Md. 279, 302 (1998) (holding that a "statutory offense" that "must be specifically charged to support a conviction" also must be specifically charged "in order to be sent to the jury").

Here, neither party disputes that the State did not charge the appellant with being an accessory after the fact. A defendant is not entitled to a jury instruction on an uncharged offense unless the instruction sought is for a lesser included offense; and then, only under specific circumstances. *Hook v. State,* 315 Md. 25, 41 (1989) (holding that a defendant "has the option whether to have a lesser offense instruction given to the jury" when the offense "is fairly supported by the evidence"); *Hagans v. State,* 316 Md. 429, 455 (1989) ("[E]xcept to the extent that the defendant desires and is entitled to have it submitted," it "would obviously be inappropriate to submit the lesser included offense to the jury."); *Lee v. State,* 186 Md. App. 631, 663 (2009), *rev'd on other grounds, Lee v. State,* 418 Md. 136 (2011) (concluding defendant charged with first-degree felony

murder not entitled to jury instruction on second-degree murder and involuntary manslaughter where the State had *nol prossed* both charges and neither was a lesser included offense).

The crime of being an accessory after the fact is not a lesser included offense of the related underlying crime. Thus, a defendant who has not been separately charged with being an accessory after the fact is not entitled to the corresponding jury instruction. *Tharp,* 129 Md. App. at 319. In *Tharp,* the defendant appealed his second degree murder conviction, arguing that the trial court erred by refusing to give a jury instruction on accessory after the fact. We explained that Rule 4-325(c) "imposes a duty on the court to instruct on any crime 'so long as it [i]s a permissible verdict generated by the evidence.'" *Id.* at 330 (quoting *Dishman,* 352 Md. at 292) (alterations in *Tharp*). Noting that a "verdict as to a particular crime is permissible if it was charged by the State," we held that the trial court's refusal to give the requested instruction was not error because the defendant had not been charged with accessory after the fact:

> We find that the State did not charge Tharp as an accessory after the fact in the short-form indictment. Therefore, a verdict on that crime would not have been permissible. As the requested instruction was not a correct exposition of the law as applied in this case, the trial court did not err in refusing to instruct the jury as to accessory after the fact.

Id. at 333 (internal citations omitted). Accordingly, in this case, the appellant was not entitled to a jury instruction on accessory after the fact, and the court did not abuse its discretion by refusing to give one.

The appellant argues that the court should have given the instruction anyway because he needed it to "bolster" his argument "that, at worst, [he] was guilty of an offense the State failed to charge." In *Harrison v. State,* 198 Md. App. 236, 251 (2011), we explained that a defendant is not entitled to instructions on uncharged lesser included offenses when he "merely wanted the instructions to illustrate that [he] should have been charged with" the lesser crimes. The same rationale applies here.

Finally, the appellant's reliance on *Hawkins v. State,* 291 Md. 688 (1981), is unavailing. In *Hawkins,* the defendant was charged with daytime housebreaking. He requested an instruction on breaking and entering, which he believed to be a lesser included offense of daytime housebreaking. The trial court declined and prohibited defense counsel from arguing in closing that "the State may have established the defendant's guilt with respect to [the] lesser offense, but . . . failed to prove the defendant guilty of daytime housebreaking[.]" *Id.* at 690-91. The case reached the Court of Appeals, which determined that breaking and entering was not a lesser included offense of daytime housebreaking. It nevertheless held the trial court had erred by refusing to allow defense counsel to "refer to [the breaking and entering statute] in connection with his closing argument designed to persuade the jury that the State had failed to establish a violation of [the daytime housebreaking statute]." *Id.* at 693. Unlike defense counsel in *Hawkins,* defense counsel here was allowed to—and did—argue in closing that the State's case was insufficient to prove any crime except accessory after the fact.

IV.

Finally, the appellant contends the trial court's instruction on accomplice liability was legally incorrect. Although he concedes that his lawyer did not object to the instruction, he asks us to exercise our discretion under Rule 4-325(e) to review the jury instruction for plain error. The State argues that the appellant waived the right to claim error of any kind.

We agree with the State that the appellant has waived his right to seek even plain error review. The day before the jury was instructed, the court and counsel discussed the instruction at issue:

> **The Court**: . . . And then, the State wanted . . . accomplice liability, and let me see what I have under that one; all right, this is six, 6-0.
>
> All right. So, in this case, the instruction asks that the crime be specified….
>
> So, as to the crime. . . . Would you agree that that's accurate, that it should be couched when naming the crime for which he may be an accomplice, that it would simply be all the crimes that are listed in the indictment?
>
> **[Counsel for the State]**: Yes, any or all of them, so I think the –
>
> **The Court**: That's what I thought. [Defense Counsel]*, do you agree?*
>
> **[Counsel for Appellant]**: *Yes, I do.*

(Emphasis added.) After instructing the jury the next day, the court asked the prosecutor and defense counsel whether they were satisfied with the instructions. Defense counsel responded, "I'm satisfied."

In *Booth v. State,* 327 Md. 142, 177 (1992), the Court held that "there is no error" from a jury instruction given by the court when the defendant, "through counsel,

consented to the instruction." Further, "even a plain error analysis" is not required when "there is more . . . than the simple lack of an objection to the instruction as given." *Id.* at 180. Where "defense counsel affirmatively advised the court that there was no objection to the instruction which the court immediately thereafter gave to the jury[,]" *any* error "has been waived." *Id.* at 180. In that case, the trial court had "specifically asked defense counsel if he had 'any objection to [the challenged instruction],' to which defense counsel replied: 'Actually, no. We would not have any objection to that.'" *Id.* at 178. The court gave the instruction and no objection followed.

Here, as in *Booth*, defense counsel expressly approved of the instruction the appellant now claims was erroneous. Defense counsel agreed to the instruction on accomplice liability as the court planned to give it and later reassured the court that he was "satisfied" with all the jury instructions given. Accordingly, the appellant affirmatively waived any right to plain error review, which, in any event, we would not have exercised our discretion to conduct. *Austin v. State,* 90 Md. App. 254 (1992).

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