UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2813

September Term, 2015

DEVIN THOMAS ROBINETTE

v.

STATE OF MARYLAND

Krauser, C.J.,
Nazarian,
Moylan, Charles, E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: March 24, 2017

Devin Robinette was convicted by a jury in the Circuit Court for Allegany County of second-degree assault and disorderly conduct. He contends on appeal that the trial court abused its discretion in instructing the jury on accomplice liability because, he says, no evidence presented at trial supported that instruction. The State concedes that the jury instruction on accomplice liability was not supported by the evidence, but contends that the error was harmless beyond a reasonable doubt. We agree with both parties and affirm.

I. BACKGROUIND

On the night of June 15, 2014, Jeffrey Wilson was walking along Main Street in Frostburg when he observed a Kia sport utility vehicle being driven by Thomas Lancaster. Mr. Robinette and Christian Ross were passengers in that SUV.[1] Mr. Wilson exchanged words with someone in the vehicle, and it pulled over. One of the occupants exited the front passenger seat, chased Mr. Wilson down the street, then punched him in the head, causing him to lose consciousness. Samantha Stott, a passerby, heard Mr. Wilson screaming for help and observed "an attack going on." In response, Ms. Stott got out of her car and yelled at the assailant, who ran back to the SUV and got in the passenger seat.

Shortly thereafter, Frostburg Police Officer Irvin Buskirk stopped the SUV, which was still occupied by Messrs. Robinette, Lancaster, and Ross. When asked about the assault, Mr. Ross admitted that "[y]es it was us," but would not identify the assailant. Officer Buskirk then spoke to Mr. Lancaster, who indicated that Mr. Robinette had committed the assault. Mr. Robinette denied any involvement in the offense.

[1] Mr. Wilson did not know any of the occupants of the SUV.

Later that evening, Ms. Stott went to the police station, viewed a six-person photo array that included photographs of Messrs. Robinette and Lancaster, and identified Mr. Robinette as the assailant. Mr. Wilson and Ms. Stott also identified Mr. Robinette as the assailant at trial.[2] Mr. Lancaster testified as well that he stopped the SUV after Messrs. Robinette and Wilson had started yelling at one another. He then saw Mr. Robinette get out of the SUV and chase Mr. Wilson down the street.

Mr. Robinette testified on his own behalf at trial and denied committing the assault. He testified that Mr. Lancaster was driving (while intoxicated), yelled at Mr. Wilson, stopped the car when Mr. Wilson responded, then started "beating on" Mr. Wilson. Mr. Robinette then told Mr. Ross to "go get [Mr. Lancaster]" because the police would come. When Mr. Lancaster returned, he threatened Messrs. Ross and Robinette and told them not to say anything about the assault. Mr. Robinette admitted that he did not intend to say anything to the police and was "going to cover up [the] assault."

Mr. Robinette also called two witnesses in his defense: Mr. Ross and Emily Holland, his friend and Mr. Lancaster's ex-girlfriend. Mr. Ross identified Mr. Lancaster as the assailant, and said that he later asked Mr. Ross to blame the assault on Mr. Robinette. According to Mr. Ross, Mr. Robinette was sitting in the front seat of the SUV and texting with a girl when the assault occurred. Ms. Holland testified that on the night of the assault,

[2] Mr. Wilson's identification testimony was problematic—he was unable to identify appellant on the night of the incident, and had previously told appellant's trial counsel that he could not remember who hit him.

Mr. Lancaster told her that he committed an assault but that the police had incorrectly blamed it on Mr. Robinette.

After the close of all the evidence, the State asked the trial court to instruct the jury on accomplice liability, using Maryland Pattern Criminal Jury Instruction 6.00 "except for . . . the second of the three paragraphs." This request was based on Mr. Robinette's testimony that he had intended to "cover up" Mr. Lancaster's assault when he spoke to Officer Buskirk. The trial court gave the accomplice liability instruction over Mr. Robinette's objection.[3] During closing argument, however, the State did not contend that anyone other than Mr. Robinette committed the assault, and argued instead that the case "comes down to identification."

[3] The trial court instructed the jury as follows:

> [T]he defendant may be guilty of assault or Disorderly Conduct as an accomplice even though the defendant did not personally commit the acts that constitute that crime. In order to convict the defendant of either assault or disorderly conduct as an accomplice, the State must prove that the [ ] assault or disorderly conduct 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 the primary actor in the crime that he was ready, willing, and able to lend support if needed. 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 the surrounding circumstances in determining whether the intent, the defendant intended to and was willing to aid the primary [actor], for example, by standing by as a lookout to warn the primary actor of danger and whether the defendant communicated that willingness to the primary actor.

The jury ultimately found Mr. Robinette guilty of second-degree assault and disorderly conduct. This timely appeal followed.

II. DISCUSSION

Mr. Robinette's sole contention on appeal is that the trial court abused its discretion when it instructed the jury on accomplice liability. We review a trial court's refusal or giving of a jury instruction for abuse of discretion. *Stabb v. State*, 423 Md. 454, 465 (2011). When considering whether a trial court abused its discretion in granting or denying a request for a particular jury instruction, we consider three factors: (1) whether the requested instruction was a correct statement of the law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions actually given. *See Carroll v. State*, 428 Md. 679, 689 (2012). A jury instruction applies to the facts of the case as long as there is "some evidence" to generate it. *See, e.g.*, *Dishman v. State*, 352 Md. 279, 292–93 (1998); *Dykes v. State*, 319 Md. 206, 216–17 (1990).

Mr. Robinette argues, and the State concedes, that no evidence presented at trial supported a jury instruction on accomplice liability. And we agree. "[T]o be an accomplice a person must participate in the commission of a crime knowingly, voluntarily, and with common criminal intent with the principal offender, or must in some way advocate or encourage the commission of the crime." *Silva v. State*, 422 Md. 17, 28 (2011) (citation omitted). "[T]he mere fact that a person witnesses a crime and makes no objection to its commission, and does not notify the police, does not make him a participant in the crime." *Id.* (alteration in original) (citation omitted). "Instead, the person must actually participate by 'assist[ing], support[ing] or supplement[ing] the efforts of another,' or, if not actively

participating, then the person must be present and 'advise or encourage the commission of a crime' to be considered an accomplice." *Id.* (alterations in original) (citation omitted).

Here, all the witnesses testified that a single person committed the assault. The only dispute was whether that person was Mr. Robinette or Mr. Lancaster. No witness suggested that anyone else in the SUV assisted or encouraged the assailant. Moreover, because all of the witnesses agreed that Mr. Lancaster drove the SUV both before and immediately after the assault, Mr. Robinette's guilt could not be predicated on his stopping the SUV to let Mr. Lancaster out of the vehicle or his acting as a getaway driver. Finally, Mr. Robinette's presence in the vehicle, coupled with his refusal to speak to Officer Buskirk, would not make him liable for either assault or disorderly conduct. So because there was no evidence at trial that could support a theory in which Mr. Robinette was an accomplice, the trial court abused its discretion in instructing the jury on accomplice liability.

That conclusion does not end the matter, however, as "not every error committed during a trial is reversible error." *Moore v. State*, 412 Md. 635, 666 (2010). Except in cases of structural error, *see, e.g.*, *State v. Waine*, 444 Md. 692, 705 (2015), an error in a jury instruction is not grounds for reversal if the error is "harmless," *Nottingham v. State*, 227 Md. App. 592, 610 (2016). To prevail in a harmless error analysis, the beneficiary of the alleged error, in this case the State, must satisfy the appellate court "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." *Dorsey v. State*, 276 Md. 638, 659 (1976).

We find that the State has met its burden in this case. In *Perry v. State*, 150 Md. App. 403 (2002), we addressed an almost identical issue: whether a supplemental jury instruction on aiding and abetting, which the appellant claimed was not supported by the evidence, constituted reversible error. We rejected the appellant's argument that it was. We recognized that although "excessive and frequently unnecessary jury instruction[s]" are "unfortunate," they "nonetheless happen [] all the time" and that "[i]t has never been suggested that it is reversible error." *Id.* at 426–27. Reversible error, we held, occurs where the jury was under-instructed rather than over-instructed:

> A rule requiring a necessary instruction does not forbid an unnecessary instruction. It is under-inclusion that runs the risk of error. Over-inclusion only runs the risk of boredom. . . . In doubtful or ambiguous situations, the discreet thing to do is to tell the jury more than it needs to know rather than run the risk of denying the jury necessary knowledge. When in doubt, it is better to err on the side of over-inclusion rather than under-inclusion. That is why over-inclusion has never been made the occasion for reversible error.

Id.

It's true that in *Brogden v. State*, 384 Md. 631 (2005), the Court of Appeals recognized that an unnecessary or superfluous jury instruction *can* sometimes constitute reversible error, such as when it "purports to place a burden of proof on a defendant to prove a defense that the defendant never raised." *Id.* at 645 n.6. In *Brogden*, the defendant was charged with carrying a handgun during a burglary. *Id.* at 632. Over his objection, the circuit court gave the jury a supplemental instruction stating that "[i]t's the burden of the Defendant to prove the existence of the [handgun] license, if one exists, not the State." *Id.* at 643. The Court held that the circuit court committed prejudicial error in giving that

instruction because the defendant had not raised the defense that he had a license that entitled him to possess the gun. *Id.* at 644.

But *Brogden* doesn't help Mr. Robinette. In contrast to the erroneous instruction that imposed a burden to establish a defense the defendant hadn't raised, the accomplice liability instruction in this case did not impose any additional burden on Mr. Robinette. In fact, the jury was reminded a number of times throughout trial, including in the final jury instructions, that the burden of proof rested with the State alone. The State, in turn, argued only that Mr. Robinette had committed the charged offenses.

Finally, Mr. Robinette does not articulate specifically how he was prejudiced by the accomplice liability instruction. He intimates that it might have confused the jury because it "erroneously implied that any [ ] occupant of the SUV could be found guilty of assault, even if the police arrested the wrong man for the actual beating." But the jury was instructed twice that Mr. Robinette's mere presence at the crime scene was not sufficient to support a conviction. Moreover, the challenged instruction instructed the jury that it could convict Mr. Robinette as an accomplice only if he possessed "the intent to make the crime happen[,] knowingly aided, counseled, commanded, or encouraged the commission of the crime, or communicated to the primary actor in the crime that he was ready, willing, and able to lend support if needed." As he points out in his brief, however, there was no evidence to support such a finding and, for that reason, there was no reasonable possibility that the jury relied on that instruction to establish his guilt. *See Donaldson v. State*, 200 Md. App. 581, 595 (2011) (noting that "jurors are generally presumed to follow the court's

instructions"). Consequently, any error by the trial court in giving the accomplice liability instruction was harmless beyond a reasonable doubt.

JUDGMENT OF THE CIRCUIT COURT FOR ALLEGANY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.