Circuit Court for Washington County
Case No. C-21-CR-18-000051

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2314

September Term, 2019

DEVAUGHN DREW

v.

STATE OF MARYLAND

Graeff,
Ripken,
Alpert, Paul E.
(Senior Judge, Specially Assigned)

JJ.

Opinion by Ripken, J.

Filed: January 18, 2022

A jury in the Circuit Court for Washington County convicted DeVaughn[1] Drew ("Drew") of murder in the second degree of Destiny Boccone ("Boccone"). The court sentenced Drew to forty years in prison, and Drew noted a timely appeal of his conviction. On appeal, Drew argues that the court erred in giving a supplemental jury instruction on accomplice liability. For the reasons to follow, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 11:05 p.m. on November 19, 2017, police responded to a report that a car collided with a tree on Dogwood Drive in Hagerstown, Maryland. The police found Boccone in the driver's seat with two gunshot wounds to the back of her head. Boccone was determined to be deceased at the scene, and the gunshot wounds were subsequently determined to be the cause of her death.

The police spoke with two residents of Dogwood Drive who heard the car collide with the tree. One witness, the 911 caller, saw two men get out of the car and run away. The other witness observed two individuals leaving the scene and identified them as males because he heard them each speaking "in a low tone of voice." The police obtained the home security camera footage from residences one block from the crime scene that captured two individuals running down the street. The police also learned that, shortly after Boccone's car collided with the tree, a cab picked up two individuals near the crime scene and they were driven to 322 West Howard Street, Hagerstown.

Based on the information from the witnesses and the cab company, officers were

[1] We note that there are conflicting spellings of Drew's first name. We use "DeVaughn," which is the spelling Drew gave during his police interview.

dispatched to 322 West Howard Street, where police subsequently arrested Donovan Watts ("Watts"). Watts was then transported to the sheriff's office for an interview. Following the arrest, officers searched the apartment[2] and found a striped jacket and a green baseball hat, both of which had stains of blood on them. A tenant of the apartment told police that Watts and, a man whom she identified as Drew,[3] arrived at the apartment shortly before the police and that Drew ran out the backdoor of the apartment when the police arrived.

During an interview with police, Watts informed detectives that Boccone picked him and Drew up in her car earlier that evening and that Boccone drove them to a Sheetz on Virginia Avenue, Hagerstown. Police obtained the Sheetz parking lot video surveillance that showed Boccone's car being driven into the parking lot at approximately 10:39 p.m. The video showed Boccone and Watts exit the front driver and front passenger seats, respectively, and enter the store; it also depicted a person, whose arm is out the car window, seated in the driver's side rear passenger seat. At approximately 10:44 p.m., the video showed Boccone and Watts get back into their respective seats in the car and drive out of the Sheetz parking lot. During the interview, Watts maintained that he did not shoot Boccone and that Drew was in the car when Boccone was shot.

Based on this information, the police obtained an arrest warrant for Drew, and, on December 5, 2019, Drew turned himself in and gave a statement to the police. Drew stated

[2] The apartment belonged to Watts's girlfriend and her roommate.

[3] The witness stated that the man who arrived with Watts was named "Vega," and a search of the police database revealed that Vega was a known alias of Drew. The witness further identified Drew at trial as the man she saw arrive with Watts.

that he went to the Sheetz with Boccone and Watts and that he was seated in the rear driver's side passenger seat when the car arrived at Sheetz and after the car was driven out of the parking lot. After leaving the Sheetz, Drew stated that he switched seats with Watts and exited the car shortly after switching seats. Per Drew, Boccone and Watts dropped him at 322 West Howard Street and drove away. Drew maintained that he was sleeping in the apartment at 322 West Howard when Watts came into the bedroom in a panicked state.

In October 2019, Drew was tried for the murder of Boccone and for related handgun offenses.[4] The State's evidence included the testimony of the two witnesses that observed two men running away from Boccone's car; the security camera footage of two individuals running, one block from the scene; the testimony of the cab company employees that confirmed a cab picked up two individuals near the scene; DNA evidence of Boccone's blood in the backseat of that cab; the Sheetz parking lot video surveillance that portrayed Boccone, Watts, and a person in the rear passenger seat of Boccone's car; and Drew's statement to police.

In addition, at trial, Watts testified that that he was wearing the striped jacket, seen in the Sheetz video, when he was at the Sheetz; that Drew was in the car at the Sheetz; and that Drew was in the rear passenger seat when Boccone was shot. Watts testified that he did not shoot Boccone and that he did not know how or why she was shot because the radio in the car was extremely loud and he was texting on his phone. Watts testified that he heard

[4] The State charged Drew with seven offenses consisting of (1) murder in the first degree; (2) murder in the second degree; (3) assault in the first degree; (4) assault in the second degree; (5) using a handgun in the commission of a crime of violence; (6) wearing, carrying, or transporting a handgun; and (7) transporting a handgun in a motor vehicle.

"a loud pop," that he and Drew exited the car and started running when Boccone drove into the tree, and that he and Drew got into a cab and were driven to 322 West Howard Street.

The State called forensic scientist Jessica Shaffer ("Shaffer"), who testified that a rear passenger exited the vehicle after Boccone was shot because the front passenger seat of the two-door car was leaning forward and the corner of its backrest had a transferred stain of Boccone's blood. Shaffer opined that the rear passenger likely shot Boccone while she was sitting facing forward due to the bloodstain patterns in the car and on Boccone's clothing; the bullets' angle of impact; and the bullets' straight-line trajectory.

The State also presented evidence that the blood sample from Watts's striped jacket matched Boccone's DNA and that the blood sample from the green hat had a major female contributor, determined to be Boccone, and a male contributor, who could not be identified. In addition, the State tested a DNA sample from inside the green hat. A forensic scientist testified that Drew could not be excluded as a significant contributor to the DNA sample from inside the hat and that the probability was 1 in 24 quintillion that a randomly selected individual from the African American population would match the profile of that sample.

The State also called an expert in cell phone data extraction to testify to the contents of Drew's cell phone.[5] Specifically, the expert testified to text messages that were sent from

[5] The cellphone was recovered from the crime scene the day after Boccone's death, and police connected the phone to Drew from a picture of him on the phone's screensaver. After obtaining a search warrant of the phone, police extracted data from the phone, which included text messages. Drew filed a motion in limine to exclude the phone and text messages at trial. The court denied the motion, and the text messages were introduced at trial through expert testimony.

Drew's phone to Watt's phone on November 19. In particular, one text was sent to Watts's phone at approximately 10:36 p.m., shortly before Boccone's death, which read, "Tell her you gotta put something else in the trunk."

Witnesses for Drew testified that Drew and Watts were leaving the residence of Drew's daughter's home at the time of Boccone's death. One witness testified that Watts was carrying a gun a few hours before Boccone's death. Another witness for Drew testified that she was at the 322 West Howard Street apartment complex on the night of Boccone's murder, that she saw a man jumping over a fence when the police arrived, and that Drew was not that man.

At the close of evidence, the court gave oral instructions to the jury, which did not include an instruction on accomplice liability. Neither party objected to any of the instructions nor did either party request any additional instructions. Each party presented closing arguments. After the jury began deliberating, the court received a note from a juror, which asked in pertinent part:[6] "Does the defendant have to be found guilty of pulling the trigger in order to be guilty of second degree murder?" The court responded to the question by re-instructing the jury with the second-degree murder instruction that had previously been given. The jury continued deliberations, not reaching a verdict by the end of the day.

When the jury reconvened, the court received a note from the jury foreperson that asked a similar question posed in the prior note: "If the Defendant was not the shooter, can

[6] The jury note also asked, "We seem to be deadlocked. How long are we required to continue to try and reach a hundred percent?" This portion of the note is not relevant to the issue on appeal.

he still be found guilty of first or second degree murder[?]" The court discussed its response to this question with the parties as follows:

> THE COURT: So at this point, it would appear, I mean we can infer that someone, at least one juror, if not more, may have thought that both the persons in the car were involved in some way, and they're not sure who shot or they believe Watts was the shooter and Mr. Drew was helping him. So the question is, do I read the accomplice liability instruction which the Court believes is appropriate. It's a statement of law, even though the State's theory was he was principal in the first, it's up to the jury to decide.
>
> [DEFENSE COUNSEL]: No, no, no. This is, as I said from the outset, it seems to me that this is, because of the way it was charged, it's an all or nothing case. Um, if he's the shooter, he goes down for all of it. If he's not, he goes down for none of it.
>
> THE COURT: Let me ask you this, what in the charging document would preclude accomplice liability from coming into it? You don't have to charge a co-conspirator.
>
> [DEFENSE COUNSEL]: Because they have to show intent I think to—to—There's nothing—
>
> THE COURT: I mean the charging statement doesn't change.
>
> [DEFENSE COUNSEL]: There's—There's no—If Watts is the shooter, then they have to infer, guess, that he's a knowing and (inaudible).
>
> THE COURT: No I mean, the Court could find that the text exchange that occurred right before the shooting, there is, I mean there is some evidence on the record from which a—a trier-of-fact could theorize that they are in cahoots together at the time of the shooting.
>
> [DEFENSE COUNSEL]: That's not—That's not the State's theory. The State's theory is that Drew was the shooter. (Inaudible).
>
> THE COURT: Oh, that's certainly how it was presented. I agree with that.
>
> [DEFENSE COUNSEL]: And were that not the theory, I assume Watts would have been charged with a conspiracy—
>
> [THE STATE]: Not—Not necessarily.

> THE COURT: Not necessarily. Now that is speculating differently from this. I mean I can certainly see Watts wouldn't have testified if he was charged.
>
> ***
>
> [THE STATE]: We would ask you to read the instruction.
>
> [DEFENSE COUNSEL]: I—I would disagree and say read the first and second degree murder charge again because that's what—that's what they're asking. [T]hey're asking, you know, I mean that's exactly what they're asking, so that would be my—
>
> [THE STATE]: But—And accomplice liability would help answer what they're asking. It is the law.
>
> THE COURT: It goes directly—Which goes directly to what they are requesting. All right, well, I know the defense objects. The Court's belief is that the only appropriate answer to this is the pattern jury instruction on accomplice liability. If the jury—Like I said, the Court did hear all the evidence, does believe that there's enough for a trier-of-fact to go that route if they wanted to. Um, I think it's the appropriate answer to this question.
>
> [DEFENSE COUNSEL]: Note my objection.
>
> THE COURT: Oh, I—absolutely. I appreciate it . . . I understand. Your objection is fully noted.

Following the request by the State, the court orally instructed the jury on accomplice liability using the applicable Maryland Pattern Jury Instruction, MPJI-CR 6:00.[7] The court again noted Drew's objection to the instruction, and the jury resumed deliberations.

[7] The court clarified that the instruction applied only to the murder and assault charges and read the following instruction:

> The defendant may be guilty of the crimes as an accomplice even though the defendant did not personally commit the acts that constitute that crime. In order to convict the defendant of those crimes as an accomplice, the State must prove that the crimes occurred and that the defendant, with the intent to make that crime happen, knowingly aided, counseled, commanded, or encouraged the commission of the crime or communicate it to a participant in the crime that he was ready, willing, and able to lend support if needed. A person need not be physically present at the time and place of the commission

The jury returned a verdict finding Drew guilty of murder in the second degree and not guilty of the remaining six charges. On January 23, 2020, the court sentenced Drew to forty years in prison with twenty-five months credit for time already served. Drew's timely appeal of his conviction followed.

ISSUE PRESENTED FOR REVIEW

On appeal, Drew presents one issue for review, which we have slightly rephrased:[8] Whether the trial court abused its discretion in giving a supplemental jury instruction on accomplice liability in response to a jury question that read, "[i]f the Defendant was not the shooter, can he still be found guilty of first or second degree murder[?]"

Specifically, Drew asserts three errors with the giving of the accomplice liability instruction: (1) the evidence did not generate the instruction; (2) the court did not offer Drew the opportunity for supplemental closing argument to address accomplice liability; and (3) the instruction given was an incorrect statement of law. For the reasons discussed below, we hold that the evidence at trial generated the instruction and the two remaining claims of error are not preserved for appellate review.

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

[8] Rephrased from: Did the trial court err in its handling of a jury note asking: "If the defendant was not the shooter, can he still be found guilty of first or second degree murder?"

DISCUSSION

We review a trial court's decision to give a supplemental jury instruction for an abuse of discretion. *Sweeney v. State*, 242 Md. App. 160, 173 (2019). A trial court abuses this discretion "if it commits an error of law in giving an instruction." *Taylor v. State*, 473 Md. 205, 230 (2021). "The threshold determination of whether the evidence is sufficient to generate the desired instruction is a question of law[,]"*Dishman v. State*, 352 Md. 279, 292 (1998), which we review *de novo*, *State v. Robertson*, 463 Md. 342, 358 (2019).

I. THE EVIDENCE GENERATED THE ACCOMPLICE LIABILITY INSTRUCTION.

Drew's first argument is that the evidence at trial did not generate the accomplice liability instruction because there was no evidence that any person other than Drew committed the murder as the primary actor. The State responds that that the evidence in the record supported the theory that Drew participated as an accomplice and that Watts was the principal in the first degree. We agree with the State.

Pursuant to Maryland Rule 4-325, a trial court shall "give instructions to the jury at the conclusion of all the evidence and before closing arguments[.]" Md. Rule 4-325(a). However, the court may give a supplemental jury instruction "at a later time when appropriate[,]" Md. Rule 4-325(a), which is "often triggered by" a question from the jury, *Sweeney*, 242 Md. App. at 173. *E.g.*, *State v. Bircher*, 446 Md. 458 (2016); *Cruz v. State*, 407 Md. 202 (2009); *State v. Baby*, 404 Md. 220 (2008). Where the jury asks a question that evidences its confusion on a "issue central to the case," the court must respond to the question in a manner that clarifies the confusion for the jury, *State v. Baby*, 404 Md. at 263, usually through giving a jury instruction, *Sweeney*, 242 Md. App. at 173. And at a party's

request, the court shall give a jury instruction if the instruction (1) is a correct statement of the law; (2) is generated by the evidence; and (3) is not fairly covered elsewhere in the jury instructions as a whole. *Sweeney*, 242 Md. App. at 173–74.

The evidence at trial generates a jury instruction when there is "some evidence to support the theory it propounds." *Sweeney*, 242 Md. App. at 174. The "some evidence" standard "calls for no more than what it says—'some,' as that word is understood in common, everyday usage." *Id.* at 175–76 (quoting *Wood v. State*, 436 Md. 276, 293 (2013)). The metric of some evidence "need not rise to the level of beyond a reasonable doubt[,] clear and convincing[,] or [a] preponderance of the evidence." *Id.* at 176 (internal quotations omitted) (quoting *Wood*, 436 Md. at 293). Rather, some evidence is a low threshold. *Bazzle v. State*, 426 Md. 541, 551 (2012). In determining whether there is some evidence to generate an instruction, we examine "the facts in the light most favorable to the requesting party." *Rainey v. State*, 252 Md. App. 578, 591 (2021).

Under the common law doctrine of accomplice liability, a defendant is guilty as a principal in the second degree, an accomplice, when the defendant does not "do the deed . . ." but participates in the commission of the crime in some way by "aiding, commanding, counseling, or encouraging the principal in the first degree, who is the primary actor." *Sweeney*, 242 Md. App. at 174 (quoting *Pope v. State*, 284 Md. 309, 331 (1979)); *see* MPJI-Cr 6:00 Accomplice Liability ("[T]o convict the defendant of (crime) as an accomplice, the State must prove that the (crime) occurred and that the defendant, with the intent to make the crime happen, knowingly aided, counseled, commanded, or encouraged the commission of the crime[.]").

Thus, to generate an accomplice liability instruction, some evidence must indicate that the defendant participated in the crime in question in some way by knowingly "aiding . . . [an] *actual perpetrator*." *Sweeney*, 242 Md. App. at 175–76 (alterations and emphasis in original) (quoting *Pope*, 284 Md. at 331). "[I]t is axiomatic that in order for a person to be a principal in the second degree, there must be a crime committed and a principal in the first degree, and it must be shown that the person aided or abetted was connected with the offense." *Id.* at 175 (quoting *Handy v. State*, 23 Md. App. 239, 252 (1974)) (holding that the evidence did not generate accomplice liability when it lacked support to suggest a second *participant* in the crime).

Here, the content and timing of the text message from Drew to Watts supports the theory that if Drew were not the primary actor, he participated in the murder of Boccone as an accomplice. Approximately three minutes before Boccone drove into the Sheetz parking lot, Drew's phone sent a text message to Watts's phone, which read, "Tell her you gotta put something else in the trunk." Approximately five minutes after she drove out of the Sheetz parking lot with Drew and Watts, Boccone was shot and killed. Because we review "the facts in the light most favorable" to the party requesting the instruction, *Rainey*, 252 Md. App. at 591, the State in this case, there is an inference that the text message was criminal in nature. The content of the message—an effort to get Boccone to stop the car—in conjunction with the timing of this message—within fifteen minutes before Boccone's death—supports an inference that Drew sent a direct communication to Watts to knowingly aid, counsel, command, or encourage Watts to kill Boccone. Thus, the text message satisfies the low threshold of some evidence to generate accomplice liability.

Drew's claim that there was no evidence of a first-degree principal is not convincing. Drew contends that because the evidence established that Boccone was shot from the rear passenger seat and that Watts was in the front passenger seat when Boccone was shot, Watts cannot be a first-degree principal and Drew cannot be an accomplice. Drew points out that the State's theory was that Drew was the rear passenger and shooter and that Watts was a witness in the front passenger seat. To be sure, this was the State's theory of the evidence at trial. However, a theory of evidence is immaterial to whether the evidence generated the instruction, and this argument fails to consider the whole record. While Watts testified that he was in the front passenger seat when Boccone was shot, Drew told police that he switched seats with Watts shortly after leaving the Sheetz. Of note, while Watts testified that he did not shoot Boccone, a witness testified that Watts was carrying a gun prior to the shooting.

Drew's interpretation of *Sweeney* to further support this argument is flawed because the holding in *Sweeney* turned on significantly different facts. In *Sweeney*, the defendant was on trial for second-degree theft and burglary for allegedly stealing, among other items, a 450-pound lawnmower from the owner's shed. *Sweeney*, 242 Md. App. at 167. The State "concede[d] that it provided 'no witnesses, DNA evidence, fingerprint evidence, or boot tracks evidence' that might [have] suggest[ed] a second participant [in the crime]." *Id.* at 176. This Court held that the evidence did not generate the accomplice liability instruction because the record lacked evidence that "*any* other person" was involved in the crime with the defendant. *Id.* at 176 (emphasis in original) (dismissing the speculative theory that one person alone could not have lifted the heavy lawnmower onto the defendant's truck).

In stark contrast with *Sweeney*, here, the evidence shows that two men participated in the crime, one of which was the principal in the first degree in shooting Boccone. To recap, witnesses identified two men running from the crime scene; residential home security camera footage captured two individuals running down a street one block from the crime scene; shortly after the 911 call, a cab picked up two individuals near the scene; Boccone's blood was found in that cab; and the Sheetz parking lot video surveillance depicted three occupants in Boccone's car approximately five minutes before her death. Furthermore, Drew told police that he was in the rear passenger seat of the Boccone's car when she drove the car from the Sheetz; Watts testified that he was in the front passenger seat and that Drew was in the rear passenger seat when Boccone was shot; Boccone's DNA matched the blood sample from Watts's striped jacket; Boccone was the major contributor of the blood sample from the outside of the green hat; and Drew could not be excluded as the significant contributor to the DNA sample from inside the hat.

In sum, the evidence indicated two participants in the crime, and the text message satisfies the low threshold of some evidence that Drew knowingly aided, counseled, commanded, or encouraged the commission of the crime. Therefore, the evidence generated the accomplice liability instruction.

II. DREW'S TWO REMAINING CLAIMS OF ERROR ARE NOT PRESERVED FOR APPELLATE REVIEW.

Despite making such objections at trial, Drew asserts two additional errors with the giving of the accomplice liability instruction. Drew argues that the court failed to provide him with supplemental closing argument to address accomplice liability and that the

instruction was an incorrect statement of law because the instruction did not include the *mens rea* for second-degree murder. Drew contends that a request for supplemental closing argument is not required; and, though Drew concedes that he did not preserve the argument that the instruction was an incorrect statement of law, he asks this Court to exercise discretionary plain error review. We address each argument in turn.

A. Drew's Request for Supplemental Closing Argument is Not Preserved.

An appellate court will generally not decide an issue on appeal unless "it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a). Pursuant to Maryland Rule 4-325(f), no party may assert error with a jury instruction unless it "objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." Md. Rule 4-325(f). The purpose of Rule 4-325 is to give the court "an opportunity to correct its charge to the jury if it believes a correction is necessary in light of the objection." *Taylor*, 473 Md. at 227.

Where a party states specific grounds for an objection at trial, as in a jury instruction objection, the objecting party "will be held to those grounds and ordinarily waives any grounds not specified that are later raised on appeal." *Klauenberg v. State*, 355 Md. 528, 541 (1999). But a cryptic objection without explanation substantially complies with the preservation requirement, if the basis is apparent from the record. *Taylor*, 473 Md. at 227. The basis of an objection is apparent when the court can "reasonably infer the grounds for the objection based on the overall context in which the objection was made." *Id.* at 227, 229–30 (reasoning that the court understood the objection and expressed no confusion).

Here, Drew's objection to the accomplice liability instruction at trial was not based on the lack of an opportunity to address the new theory of accomplice liability. When the court discussed giving the jury a supplemental instruction on accomplice liability after the second jury question, the stated basis of Drew's objection was that "because of the way it was charged, it's an all or nothing case. [] [I]f he's the shooter, he goes down for all of it. If he's not, he goes down for none of it." The court responded that "the charging statement doesn't change[,]" because the State does not "have to charge a co-conspirator" for accomplice liability. The court further stated that it "could find that the text exchange that occurred right before the shooting, there is . . . some evidence on the record from which a[] trier-of-fact could theorize that they are in cahoots together at the time of the shooting." In response, Drew's defense counsel said "[t]hat's not the State's theory. The State's theory is that Drew was the shooter" and said "were that not the theory, I assume Watts would have been charged with a conspiracy[.]"

From this discussion, it is apparent that Drew objected to the accomplice liability instruction on the basis that Drew was not charged as an accomplice and Drew's role as an accomplice "was not the State's theory of the case." The court's response and its oral statement indicated its understanding that the basis of objection raised the issue of whether the evidence generated the instruction. The court stated that the accomplice liability was appropriate based on the evidence in record, importantly, the "text [message] exchange" from Drew to Watts. In light of Drew's objection that the State did not purse an accomplice liability theory at trial, the court assessed whether to correct its charge to the jury with

respect to whether the evidence generated the instruction, and the trial court decided this issue in favor of giving the clarifying instruction.

Drew's objection did not raise the issue that he lacked an opportunity to address accomplice liability. Based on "the overall context in which the objection was made," *Taylor*, 473 Md. at 227, we cannot conclude that the trial court could reasonably infer that Drew was also objecting on the grounds that he required supplemental closing argument. Without a specific objection based on the ability to address accomplice liability, the court could not have had "an opportunity to correct its charge to the jury," with respect to the issue that Drew raises now for the first time. The discussion between the court and the parties was limited to the charging document, the State's theory of the case, and whether the evidence generated the instruction. Drew did not assert that he lacked an opportunity to address accomplice liability nor did he request additional closing argument to address the instruction. Therefore, that ground of objection is not preserved on appeal, and the scope of appellate review is limited to the stated basis at trial.

Drew's reliance on the holding in *Sweeney*, again, is misplaced. In *Sweeney*, the court gave a supplemental jury instruction on accomplice liability over the defendant's objection that he did not have an opportunity to address accomplice liability. 242 Md. App. at 171.This Court held that, "the trial court must at least give the defense an opportunity to respond in a supplemental argument after the instruction" when a court's "supplemental instruction injects a new theory of criminal liability into the case after closing arguments[.]" 242 Md. App. at 178. However, *Sweeney* did not address the threshold issue of preservation and whether the defendant must request supplemental closing argument.

Here, we cannot apply the holding in *Sweeney* before determining whether the issue is preserved on appeal.

For the same reason, Drew's reliance on *Cruz* is also misplaced. In *Cruz*, the trial court instructed the jury on assault before closing arguments, and the parties agreed that the court would not instruct the jury on attempted battery. 407 Md. at 207–08. However, in response to a jury note after closing arguments, the court gave a supplemental jury instruction on attempted battery—a new theory of culpability. *Id.* The Court of Appeals held that the supplemental jury instruction prejudiced the defendant because the defense counsel tailored his closing argument to the absence of the instruction and made concessions to elements of attempted battery. *Id.* at 220, 222. However, the Court's decision in *Cruz* did not address our threshold question of preservation.

As discussed, Drew's argument is not preserved for appellate review because his claim for supplemental closing argument was not raised in or decided by the trial court. Therefore, we do not reach the merits of the arguments addressed in *Sweeney* and *Cruz*.

B. Drew's Unpreserved Objection that the Accomplice Liability Instruction was an Incorrect Statement of Law Does Not Warrant Plain Error Review.

Pursuant to Maryland Rule 4-325(f), we have discretion to review an unpreserved issue with a jury instruction. *Wiredu v. State*, 222 Md. App. 212, 223 (2015). "An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the [jury] instructions, material to the rights of the defendant, despite a failure to object." Md. Rule 4-325(f). However, we rarely exercise this discretion. *Yates v. State*, 429 Md. 112, 131 (2012). "Plain error review is reserved for errors that are

'compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.'" *Id.* at 130 (quoting *Savoy v. State*, 420 Md. 232, 243 (2011)).

A fact that "weighs heavily against the possibility of plain error review" is whether the instruction "came directly from the Maryland Pattern Jury Instructions[.]" *Wiredu*, 222 Md. App. at 224. "Although the use of a pattern jury instruction does not insulate a conviction against review, it is a factor in our analysis[,]" *Yates v. State*, 202 Md. App. 700, 723 (2011), and appellate courts "strongly favor the use of pattern jury instructions[,]" *Minger v. State*, 157 Md. App. 157, 161 n.1 (2004).

Here, the court's instruction on accomplice liability came directly from the Maryland Pattern Jury Instruction for accomplice liability, MPJI-Cr 6:00. Because the court's use of the applicable pattern jury instruction weighs strongly against plain error review, this case "does not compel th[e] extraordinary remedy [of plain error review]," *Wiredu*, 222 Md. App. at 224. *See Yates*, 429 Md. at 131 (reasoning that in declining to exercise its discretion, "[this] Court pointed out that the trial court used a pattern jury instruction" and "cited past appellate decisions approving of the use of pattern instructions . . ."). Accordingly, we decline Drew's request to review the contents of the accomplice liability instruction for plain error.

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