Circuit Court for Baltimore City
Case Nos. 119140013, 119140014, 119140015, 119140016

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 1781

September Term, 2021

DONTE PATTERSON

v.

STATE OF MARYLAND

Graeff,
Tang,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Tang, J.
Dissenting Opinion by Raker, J.

Filed: August 21, 2023

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

** At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

At the conclusion of a jury trial in the Circuit Court for Baltimore City, Donte Patterson, appellant, was convicted of second-degree murder, two counts of attempted second-degree murder, two counts of conspiracy to commit murder, and various firearms offenses arising from a quadruple shooting on April 11, 2019. Appellant was sentenced to an aggregate term of life imprisonment plus 52 years. On appeal, he presents the following questions, which we have reordered and rephrased for clarity:

I. Did the trial court err in denying appellant's motion to suppress his statement?

II. Did the trial court err in permitting the State to amend the language concerning conspiracy in its indictments?

III. Did the trial court err in instructing the jury on accomplice liability?

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On April 11, 2019, Levar Mullen-El was shot and killed, and three others—Shewayne Rhodes, Jermaine Kearney, and Antoine Caesar—were wounded, in what police believed was retaliation for a double homicide committed the night before.[1] To place the April 11 shooting and the subsequent investigation into context, we begin with the preceding event.

On April 10, 2019, in the east side of Baltimore City, a shooting claimed the lives of appellant's "little cousins," "Marcus" and "Mama." That night, appellant received word

[1] For convenience and clarity, we refer to these individuals by their last names. We mean no disrespect in doing so.

of the shooting and immediately drove to the scene where he saw his cousins on the ground; Marcus was "already dead," and Mama was "still breathing" but eventually succumbed to her injuries.

The next day, shortly after 11 a.m., police were notified of a shooting, and they responded to the west side of Baltimore City where they found Mullin-El, Rhodes, Kearney, and Caesar wounded. Police recovered several cartridge cases at the scene, which were later determined to be fired from three different firearms. Among those were .40 caliber Smith & Wesson cartridge cases. Bullet specimens of the .40 Smith & Wesson class were consistent with the Hornady Flex Tip type.

Detective Ryan Diener responded to the scene and obtained video surveillance footage from a local grocery store. The video showed four people exiting a silver Infiniti, driven by a fifth person, and proceeding down an alley. Shortly thereafter, the four returned to the vehicle and fled.

Using license plate reader technology, Detective Diener was able to identify the Infiniti's tag number. With that information, he ran the tag number and recovered pictures of the Infiniti with dates and times that different cameras had captured. Notably, one camera showed the Infiniti, the night before, on the east side of Baltimore where the double homicide had occurred. Other pictures showed that the Infiniti was parked regularly around East North Avenue and North Chester Street.

On April 17, 2019, Detective Diener visited the 1900 block of North Chester Street where he found appellant leaning against the Infiniti. After briefly speaking to appellant,

the detective learned that the Infiniti was registered to another person, but appellant claimed to own it. He advised appellant that police would be seizing the vehicle and applying for a search warrant to search it.

As detailed *infra*, the detective gave appellant his card and asked to speak with him later. About an hour later, appellant responded to the police station where Detective Diener advised appellant of his rights and interviewed him. The two discussed the April 10 shooting, and appellant told the detective that the victims of that homicide were his "two little cousins." As the interview progressed, the detective explained that he believed that appellant and his friends targeted someone that they thought was involved in killing appellant's cousins, and he asked appellant to explain the presence of the Infiniti at the scene of the April 11 shooting. Appellant stated that the Infiniti was his but denied he was there, claiming instead that he was buying tennis shoes at Mondawmin Mall. After reviewing surveillance video from the shoe store, the detective determined that appellant was not at the store as claimed.

After the interview, police searched the Infiniti and recovered a .40 caliber, Smith & Wesson, Hornady live round from the rear floorboard. Police searched appellant's home where they found ammunition including three .40 caliber Smith & Wesson live rounds.

Detective Diener also conducted a jail call investigation. He discovered that, hours after the April 11 shooting, appellant had a conversation with an inmate, who was appellant's "main man" and Mama's biological brother. In the recorded call, appellant

informed the inmate that Mama had been killed but assured him that appellant "went over there" and "took care of it"; appellant tried his best to avenge Mama and "took two down."

The State indicted appellant in four cases, one for each victim: Case Nos. 119140013 (Mullen-El), 119140014 (Rhodes), 119140015 (Kearney), and 119140016 (Caesar). The four cases were tried together.

After trial, the jury convicted appellant of the following offenses: as to Mullen-El, second-degree murder; conspiracy to commit murder; use of a handgun in a crime of violence; possession of a handgun in a vehicle; and wearing, carrying, and transporting a handgun. As to Kearney, attempted second-degree murder and use of a handgun in a crime of violence. And, as to Caesar, attempted second-degree murder; conspiracy to commit murder; and use of a handgun in a crime of violence.[2]

Additional facts will be supplied, as necessary, in the discussion below.

DISCUSSION

I.

Voluntariness of Appellant's Statement

At a suppression hearing, appellant moved to suppress the statement he gave to Detective Diener at the police station. He argued that the statement was induced, and therefore not voluntary, because the detective told appellant that he would get his vehicle back faster if he came to the station to speak with the detective.

[2] The court granted appellant's motion for judgment of acquittal as to all charges in the indictment filed in Case No. 119140014 (Rhodes).

As mentioned, during his initial encounter with appellant, Detective Diener told appellant he would be seizing the Infiniti and obtaining a search warrant to search it. He then asked if appellant would be able to come to the police station to answer questions:

> DETECTIVE DIENER: Yes. Okay. Are you available today to come down and talk to me? Because that makes the other process of getting the vehicle back—I mean, you can come down on your own, they don't have to take—
>
> * * *
>
> DETECTIVE DIENER: I work–yeah, I work downtown at the headquarters. So you're—I mean, if you want, I can give you a ride or if you want to get your ride down there, that's fine. I mean, I (indiscernible 10:02.01 a.m.), but I do need to speak to you today. And if I speak to you—soon as I speak to you as soon as we process (indiscernible 10:02.04. a.m.) So that's up to you. You want to—you want to go with them right now, I can get somebody out of work right now and they can start to process right now. As soon as this gets towed, I'll be going down (indiscernible 10:02:16 a.m.).
>
> That's fine. (Indiscernible 10:02:17 a.m.) Like I said, that will just speed up the process. So then once I get done talking to you, get the search warrant, do what I need to do[.]

About an hour later, appellant arrived at the police station to speak with the detective. The detective told appellant that he was not under arrest and was free to leave at any time. He proceeded to advise appellant of his *Miranda* rights including his right to remain silent and to an attorney. Then, the following exchange occurred:

> DETECTIVE DIENER: And then it says, "I've been advised of and understand my rights (indiscernible 10:11:20 a.m.). I freely and voluntarily waive my rights and agree to talk to the police without having an attorney present." So you want to talk right now to me, however, what I always tell people, because they read that and they start getting worried, number 4, "If you agree to answer questions, you may stop at any time and request an attorney and stop."

> So if we start talking (indiscernible 10:11:39 a.m.) I'm done, that's fine. We can stop. I mean, I can't force you to be here because you're here on your own free will, okay? So I just need you to sign there and I'm going to get it —(indiscernible 10:11:46 25 a.m.).
>
> [APPELLANT:] But you told me I had to come down here (indiscernible 10:11:49 a.m.) If I wanted to go out (indiscernible 10:11:51 a.m.) —
>
> DETECTIVE DIENER: Yes, sir.
>
> [APPELLANT:] (indiscernible 10:11:56 a.m.) what's going on —
>
> DETECTIVE DIENER: That's fair.
>
> [APPELLANT:] (indiscernible 10:11:59 a.m.) what's going on to me, right?
>
> DETECTIVE DIENER: Well, I need to speak with you, yes, I did tell you that, that I needed you to come down so I could speak to you. And then—you know, you—eventually you came down and we were able to sit down and talk and I appreciate that.

Detective Diener proceeded to inquire about the double homicide that occurred on April 10, appellant's ownership of the Infiniti, and his whereabouts during the quadruple shooting on April 11. Appellant made various statements, summarized, *supra*. He denied any knowledge of the April 11 shooting and insisted that he wanted his car back: "But all I want you to do is do your investigation–if I don't get my car back–because I need my car." The detective told appellant it would probably be processed the next day, and he could retrieve it then. At the end of the interview, the following exchange ensued:

> [APPELLANT:] I just feel like—you told me to come down here—like, I ain't have to come down here.
>
> DETECTIVE DIENER: You didn't. You didn't.
>
> [APPELLANT:] You know what I'm saying?

DETECTIVE DIENER: That's true, you didn't. [Y]ou can understand why I had you come down.

[APPELLANT:] Yeah.

Following argument, the circuit court concluded that appellant was not in custody at the time of the interview and *Miranda* rights were therefore not required. In the alternative, the court determined that, while appellant's decision to go to the station was "induced," the statements themselves were not.

On appeal, appellant does not challenge the court's finding that he was not in custody. Instead, he contends, relying on the Maryland common law rule, that his statement to police was the product of an improper inducement.[3] The State counters that appellant's statement was voluntary because police made no improper promises to him.

Analysis

Under Maryland common law, "a confession or incriminating statement is not admissible unless the State can prove that the statement was freely and voluntarily made and not in any way the product of coercive promises or threats."[4] *State v. Tolbert*, 381 Md.

[3] We briefly comment on the interplay between custodial interrogation and the voluntariness doctrine. The Supreme Court of Maryland "appears to have taken a sharp turn away from the requirement that custody be a precondition for the operation of the *per se* common law test." Andrew V. Jezic, *et al*., *Maryland Law of Confessions*, § 3.2 at 79 (2020-2021 ed.). *Hill v. State*, 418 Md. 62 (2011), presented the "first case in which [the Court] applied the exclusionary rule of the common law voluntariness doctrine in a non-custodial setting." *Maryland Law of Confessions*, at 79. "Although the *Hill* Court did not specifically state that custody is no longer a requirement for the *per se* rule of exclusion, it appears that is now the case." *Id*.

[4] There is distinction between a confession and an admission. "A confession is a species of admission, that is to say, an admission that says or necessarily implies that the

539, 558 (2004). In *Hillard v. State*, 286 Md. 145 (1979), the Supreme Court of Maryland[5] established a two-prong test for determining whether a confession or significantly incriminating remark is the result of an improper inducement by police. *Id*. at 153. Under that test, an inculpatory statement is involuntary if (1) any officer or agent of the police promises or implies to the suspect that he will be given special consideration from a prosecuting authority or some other form of assistance in exchange for the suspect's statement, and (2) the suspect makes remarks in apparent reliance on the police officer's explicit or implicit inducement. *Id*. Both prongs must be satisfied before such statement is deemed to be involuntary. *See Winder v. State*, 362 Md. 275, 310 (2001). "The suppression court's ruling that a confession [or significantly incriminating remark] is voluntary is subject to *de novo* review on appeal, with credit given to the suppression court's first-level factual findings." *Hill v. State*, 418 Md. 62, 77 (2011).

As a preliminary issue, the State suggests that appellant's statement is not subject to the voluntariness inquiry because appellant did not make a confession or similar

matter confessed constitutes a crime." *Stewart v. State*, 232 Md. 318, 323 (1963). By contrast, an "admission which is not a confession is an acknowledgment of some fact or circumstance which, in itself, is insufficient to authorize a conviction but which tends to establish the ultimate fact of guilt." *Id*. An "admission which is significantly incriminating but short of a confession must, like a confession, have been made voluntarily and without improper inducement to be evidence against the accused." *Id*. "The less incriminating the admission, the less the likelihood that it was obtained by coercion or inducement." *Id*. at 324.

[5] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See also* Md. Rule 1-101.1(a).

inculpatory statement; he denied his involvement in the quadruple shooting. While appellant firmly denied his involvement in the quadruple shooting, he made admissions of fact that were incriminating. *See* n.4, *supra*. He explained his relationship to his "little cousins" whom he found dead on the eve of the quadruple shooting; he described when and how he came to own the Infiniti that was later seen on the store's surveillance video and where police subsequently discovered ammunition of the type that was found at the scene of the quadruple shooting; and he provided an alibi that was eventually disproved by subsequent investigation. Because of these incriminatory aspects, appellant's statement is subject to the voluntariness inquiry. *See Green v. State*, 236 Md. 334, 338–39 (1964) ("While the statements appear to be more exculpatory than otherwise, they were incriminatory in certain respects. . . . [B]ecause of the incriminatory aspects, the statements must have been made voluntarily to have been admissible.").

Returning to the *Hillard* test, the kinds of improper inducements "have involved promises by the interrogating officers either to exercise their discretion or to convince the prosecutor to exercise discretion to provide some special advantage to the suspect." *Knight v. State*, 381 Md. 517, 536 (2004) ("If down the line, after this case comes to an end, we'll see what the State's Attorney can do for you, with your case, with your charges," was "clearly a promise to exercise advocacy on the defendant's behalf"); *see also Hill*, 418 Md. at 80–82 (interrogator's statement that victim and victim's family "did not want to see [the defendant] get into trouble, but they only wanted an apology" for what happened was an improper inducement); *Winder*, 362 Md. at 289 ("I can make you a promise, Okay? I can

help you. I could try to protect you" held to be an improper inducement); *In re Lucas F.*, 68 Md. App. 97, 105 (1986) (interrogator's statement that there would be "no problem later" held to be unlawful inducement); *Hillard*, 286 Md. at 153 ("[I]f you are telling me the truth . . . I will go to bat for you" held to be an improper inducement).

The purported promise at issue was that appellant could recover his vehicle faster if he spoke to the detective, as opposed to leniency, as in these cases, *supra*, in which we determined there was a common law violation. Detective Diener did not promise to exercise any discretion, nor did he promise that the prosecutor would exercise any discretion to provide some special advantage to appellant. Appellant does not cite to any Maryland case holding that a statement was rendered involuntary, under Maryland common law, based on a promise like the one that Detective Diener purportedly made. *See e.g.*, *Lee v. State*, 418 Md. 136, 162 (2011) (declining to expand common law involuntariness to cover interrogator's promise of confidentiality). Because there was no improper inducement in this case, there is no need to engage in the second step of the *Hillard* test. *See, e.g.*, *Brown v. State*, 252 Md. App. 197, 241 (2021) (not reaching second prong after concluding that first prong had not been met). Accordingly, the court did not err in denying the motion to suppress.

II.

Amendment of Conspiracy Charges

On the first day of trial, the State moved to amend the count for conspiracy to commit murder on each of the four indictments. The prosecutor explained:

> The indictment reads Count 2, in pertinent part, "Defendant late of said City heretofore on or about April 11, 2019, 2200 block of Ruskin Avenue, did conspire with four unknown others to feloniously *without* malice or forethought, kill and slay Levar Mullen and then Shewayne Rhodes, Jermaine Kearney, Antoine Caesar." Clearly the language should say, it either should say *with* malice or forethought or malice should not be discussed at all when it comes to a conspiracy charge. So I am moving to amend the word *without* to read *with*[.]

(Emphasis added). After further argument, the court concluded that the requested amendment would constitute a "substantive" change but found there was no prejudice because appellant was on notice of the nature of the conspiracy charges "from day one[.]" Accordingly, the court permitted the requested amendment.

On appeal, appellant argues that the court erred by allowing an amendment that altered an element of conspiracy, and thus changed the character of the offense, without his consent. The State counters that appellant was fully aware of the nature of the conspiracy charges based on the language used to describe those counts in the initial statement of charges and other murder-related offenses in the subsequent indictments.

Analysis

"One of the primary purposes of a charging document is to inform an accused of the accusation against him or her." *Campbell v. State*, 325 Md. 488, 493 (1992); Md. Const., Decl. of Rts., art. 21 (stating that "[i]n all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defence"). The purposes served by the constitutional requirement include:

(1) putting the accused on notice of what he is called upon to defend by characterizing and describing the crime and conduct;

(2) protecting the accused from a future prosecution for the same offense;

(3) enabling the accused to prepare for his trial;

(4) providing a basis for the court to consider the legal sufficiency of the charging document; and

(5) informing the court of the specific crime charged so that, if required, sentence may be pronounced in accordance with the right of the case.

Campbell, 325 Md. at 494 (citing *Ayre v. State*, 291 Md. 155, 163–64 (1981)).

Maryland Rule 4-204 provides, in pertinent part, that "the court at any time before verdict may permit a charging document to be amended except that if the amendment changes the character of the offense charged, the consent of the parties is required." "An indictment may be corrected without the defendant's consent if the amendment does not alter any of the elements of the offense and results in no prejudice." *Tapscott v. State*, 106 Md. App. 109, 134 (1995).

"Matters relating to the character of the offense are those facts that must be proved to make the act complained of a crime." *Id.*; *see, e.g.*, *Counts v. State*, 444 Md. 52, 65–66 (2015) (amendment substituting felony theft for misdemeanor theft changed character of offense because it required "proof of an element the original offense did not require"); *Busch v. State*, 289 Md. 669, 679 (1981) (amendment substituting charge of resisting arrest for charge of resisting, obstructing, or hindering an officer in performance of his duties changed character of offense because "[t]he charge as amended required proof of an arrest while the original charge did not"). Here, the question becomes whether the amendment

from "*without* malice" to "*with* malice," as used to describe the object of the conspiracy (murder), constituted a change to the character of the conspiracy offense.

The crime of conspiracy is defined in Maryland as the "combination of two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means. The essence of a criminal conspiracy is an unlawful agreement." *Campbell*, 325 Md. at 495–96 (citation omitted). Furthermore, "the crime is complete when the unlawful agreement is reached, and no overt act in furtherance of the agreement need be shown." *Id*.

"It is well settled that, in order validly to charge conspiracy, a charging document must allege both the fact of the conspiracy and its object." *Id*. at 496. "[A]lthough a defendant must be informed of the fact that he is charged with conspiracy, he need not be informed of the precise crime that is the object of the conspiracy." *Rudder v. State*, 181 Md. App. 426, 446 (2008) (citing *Campbell*, 325 Md. at 496–97). "[T]he means by which [the conspiracy] was intended to be accomplished need not be set out, being only matters of evidence to prove the charge, and not the crime itself, and may be perfectly indifferent[.]" *Campbell*, 325 Md. at 496 (quoting *State v. Buchanan*, 5 H. & J. 317, 352 (1821)). Thus, the "object of the conspiracy need not be set out [in the indictment] with the same particularity as if charging it as a substantive crime." *Id*. at 501.

In *Campbell v. State*, the Supreme Court of Maryland explained:

> When the object of a conspiracy is the commission of a crime, alleging that fact in the charging document obviously would be a sufficient statement of the conspiracy's object. Nevertheless, it is not required that the object of the unexecuted conspiracy should be set out with great particularity and certainty

> in the indictment, because only such facts need be stated as shall fairly and reasonably inform the accused of the offense with which he is charged. Thus, because it is not essential to the proof of conspiracy that its object be attained, the crime need not be alleged with such specificity as to render an indictment for it sufficient. This is consistent with the fact that the offense of which the accused is required to be informed is the conspiracy, rather than the crime which is its object.

Id. at 496–97 (cleaned up). The *Campbell* Court rejected a claim that the indictment for conspiracy "to violate the controlled dangerous substances law of the State of Maryland" should have alleged how the conspirators used the substance or what they intended to do with it. *Id*. at 501. Although the indictment "could have been more explicit, the charge put the accused on notice, *albeit* only in a general way, of what he was called upon to answer." *Id*. at 502; *see also Hurwitz v. State*, 200 Md. 578, 582 (1952) (indictment sufficient where defendant was charged with conspiring to "unlawfully violate the lottery laws of the State"); *Quaglione v. State*, 15 Md. App. 571, 580 (1972) (indictment sufficient where it charged conspiracy "to violate the Narcotic Laws of the State of Maryland").

Indeed, the legislature simplified the form of indictments for conspiracy. *Hurwitz v. State*, 200 Md. 578, 588 (1952). An indictment for conspiracy is sufficient if it "substantially" states: "(name of defendant) and (name of co-conspirator) on (date) in (county) unlawfully conspired together to murder (name of victim) (or other object of conspiracy), against the peace, government, and dignity of the State." Md. Code Ann., Crim. Law ("CR") § 1-203. "This form of indictment for conspiracy to murder is briefer in statement of the object of the conspiracy than the statutory short form of indictment for murder." *Hurwitz*, 200 Md. at 588; *see* CR § 2-208 (an indictment for murder or

manslaughter is sufficient if it substantially states: "(name of defendant) on (date) in (county) feloniously (willfully and with deliberately premeditated malice) killed (and murdered) (name of victim) against the peace, government, and dignity of the State."). In other words, "the formula for a conspiracy indictment" "requires only a brief statement of the 'object of the conspiracy.'" *Pearlman v. State*, 232 Md. 251, 257–58 (1963) ("Statutes prescribing a short form of indictment—provided the simplified form contains the essential elements of the crime it purports to charge—are generally upheld on the ground that the right of the defendant to demand the particulars of the accusation protects him against injury.").

Based on the foregoing, we conclude that the amendment in the instant case did not change the essential elements of the conspiracy offense, and thus did not change its character. Although the conspiracy counts did not describe the object of the crime with precision, it expressly referred to its purpose as "kill[ing]" and "slay[ing]." *See Rudder*, 181 Md. App. at 453 ("Ideally, the conspiracy count will make reference to the first or titular count of the indictment. If there is any doubt, however, as to which substantive count the conspiracy count relates, the presumption will be that it relates to the most serious count."). Moreover, appellant did not claim that he was deprived of fair notice that the State had charged him with conspiracy to commit murder, that he was unable to prepare for his defense, or another claim that touched on the purposes served by a charging document, *supra*. Although the court viewed the amendment as a "substantive" one, it still reached the right result in granting the State's motion to amend each conspiracy charge.

See Davis v. State, 207 Md. App. 298, 306 n.2 (2012) ("[I]t is within our province to affirm the trial court if it reached the right result for the wrong reasons[.]") (citation omitted).

III.

Accomplice Liability Instruction

At trial, the State requested a jury instruction on accomplice liability.[6] Appellant objected, arguing that the State's theory was that appellant was a principal in the first degree, not an accomplice. The prosecutor responded that the jury might feel appellant's involvement was not exactly how the State posited, but in another way as an accomplice. The court overruled appellant's objection and gave an accomplice liability instruction. Following the court's reading of the instruction, appellant renewed his objection.

On appeal, appellant argues that the accomplice liability instruction did not apply to the facts of the case because (1) the State never adduced evidence of or pursued a theory of liability attributable to appellant as an accomplice, and (2) he cannot be both a principal and an accomplice. The State argues that the court properly gave the instruction because it was generated by the evidence.

[6] Accomplice liability is a common law doctrine which provides that a person "who did not actually commit the crime in question may nevertheless be guilty to the same degree as the person who did." *Kohler v. State*, 203 Md. App. 110, 119 (2012). A defendant who "does not do the deed himself" is guilty as a principal in the second degree, or accomplice, when he participates in the commission of the crime by aiding, commanding, counseling, or encouraging the principal in the first degree, who is the primary actor. *Sweeney v. State*, 242 Md. App. 160, 174 (2019) (quoting *Pope v. State*, 284 Md. 309, 331 (1979)).

Analysis

Maryland Rule 4-325(c) "requires a trial court to give a requested instruction when (1) it 'is a correct statement of the law'; (2) it 'is applicable under the facts of the case'; and (3) its 'content . . . was not fairly covered elsewhere in the jury instruction[s] actually given.'" *Hayes v. State*, 247 Md. App. 252, 288 (2020) (citation omitted). "Unless the trial court has made an error of law, we review its decision to give a jury instruction for abuse of discretion." *Id*.

Under the second element, challenged here, a "requested jury instruction is applicable if the evidence is sufficient to permit a jury to find its factual predicate." *Bazzle v. State*, 426 Md. 541, 550 (2012). The requesting party need only produce "some evidence" to support the requested instruction. *Id.* at 551. "*Some evidence* is not strictured by the test of a specific standard. It calls for no more than what it says—'some,' as that word is understood in common, everyday usage. It need not rise to the level of 'beyond a reasonable doubt' or 'clear and convincing' or 'preponderance.'" *Id*. (quoting *Dykes v. State*, 319 Md. 206, 216–17 (1990)) (emphasis in original). 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).

Appellant's first contention is without merit. A theory of evidence is immaterial to whether the evidence generated the instruction. *See Perry v. State*, 150 Md. App. 403, 430 (2002) ("The fact that a party did not pursue a particular theory does not preclude the trial judge from giving an instruction on that theory where it deems such an instruction to be

appropriate.") (quoting *United States v. Horton*, 921 F.2d 540, 544 (4th Cir. 1990)). While the evidence presented at trial tied appellant to the shooting, it was not a foregone conclusion that he was a principal in the first degree. That appellant "was the actual triggerman was only an inference, a very persuasive inference, to be sure, but an inference that could be drawn or could be declined" by the jury. *Id*. at 430–31. Accordingly, "[t]he jury necessarily was called upon to engage in intelligent speculation." *Id*. at 431.

As to his second contention, appellant relies on *Sweeney v. State*, 242 Md. App. 160 (2019) for the purported proposition that appellant could not be both the first-degree principal and an accomplice. His interpretation of *Sweeney*, however, is flawed. In *Sweeney*, the defendant was convicted of second-degree theft and burglary for allegedly stealing, among other items, a 450-pound lawnmower from the owner's shed. *Id*. at 167. The State conceded that it provided no evidence that might have suggested 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.* (emphasis in original).

By contrast, the evidence in the instant case implicated five participants in the quadruple shooting on April 11. The video from the grocery store showed appellant's Infiniti drive up to the scene. The driver remained in the Infiniti while four other individuals got out of the car, hurried back, and fled afterwards. The cartridges found at the scene indicated that three different firearms were used in the shooting. Because the

instruction was generated by "some evidence," the court did not abuse its discretion by giving it.

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

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Raker J., Dissenting.

I respectfully dissent. I would reverse the judgments on two grounds. First, I would hold that the trial court erred in permitting the State to amend the indictment, over the objection of the defense. *See* Md. Rule 4-204. Second, I would hold that the trial court erred in failing to suppress appellant's statement because the statement was involuntary under Maryland common law.

As to the amendment of the indictment, prior to the amendment, the indictment was defective. It didn't charge an offense. I agree with the trial judge that the State erred in drafting the indictment and that the State's requested amendment was a substantive change. Charging conspiracy to kill and slay *without malice* does not charge conspiracy to commit first or second-degree murder. Md. Code Ann., Crim. Law § 2-201; § 2-207. In fact, it charges no cognizable crime in Maryland. *Cf. Mitchell v. State,* 363 Md. 130 (2000). At best, it purports to charge conspiracy to commit manslaughter, which is not a crime in Maryland. Count 2 of the indictment charged no offense.

Some courts have held that an indictment that does not charge an offense is void. *See e.g., Jones v. Mack,* No. CA 20-0290-TFM-MU, 2020 U.S. Dist. LEXIS 204863, at *12 (S.D. Ala. Oct. 1, 2020) ("[T]he proper vehicle by which to *challenge a void indictment [e.g., where the indictment charges no offense]* is by way of a petition for writ of habeas corpus) (emphasis added); *State v. McNichols,* 743 N.E.2d 500, 501 (Oh. Ct. App. 2000) ("Because the original indictment charged appellant with violating a nonexistent statute, it was void from its inception and could not be amended. We reject the state's suggestion that a void indictment can simply be amended as long as the amended indictment charges a

defendant with a crime bearing the same name but under a different provision of the applicable statute."); *Henderson v. Cardwell*, 426 F.2d 150, 152 (6th Cir. 1970) ("A void indictment would be one which described no offense that existed under the statutes of the state.").[1]

Maryland rules permitting amendment of an indictment do not contemplate the making of a good indictment from one that states no offense any more than the rules cited in the above cases. Article 21 of the Maryland Declaration of Rights requires that every criminal defendant have a copy of his indictment in order to prepare a defense, and to enable him to plead double jeopardy in the event of a subsequent prosecution for the same offense. Md. Rule 4-204 requires that "if the amendment [to the indictment] changes the character of the offense charged, the consent of the parties is required." The amendment here changed the character of the offense in that it added an offense where no offense was charged. Therefore, the amendment was impermissible. The amendment was improper and requires reversal of Count 2.

Second, as to the appellant's statements, his statements were incriminatory and, therefore, subject to a common law voluntariness inquiry. I disagree with the majority's conclusion that there was no inducement to the accused to make any statements. The

[1] Some courts have even held that a court lacks subject matter jurisdiction to try a defendant on an indictment that does not allege a crime. *See, e.g., United States v. Rosa-Ortiz*, 348 F.3d 33, 36 (1st Cir. 2003) ("A federal court lacks jurisdiction to enter a judgment of conviction when the indictment charges no offense under federal law whatsoever."); *United States v. Rodriguez-Santana*, No. 95-236, 2018 U.S. Dist. LEXIS 236404, at *3-4 (D.P.R. Apr. 16, 2018) ("Therefore, it can only be argued that a district court lacks jurisdiction to enter a judgement of conviction when the indictment charges no offense under federal law").

promises or inducement the detective made to appellant induced appellant to come to the police station and to make his inculpatory statements to law enforcement. The inquiry is whether "[the] accused [was] told . . . that making an inculpatory statement would be to his advantage." *Hillard v. State*, 286 Md. 145, 153 (1979). Under the majority's reasoning, the defendant's decision to sit for a police interview after a deadly shooting was entirely unmotivated. But cars are important in today's society, and the early release of his vehicle was apparently important to appellant. It would, therefore, be to his advantage to get his car back sooner, and both he and the police knew that. The police proceeded to ask him inculpatory questions with the promise that answers would result in that advantage. The inducement was improper, provided a benefit to appellant, and made his statement involuntary.

For the above stated reasons, I would reverse the judgments.