Circuit Court for Baltimore City
Case No.: 114157031

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0151

September Term, 2016

DONNELL JOHNSON

v.

STATE OF MARYLAND

Meredith,
Beachley,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: July 9, 2018

Donnell Johnson, appellant, was charged in the Circuit Court for Baltimore City with murder in the first and second degrees, first and second-degree assault, and carrying a dangerous weapon. He was acquitted by a jury on all counts except second-degree assault upon James Hunter. The court sentenced him to ten years' imprisonment. This direct appeal followed.

Johnson presents the following questions for our consideration:

1. Did the circuit court err in not instructing on self-defense or defense of others?

2. Did the circuit court err in denying a *Batson* challenge raised by the defense?

For the reasons set forth below, we will affirm the judgment of the Circuit Court for Baltimore City.

FACTUAL BACKGROUND

James Hunter (the alleged victim in this case) owned a tire shop on Harford Road in Baltimore. Dennis Settle was a friend of Hunter, and also the boyfriend of Hunter's ex-daughter-in-law. Settle would often visit the tire shop and help Hunter with work. On Saturday, April 26, 2014, Settle and Hunter worked together at the tire shop. After work, Hunter and Settle consumed several beers before heading out to a bar known as Maceo's. Hunter was unsure exactly how much alcohol he drank that night, but he testified at trial that he thought that he and Settle split a 6-pack of beer. He did not recall telling police that he drank a 12-pack and half a pint of Jack Daniels that night. At approximately 9 p.m., Hunter and Settle drove Settle's blue Scion vehicle to Maceo's. Hunter remembered seeing

four or five people inside the bar when they arrived. Hunter had two shots of vodka and a beer, and Settle had one beer. Hunter had a "vague" recollection of having an argument with some women inside the bar, and eventually he and Settle were asked to leave. He recalled that Johnson (the appellant) was in the bar, standing near the women, but he did not recall that he exchanged any words with Johnson, whom he had not met prior to that night. Hunter recalled that, when he went outside the bar, he saw a man (he later identified as Johnson) walking toward him and Settle. Hunter did not recall what happened after that point, but he knew that he was knocked unconscious. Hunter believed that he had been driven home by Settle that night, until police informed him the next day that Settle had been found dead outside Maceo's.

At approximately 2:00 a.m. on April 27, 2014, police found Settle's body one block from Maceo's, lying motionless between two cars. He was pronounced dead on the scene.

Detective Dawnyell Taylor of the BCPD responded to the scene at approximately 2:00 a.m. on April 27, 2014, to investigate Settle's homicide. Detective Taylor observed a trail of blood leading from Settle's body to Maceo's bar, and a second trail of blood going west. After learning that Hunter was with Settle on the previous night, the detective interviewed Hunter at the police station on April 28, 2014. She observed that Hunter had bruising and swelling around his eyes and lips.

During Detective Taylor's investigation of the crime scene, she noticed a "CitiWatch" surveillance camera that was situated near the crime scene. She obtained video surveillance footage of the incident that transpired outside Maceo's at 11:39 p.m. on April 26, 2014. She recognized Johnson in the footage because he was the friend of a

victim in another case she had investigated. Detective Taylor testified that the video footage showed a vehicle fitting the description of Settle's blue Scion arriving, and two men (believed to be Hunter and Settle), walking from the vehicle toward Maceo's at 9:13 p.m. At 11:34 p.m., the video showed two men (believed to be Hunter and Settle) leaving Maceo's. Detective Taylor acknowledged that the surveillance footage did not capture the entire incident because the camera captured, sequentially, multiple views of the incident. The video showed a woman in a white top (believed to be Laquan Robinson) outside Maceo's being restrained by Johnson, in the presence of Settle and Hunter as well as two unidentified males. At 11:41 p.m., the video showed Hunter "laid out on the sidewalk," while Johnson and Settle were "entangled" on the street, and Settle was up against a vehicle. The next clip of the video showed only Johnson in front of a vehicle, and two persons standing by observing, but Settle was no longer visible, and Hunter appeared unconscious on the sidewalk. At 11:45 p.m., the video depicted Johnson walking away from Maceo's and Hunter trying to get up on his feet.

DISCUSSION

I.

Johnson contends that the circuit court committed reversible error in refusing to instruct the jury on self-defense and defense of others as to the charges of assault of Hunter. Pursuant to Maryland Rule 4-325(c), a trial court "may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding." The court shall give a requested instruction if it (1) is a correct statement of the law, (2) is generated by the evidence, and (3) is not fairly covered by the other instructions

given. *Preston v. State*, 444 Md. 67, 81-82 (2015) (and cases cited). But, if a requested instruction "has not been generated by the evidence, the trial court is not required to give it." *Coleman-Fuller v. State*, 192 Md. App. 577, 592-93 (2010) (quoting *General v. State*, 367 Md. 475, 485-87 (2002)).

At the outset, we note that the parties disagree upon the proper standard of appellate review to be applied to the trial judge's refusal to give the requested instructions. Appellant contends that the trial judge's determination that a requested instruction is not generated by the evidence -- which is what the trial judge ruled in this case -- is a question of law which this Court reviews *de novo*. The State argues that the court's decision whether to give a requested instruction, including its "subsidiary" determination of whether sufficient evidence exists to generate the instruction, is reviewed for an abuse of discretion. Because the question of whether there was sufficient evidence to generate a requested jury instruction is a question of law, we conclude that the issue is reviewed *de novo*.

The Court of Appeals explained in *Preston* that "the decision whether to give a jury instruction is addressed to the sound discretion of the trial judge, *unless* the refusal amounts to a clear error of law." 444 Md. at 82 (internal quotation marks and citations omitted) (emphasis supplied). "'The threshold determination of whether the evidence is sufficient to generate the desired instruction is a question of law for the judge.'" *Bazzle v. State*, 426 Md. 541, 550 (2012) (holding that the evidence was insufficient to allow the jury to rationally conclude that appellant could not form intent for his crimes due to severe intoxication) (quoting *Dishman v. State*, 352 Md. 279, 292 (1998)); *accord Page v. State*, 222 Md. App. 648, 668, *cert. denied*, 445 Md. 6 (2015). On appeal, our task is "'to

determine whether the criminal defendant produced that minimum threshold of evidence necessary to establish a *prima facie* case that would allow a jury to rationally conclude that the evidence supports the application of the legal theory desired.'" *Bazzle*, 426 Md. at 550 (quoting *Dishman*, 352 Md. at 292); *accord Page*, 222 Md. App. at 668. The burden is on the party seeking the instruction to show both error and prejudice. *Tharp v. State*, 129 Md. App. 319, 329 (1999), *aff'd*, 362 Md. 77 (2000).

The threshold of establishing that an instruction on a point of law applies to the facts of the case is low, in that the requesting party must produce only "some evidence" to support the requested instruction. *Page*, 222 Md. App. at 668 (citations omitted). In *Dykes v. State*, 319 Md. 206, 216-17 (1990), the Court of Appeals described the meaning of "some evidence" in this context, explaining:

> *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 reasonable doubt" or "clear and convincing" or "preponderance." The source of the evidence is immaterial; it may emanate solely from the defendant. It is of no matter that the self-defense claim is overwhelmed by evidence to the contrary. If there is any evidence relied on by the defendant which, if believed, would support his claim that he acted in self-defense, the defendant has met his burden.

In determining whether there was "some evidence," we view the facts in the light most favorable to the requesting party. *Page*, 222 Md. App. at 668-69 (citation omitted). But, as Judge Charles E. Moylan, Jr., explained for this Court in *Bynes v. State*, ___ Md. App. ___ , No. 1318 , September Term 2017, 2018 WL 2670813 (filed June 4, 2018), when a party requests an instruction on self-defense, there must be evidence of each of the elements of the defense:

> The evidence, moreover, must be generated not simply with respect to self-defense generally, but with respect to each of its constituent components specifically. In *Marquardt v. State*, 164 Md. App. 95, 131, 882 A.2d 900, *cert. denied*, 390 Md. 91, 887 A.2d 656 (2005), Judge Kenney wrote for this Court:
>
> > There must be "some evidence," to support each element of the defense's legal theory before the requested instruction is warranted.
>
> (Emphasis supplied). *See also Cantine v. State*, 160 Md. App. 391, 410–11, 864 A.2d 226 (2004), *cert. denied*, 386 Md. 181, 872 A.2d 46 (2005); *Holt v. State*, 236 Md. App. 604, 182 A.3d 322 (2018).

Slip op. at 10, WL *5.

In *Bynes*, slip op. at 2, WL *1, we listed the elements needed to generate the instruction on self-defense as follows:

> In *Jones v. State*, 357 Md. at 422, 745 A.2d 396, Judge Harrell wrote for the Court of Appeals in laying out the elements of self-defense at the level not involving deadly force.
>
> > (1) the defendant actually believed that he or she was in immediate or imminent danger of bodily harm;
> >
> > (2) the defendant's belief was reasonable;
> >
> > (3) the defendant must not have been the aggressor or provoked the conflict; and
> >
> > (4) the defendant used no more force than was reasonably necessary to defend himself or herself in light of the threatened or actual harm.

Accord MARYLAND CRIMINAL PATTERN JURY INSTRUCTIONS ("MPJI-Cr."), 5:07 at 925 (MSBA 2d ed. 2012); *see also Haile v. State*, 431 Md. 448, 471-72 (2013) (setting forth the elements of self-defense and holding that defendant was not entitled to self-defense instruction where evidence established that he was the aggressor who invited the conflict).

Appellant contends that there was sufficient evidence to generate the self-defense instruction because Johnson told the police during an interview that he was "jumped" outside Maceo's, the altercation was captured in the video footage and photographic stills taken outside Maceo's, and Hunter's inebriated state "made it more likely than not that he was the initial aggressor." The State responds that Johnson's statements show clearly that he was the initial aggressor because he claimed to have been "jumped" only *after* he first "popped" Hunter for being disrespectful to his girlfriend. We agree with the State on this point.

In his statement to police, Johnson described the confrontation outside Maceo's as follows:

> **[JOHNSON]:** Yeah, I was – I got jumped down there.
>
> **[SERGEANT]:** Okay.
>
> **[JOHNSON]:** I was in a fight with some dudes over my – over my girl. Somebody was being disrespectful [to] her –
>
> **[SERGEANT]:** Okay.
>
> *** * ***
>
> **[JOHNSON]**: And they all drunk. *So one thing led to another, I popped a dude. He – he – he fell. He went and got knocked out.* So this other dude he was with a blunt object, knocked (inaudible) mouth. Look. All my shit. Banking with this. Keep – I'm trying to get this mother fucker off me.
>
> *** * ***
>
> **[SERGEANT]:** [L]et me take it back a little bit. Let's talk about the first dude. You said your girl – he disrespected your girl. Tell me about this dude and how this disrespect took place.

> **[JOHNSON]**: Dude is drunk and shit. (Inaudible) disrespecting a female when – when (inaudible) whatever whatever. So I'm like dang, you see me and you're still going to (inaudible).
>
> **[SERGEANT]:** Okay.
>
> **[JOHNSON]**: So I got mad. I ain't going to lie, I got mad. So I popped him.

Based on Johnson's version of events, he struck Hunter and knocked him unconscious because he "got mad" after Hunter disrespected his girlfriend. There was no evidence from which the jury could have rationally inferred that Johnson (or his girlfriend) had been threatened, or in fear of imminent danger, before Johnson punched Hunter with such force that he "knocked him out." Rather, the evidence showed clearly that, when Johnson struck Hunter, Johnson was the initial aggressor:

> **[SERGEANT]:** Now was he [Hunter] squeezing up on your girl or is he like right in front of you? Is that what he's doing or is he just talking trash?
>
> **[JOHNSON]:** He was talking shit to her.
>
> **[SERGEANT]:** Okay. Okay. All right.
>
> **[JOHNSON]:** So I got mad.
>
> **[SERGEANT]:** I understand.
>
> **[JOHNSON]:** I'm feeling disrespected.
>
> **[SERGEANT]:** You're standing right there.
>
> **[JOHNSON]:** (Inaudible) so I'm mad, so I pops him and he goes to sleep. And this man he come from out of nowhere.
>
> **[SERGEANT]:** Tell me – tell me about that he goes to sleep. What do you mean?
>
> **[JOHNSON]:** I knocked him out.

Although the video surveillance and still photographs could be interpreted as showing a "confrontation," there was nothing in that footage or photographs showing that Johnson was "jumped" before hitting Hunter, or that he was otherwise acting in self-defense. In denying Johnson's request for the self-defense and defense of others instructions, the trial court detailed its observations from the video footage, explaining:

> The court has had an opportunity to review the CCTV I think is what it's called, DVD of its rendition of the events of the evening in [] as it pertains to the defense of self-defense and defense of others. With respect to the defense of others, the court observed a female who seemed to be quite agitated and physically expressive of her agitation, although there was never any contact with anyone other than the person trying to restrain her from one of two males facing her. The camera shifts away from that scene and within seconds return[s] to the scene at that time the – one of the individuals, one of the males facing the female was on his back and appeared to be unconscious.
>
> The court having considered the arguments of counsel, the video, the stills and the other evidence in this case as it pertains to the request for defense of others instruction finds that [Johnson] has failed to generate any evidence to support giving the defense of others instructions . . . . [T]he court saw no evidence [] generated as it pertains to self-defense.

Although there was evidence that Hunter was intoxicated, that isolated fact would not support a finding that Hunter was the initial aggressor. There was no evidence of any verbal or physical exchange between Johnson and Hunter which would have provided a basis for Johnson to believe that he was in apparent imminent or immediate danger of bodily harm that would justify him punching Hunter and knocking him unconscious. *Cf. Bynes, supra*, slip op. at 10 (the defendant provided no evidence of a belief that he was in imminent danger of bodily harm from the victim of the assault). A review of Johnson's statements to police, the video footage of the incident, and Hunter's intoxication, when

viewed in the light most favorable to Johnson, demonstrate that Johnson failed to meet his burden to produce evidence sufficient to establish self-defense.

For similar reasons, Johnson was not entitled to a jury instruction that would have permitted the jury to find that he was acting in defense of others. In order to establish that a defendant acted in defense of others, he must satisfy the following elements: (1) the defendant actually believed that the person he was defending was in immediate and imminent danger of bodily harm; (2) the defendant's belief was reasonable; (3) the defendant used no more force than was reasonably necessary in light of the threatened or actual force; and (4) the defendant's purpose in using the force was to aid the person he was defending. MPJI-Cr. 5:01 at 884.

In support of his argument that he was entitled to this instruction, appellant again relies on his own statement in which he told the police that he was "jumped" after he hit Hunter, the video footage, and evidence of Hunter's intoxication to establish that Johnson acted in defense of others when he assaulted Hunter. When asked by the police sergeant whether Hunter was "squeezing up on [Johnson's girlfriend] or just talking trash," Johnson acknowledged that Hunter was just talking: "[Hunter] was talking shit to her." The trial court noted that it appeared from the video footage of the incident that the female in the video was being "restrained" from the two males facing her. As noted, Johnson stated that he "popped" Hunter because he "got mad" that Hunter was disrespecting his girlfriend.

In *Lee v. State*, 193 Md. App. 45, *cert. denied*, 415 Md. 339 (2010), we noted that a "common thread" in the cases in which the defense of others instruction was generated by the evidence is that the "person being defended was coming under direct attack when the

defendant came to his or her defense." 193 Md. App. at 64. In *Lee*, we held that the jury instruction of defense of others was not warranted because defendant failed to establish "some evidence" that he actually believed that a bystander was in immediate danger from the victim when he shot the victim. *Id.* at 65.

Here, there was no evidence that Johnson believed that his girlfriend was in immediate or imminent danger of bodily harm, and that Johnson responded to protect her. There was no evidence that Johnson's girlfriend was under attack and that Johnson was acting out of fear for her safety.

The elements of the defenses of self-defense and defense of others were not supported by "some evidence," and therefore, the trial court did not err in refusing to give those instructions to the jury.

II.

In his second argument, Johnson contends that the trial court erred in overruling an objection he raised during jury selection when he claimed that the prosecutor had violated *Batson v. Kentucky*, 476 U.S. 79, 83 (1986). Johnson raised the objection after the prosecutor used three peremptory strikes to remove three African Americans from the venire. The trial court responded: "Well I don't find a prima facie case of [discrimination] *yet*. Denied *at this point*." (Emphasis added.) Johnson never asked the trial court to return to the issue. On the contrary, Johnson affirmatively stated that he found the empaneled jury acceptable, without preserving any objection. In Johnson's brief, he acknowledges that he waived his challenge to the composition of the jury, stating: "As an initial matter, Appellant

recognizes that accepting the jury at the end of *voir dire* typically waives a prior *Batson* challenge. *See Gilchrist* [*v. State*, 340 Md. 606,] at 619 [(1995)]."

As Johnson conceded, the Court of Appeals explained in *Gilchrist v. State*, 340 Md. 606 (1995), that, when a party "complains about the exclusion of someone from or the inclusion of someone in a particular jury, *and thereafter* states *without qualification* that the same jury as ultimately chosen is satisfactory or acceptable, *the party is clearly waiving or abandoning* the earlier complaint about that jury." *Id*. at 618 (emphasis added). *Accord State v. Stringfellow*, 425 Md. 461, 469 (2012). Consequently, no *Batson*-related claim has been preserved for appellate review. *Gilchrist*, 340 Md. at 618.

Johnson nevertheless urges us to exercise our discretion to review the waived *Batson* challenge in this case as plain error despite his acceptance of the jury as ultimately empaneled. Pursuant to Maryland Rule 8-131(a), we ordinarily will not decide issues that do not plainly appear to have been "raised in or decided by the trial court." However, "[w]e may decide . . . an issue that was not raised or decided by the trial court 'if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.'" *Boulden v. State*, 414 Md. 284, 297 (2010) (quoting Md. Rule 8-131(a)). "The purpose of Md. Rule 8-131(a) is to ensure fairness for all parties in a case and to promote the orderly administration of law." *Robinson v. State*, 410 Md. 91, 103 (2009) (internal citations and quotations marks omitted). "Such prerogative to review an unpreserved claim of error, however, is to be rarely exercised and only when doing so furthers, rather than undermines, the purposes of the rule." *Id*. at 104; *see Conyers v. State*, 354 Md. 132, 150-51 (1999)

(discussing the narrow circumstances under which this Court will exercise its discretion to review an unpreserved issue).

The observations made by the Court of Appeals in *Robinson* persuade us that Johnson's case is not one in which we should exercise our discretion to excuse the lack of preservation:

> We have said that the appellate court should exercise the discretion to review an unpreserved claim of error "only when it is clear that it will not work an unfair prejudice to the parties or to the court." *Jones* [*v. State*, 379 Md. 704, 713 (2004).] Unfair prejudice may result, for example, when counsel fails to bring the position of her client to the attention of the trial court so "that court can pass upon and correct any errors in its own proceedings." *Id*. It would be unfair to the trial court and opposing counsel, moreover, if the appellate court were to review on direct appeal an un-objected to claim of error under circumstances suggesting that the lack of objection might have been strategic, rather than inadvertent. *See id*.; *Conyers*, 354 Md. at 150 (observing that "[t]he few cases where we have exercised our discretion to review unpreserved issues are cases where prejudicial error was found and the failure to preserve the issue was not a matter of trial tactics"). Moreover, **if the failure to object is, or even might be, a matter of strategy, then overlooking the lack of objection simply encourages defense gamesmanship**. *See, e.g., State v. Rose*, 345 Md. 238, 250 (1997) (observing that excusing the requirement of a contemporaneous objection by defense counsel "would allow defense attorneys to remain silent in the face of the most egregious and obvious instructional errors at trial").

Robinson, supra, 410 Md. at 104 (emphasis added).

In this case, it appears that Johnson's trial counsel made a decision to accept the jury rather than renew the *Batson* issue. This is not a case in which we will excuse the lack of preservation.

JUDGMENT OF THE CIRCUIT COURT FOR BALTMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.