Circuit Court for Anne Arundel County
Case No. C-02-CR-16-000592

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 486

September Term, 2017

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JERRY LEON HILL

v.

STATE OF MARYLAND

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Berger,
Arthur,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Arthur, J.

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Filed: February 26, 2018

Following a jury trial in the Circuit Court for Anne Arundel County, appellant Jerry Leon Hill was convicted of possession of a regulated firearm after having been convicted of a disqualifying crime, but acquitted of carrying a handgun and illegally possessing ammunition. Hill was sentenced to five years of incarceration, with all but one year suspended, followed by three years of supervised probation. He noted a timely appeal, in which he presents the following questions, which we quote:

> 1. Did the trial court err in not giving the requested jury instruction of the defense of necessity?
>
> 2. Was the evidence sufficient to support Appellant's conviction for possession of a firearm as a prohibited person?

For the following reasons, we shall affirm.

## BACKGROUND

On February 20, 2016, at approximately 3:47 a.m., the Anne Arundel County Police responded to a 24-hour gas station and convenience store in Glen Burnie after an unidentified citizen called 911 and reported that a white man, dressed in a "camo-style" hat, had a handgun.

When the officers arrived, the convenience store was locked. Two men were inside, behind a glass divider. One of the men, Hill, was behind the counter, next to the glass window that customers would use to pay for gas and other items. The other man, who was later identified as Hill's friend Dwayne Grimes, seemed to be hiding behind some of the shelving. Grimes wore a camouflaged-style hat and matched the description provided by the caller.

An officer asked Hill if he was okay; Hill responded that he was and said that the other man was his friend. An officer asked if he had seen anyone outside the store; Hill responded that he had not. The officers asked if they could come into the store; Hill let them in.

The officers asked Hill and Grimes whether they had a gun or had seen a gun. Both denied that they had a gun.

As he was walking through the store, one of the officers, Corporal William Daughters, saw a semi-automatic handgun on (or perhaps in) a rack of plastic containers that are designed to hold two-liter soda bottles. After Corporal Daughters retrieved the unloaded handgun, he asked where it came from. Hill "started explaining that it was a weapon kept at the business for protection purposes" and that it had been there "for quite a while."

Corporal Daughters asked where the magazine for the weapon was located. Hill replied that it "was on a shelf behind the counter." When the police were unable to find the magazine in that location, Grimes spoke up and said that he had it in his sweatshirt pocket. There was one bullet in the magazine.

At some point, the officers received information that the gun had been fired that evening. They found a bullet hole in a refrigerator. Behind that hole, the officers observed broken bottles of soda and juice. Napkins and rags were strewn about inside, as though "somebody had tried to clean it up."

At trial, Hill's sister testified that she and her father owned the gas station, that Hill was a regular employee who worked there "[a]ll the time," and that he was working

the midnight shift on the night in question. She confirmed that the handgun was an "[o]ld, rusted gun" that stayed at the gas station and had been stored underneath the counter for approximately the last 12 years. Her father kept the gun at the gas station for "safety." She said that only she or her father ever handled it.

Dwayne Grimes testified that he was at the gas station when the officers arrived. Hill had called Grimes to the store because, Hill said, "he had a situation." When Grimes arrived at the station, Hill said that he had "found a gun" and that "the gun went off" – it "[f]ell off the counter or something." According to Grimes, Hill said that he "was dealing with a customer or something and then he was just cleaning and then he hit the gun off the counter." According to Grimes's account of what Hill told him, the gun "hit the floor" and "discharged into a refrigerator." Hill did not tell Grimes how the gun got onto the counter.

Grimes testified that when he arrived the gun was back on top of the counter. Grimes took the gun from the counter and saw that it was still loaded. He tried to remove the clip, but could not get it off, because it was rusted. He went out to his car to obtain some WD-40, applied it to the weapon, and eventually succeeded in removing the clip. Hill, meanwhile, was trying to call his father, his sister, and his brother to get them to "come get the gun out of the store."

Grimes initially testified that he had placed the gun on the rack for the two-liter bottles. Later, however, he modified his testimony to say, "[I]t could have been either one of us."

The parties stipulated that Hill had been convicted of a disqualifying crime. The parties also stipulated that the firearm is operable and that it was a regulated handgun.

We shall include additional detail in the following discussion.

## DISCUSSION

### I. The Jury Instruction

Hill contends that the trial court erred in not giving a jury instruction on the defense of necessity. The State responds that this argument is not properly preserved and is without merit in any event. We agree that Hill's counsel did not preserve an objection to the court's refusal to give the instruction and that, even if he had, the court would not have erred or abused its discretion in declining to give the instruction.

Under Rule 4-325(e), "[n]o party may assign as error the giving or the failure to give an instruction unless the party 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." "A principal purpose of Rule 4-325(e) 'is to give the trial court an opportunity to correct an inadequate instruction' before the jury begins deliberations." *Alston v. State*, 414 Md. 92, 112 (2010) (quoting *Bowman v. State*, 337 Md. 65, 69 (1994)).

After the court had instructed the jury, it asked counsel to approach the bench and inquired about whether they had "[a]ny comments" on the instructions by either party. Although Hill's counsel had previously attempted to persuade the court to give an instruction on the defense of necessity, he responded to the court's question by stating that he had "[n]o comments." Hill's counsel therefore did not object to the failure to give

the requested instruction after the court instructed the jury. Accordingly, Hill failed to comply with Rule 4-325(e). It follows that he cannot complain of the failure to give his requested instruction.

Hill does not argue that he substantially complied with Rule 4-325(e) because it would have been futile for him to reiterate his earlier objection. Even if he had made that argument, we would reject it.

To show substantial compliance with Rule 4-325(e), a party must meet the following requirements:

> [T]here must be an objection to the instruction; the objection must appear on the record; the objection must be accompanied by a definite statement of the ground for objection unless the ground for objection is apparent from the record[;] and the circumstances must be such that a renewal of the objection after the court instructs the jury would be futile or useless.

*Gore v. State*, 309 Md. 203, 209 (1987); *accord Sims v. State*, 319 Md. 540, 549 (1990) (stating that, "under certain well-defined circumstances, when the objection is clearly made before instructions are given, and restating the objection after the instructions would obviously be a futile or useless act, we will excuse the absence of literal compliance with the requirements of the Rule"); *Hallowell v. State*, ___ Md. App. ___, 2018 WL 679867, at *7 (Feb. 1, 2018).

The Court of Appeals has made it clear that instances of substantial compliance "represent the rare exceptions[.]" *Sims v. State*, 319 Md. at 549. In an opinion by Judge McAuliffe, a former trial judge, the Court explained:

> Many issues and possible instructions are discussed in the usual conference that takes place between counsel and the trial judge before instructions are given. Often, after discussion, defense counsel will be persuaded that the

> instruction under consideration is not warranted, and will abandon the request. Unless the attorney preserves the point by proper objection after the charge, or has somehow made it crystal clear that there is an ongoing objection to the failure of the court to give the requested instruction, the objection may be lost.

*Id.; see also Johnson v. State*, 310 Md. 681, 686 (1987) ("a party initially requesting a particular instruction may be entirely satisfied with the instructions as actually given").

In this case counsel did not substantially comply with Rule 4-325(e). To the contrary, he acquiesced in the instructions as given when he expressed no comment on the instructions after the trial judge had invited counsel to the bench for the obvious purpose of registering objections. *See Choate v. State*, 214 Md. App. 118, 129-30 (2013) (finding no substantial compliance where defense counsel agreed with the instruction and told the court that he was satisfied with the instructions); *Braboy v. State*, 130 Md. App. 220, 226-27 (2000) (finding no substantial compliance where defense counsel told the court that the defense has no exceptions).

This is certainly not a case like *Gore*, in which the Court of Appeals found substantial compliance when defense counsel did not reiterate an objection after the court, on its own motion, devised and delivered an erroneous instruction in response to counsel's comments in closing argument and told counsel, "'You can object all you want, but I'm going to do it.'" *Gore v. State*, 309 Md. at 206. Nor is this a case like *Horton v. State*, 226 Md. App. 382, 412-14 (2016), in which this Court found substantial compliance where counsel did not object after the trial judge had said that she would consider the instruction overnight and advise the parties of her decision the following morning and, on the following morning, announced that she would not give the

instruction. Here, the court invited an exception after it had instructed the jury, but counsel did not make one.

In this case, "[o]nce the request was denied and the instructions given, there was no further discussion." *Braboy v. State*, 130 Md. App. at 227. Accordingly, "we conclude that the issue was not preserved for appeal." *Id.*

But even if the issue were properly preserved, we would find no error in the decision not to give an instruction on the defense of necessity.

Maryland Rule 4-325(c) provides that a "court may, and at the request of any party shall, instruct the jury as to the applicable law[.]" Under this rule, trial courts are required to give jury instructions requested by a party when all of the conditions of a three-part test are met: the instruction must correctly state the law, the instruction must apply to the facts of the case (in that it must have been generated by some evidence), and the content of the instruction must not have been fairly covered by another instruction. *Preston v. State*, 444 Md. 67, 81-82 (2015).

In evaluating whether the evidence is sufficient to generate a requested instruction, "we view the evidence in the light most favorable to the accused." *General v. State*, 367 Md. 475, 487 (2002). "[T]he threshold is low, as a defendant needs only to produce 'some evidence' that supports the requested instruction[.]" *Bazzle v. State*, 426 Md. 541, 551 (2012). "Some evidence" simply means any evidence, regardless of source, that, if believed, would support the defendant's claim. *Id.* "'The threshold determination of whether the evidence is sufficient to generate the desired instruction is a question of law for the judge.'" *Id.* at 550 (quoting *Dishman v. State*, 352 Md. 279, 292 (1998)).

Hill requested an instruction on the common-law defense of necessity. That defense may arise when a person is faced with a choice of two evils, one of which is the commission of an illegal act. *State v. Crawford*, 308 Md. 683, 691 (1987) (citing *Sigma Reproductive Health Center v. State*, 297 Md. 660, 677 (1983)). For the defense of necessity to be warranted, the defendant "must have presented 'some evidence' that there was a choice between two evils, that no legal alternatives existed, that the harm [that the defendant] caused was not disproportionate to the harm avoided, and that the emergency was imminent." *Marquardt v. State*, 164 Md. App. 95, 137 (2005).

The Court of Appeals' decision in *Crawford* illustrates the unusual circumstances in which a court may be required to give an instruction on the defense of necessity. In that case, Crawford claimed that he was in his apartment when an intruder fired several shots in his direction. *Crawford*, 308 Md. at 686. Crawford said that he attempted to take cover and to attract his neighbors' attention, but that the intruders (there were two of them) continued to pursue him and continued to fire at him. *Id.* at 686-87. According to Crawford, he confronted the intruders, grabbed a gun from one of them, but somehow wound up falling out of a window to the ground below. *Id.* at 687. On the ground, outside, Crawford said that he heard footsteps coming toward him. *Id.* He testified that he picked up the gun to defend himself and that he tried to crawl away. *Id.* He claimed to have encountered the assailants in a parking lot, where he was shot several times. *Id.* at 688. The police charged him with unlawful possession of a handgun. *Id.* at 685.

At trial, Crawford requested an instruction on the common-law defense of necessity. *Id.* at 690-91. The trial court declined to give the instruction. *Id.* at 691.

The Court of Appeals reversed, holding that necessity may be a defense to the statutory charge of unlawful possession of a handgun. *Id.* at 696. The Court reasoned that it was "entirely reasonable and consistent" with "the legislative purpose" underlying the statute:

> to conclude that when an individual finds himself in sudden, imminent danger of loss of life or serious bodily harm, or reasonably believes himself or others to be in such danger, and without preconceived design on his part a handgun comes into his possession, he may temporarily possess the weapon for a period no longer than the necessity or apparent necessity requires him to use it in self-defense.

*Id.* at 696.

The Court went on to hold that "necessity is a valid defense to the crime of unlawful possession of a handgun when five elements are present" (*id.* at 698-99):

> (1) the defendant must be in present, imminent, and impending peril of death or serious bodily injury, or reasonably believe himself or others to be in such danger; (2) the defendant must not have intentionally or recklessly placed himself in a situation in which it was probable that he would be forced to choose the criminal conduct; (3) the defendant must not have any reasonable, legal alternative to possessing the handgun; (4) the handgun must be made available to the defendant without preconceived design, and (5) the defendant must give up possession of the handgun as soon as the necessity or apparent necessity ends.

*Id*. at 699.

The Court emphasized "that if the threatened harm is property damage or future personal injury, the defense of necessity will not be viable; nor can the defense be asserted if the compulsion to possess the handgun arose directly from the defendant's own misconduct." *Id.* (footnote omitted).

Assuming for the sake of argument that the common-law defense of necessity applies to the statutory offense of possession of a regulated firearm after having been convicted of a disqualifying crime, we are persuaded that Hill did not generate some evidence to satisfy all five elements of the *Crawford* test.

First, Hill appears to contend that the defense of necessity applied to his decision to take possession of the weapon by picking it up from the floor after it had inexplicably fallen and perhaps by stowing in the container for the soda bottles after he had moved it from the floor back to the counter. Hill, however, was not "in present, imminent, and impending peril of death or serious bodily injury" merely because a weapon was lying on the floor of a locked convenience store in the middle of the night. Nor could Hill reasonably have believed himself or others to be in such danger. Unlike Crawford, Hill did not need to take possession of the weapon in order to defend himself or others from, for example, an imminent assault.

Second, it appears that Hill "intentionally or recklessly placed himself in a situation" in which he was allegedly "forced to choose the criminal conduct." The gun found its way from its place of safekeeping to the top of the counter, undoubtedly because Hill (the only person in the store) intentionally picked it up and moved it there. From the counter, the loaded gun fell to the floor and discharged a round, because Hill had knocked into it or dropped it. In these circumstances, Hill himself appears to have been responsible for creating the alleged emergency that, he says, it became necessary for him to address.

Third, Hill had a number of "reasonable, legal alternative[s]" to possessing the gun. He could have left it on the floor. He could waited for his father or one of his siblings to come to pick it up. He could also have waited for Grimes to pick it up. It was not at all imperative for him to take actual, physical possession of the gun.

In summary, Hill could not generate evidence to satisfy at least three of the five necessary conditions for the defense of necessity. Therefore, even if Hill had properly preserved an objection to the court's decision not to instruct the jury on that defense, we would find no error or abuse of discretion.

**II. Sufficiency of the Evidence**

Hill asserts that the evidence was insufficient to establish that he possessed the handgun. We disagree.

In assessing the sufficiency of the evidence supporting a criminal conviction, we ask "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *McClurkin v. State*, 222 Md. App. 461, 486 (2015) (emphasis in original) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "In applying that standard, we give 'due regard to the [fact-finder's] findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Id*. (alteration in original) (quoting *Harrison v. State*, 382 Md. 477, 488 (2004)). We do not "'distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence.'" *Montgomery v. State*, 206 Md. App.

357, 385 (2012) (alteration in original) (quoting *Morris v. State*, 192 Md. App. 1, 31 (2010)).

Hill was convicted of illegal possession of a regulated firearm after being convicted of a disqualifying crime, in violation of Md. Code (2003, 2011 Repl. Vol., 2017 Supp.), § 5-133(b)(1) of the Public Safety Article. To secure a conviction for violating § 5-133(b)(1), "the State must establish that the handgun involved was a regulated firearm, that the defendant possessed this firearm, and that he was precluded from doing so because of a disqualifying status," such as "certain prior convictions." *Smith v. State*, 225 Md. App. 516, 520 (2015), *cert. denied*, 447 Md. 300 (2016). Here the parties stipulated that Hill had been convicted of a disqualifying crime and that the weapon was a regulated firearm. Therefore, the only issue is whether the State adduced sufficient evidence from which a reasonably jury could conclude, beyond a reasonable doubt, that Hill possessed the firearm.

For the evidence supporting the handgun-possession conviction to be sufficient, it must demonstrate, either directly or inferentially, that Hill exercised some dominion or control over the weapon. *Parker v. State*, 402 Md. 372, 407 (2007). "A possession conviction normally requires knowledge of the illicit item" (*id.*), because "an individual ordinarily would not be deemed to exercise 'dominion or control' over an object about which he is unaware." *Dawkins v. State*, 313 Md. 638, 649 (1988); *accord Parker v. State*, 402 Md. at 407; *Moye v. State*, 369 Md. 2, 14 (2002).

"Possession may be actual or constructive, and may be either exclusive or joint." *Parker v. State*, 402 Md. at 407; *see Burns v. State*, 149 Md. App. 526, 546 (2003)

(whether defendant was in possession of a handgun depends upon whether jury could find he was in actual, constructive, joint, or exclusive possession); *see also McDonald v. State*, 141 Md. App. 371, 379 (2001) (jury could find that appellant was in constructive possession of the weapon). The mere fact that an item is not found on the defendant's person does not necessarily preclude an inference by the trier of fact that the defendant had possession of the item. *State v. Suddith*, 379 Md. 425, 432 (2004).

Viewing the evidence in the light most favorable to the State, we have no hesitation in concluding that it was sufficient to prove that Hill had actual, physical possession of the firearm. Hill knew of the gun, because he told Officer Daughters that it was "kept at the business for protection purposes" and that it had been there "for quite a while." Because the gun was typically stored under the counter, but fell onto the floor from the top of the counter, the jury could infer that Hill exercised dominion and control over the gun by moving it from beneath the counter to the top of the counter. Because Grimes testified that the gun was back on top of the counter when he arrived, the jury could also infer that Hill exercised dominion and control over the gun by picking it up from the floor and putting it back on top of the counter. Finally, the jury could draw an inference of consciousness of guilt on the basis of Grimes's ineffective efforts to conceal himself from the police officers (perhaps at Hill's behest), Hill's initial denials that there was a gun in the store, Hill's urgent efforts (as recounted by Grimes) to get a family member to remove the gun from of the store before the police arrived, and Hill's denial that he had seen anyone outside of the store (notwithstanding that he had asked Grimes to come to the store).

In summary, the evidence was sufficient for a reasonable jury to conclude, beyond a reasonable doubt, that Hill had possession of a registered handgun despite a disqualifying conviction. For that reason, we affirm his conviction.

**JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.**