Circuit Court for Prince George's County
Case No. CT181321X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 615

September Term, 2019

DAMETRIES JENNINGS

v.

STATE OF MARYLAND

Berger,
Arthur,
Gould,

JJ.

Opinion by Berger, J.

Filed: December 15, 2020

Dametries Jennings, appellant, was convicted by a jury sitting in the Circuit Court for Prince George's County of reckless endangerment.[1] Appellant asks the following question on appeal:

> Whether the trial court erred when it refused to instruct the jury on the absence of flight and defense of property.

For the following reasons, we shall affirm the judgment.

FACTS

For more than 20 years, two families, the Herndons and the Jenningses, lived next to each other in end unit townhomes in a townhouse complex on Forest Run Drive in Prince George's County. The Jenningses lived on the left with their front door on the right-hand side of their house, and the Herndons lived on the right. Parking spaces were located in front of the townhouses. A common area owned by their community association separated their yards.

On August 4, 2018, the two families became involved in a verbal and physical altercation that ended when appellant fired his shotgun once. The parties disputed most aspects of the argument, including who started it, where it occurred, and what was appellant's intent in firing his shotgun. Testifying for the State, among others, were several members of the Herndon family and the responding police officer. Testifying for the defense, among others, were several members of the Jennings family, including appellant.

[1] The jury found appellant not guilty of first- and second-degree assault and possession of a shotgun after a disqualifying conviction. Appellant was subsequently sentenced by the court to five years of imprisonment for reckless endangerment, all but two days suspended, and five years of supervised probation upon his release from prison.

Because the issue here is whether a jury instruction should have been given -- and not the sufficiency of evidence to establish guilt -- we view the evidence in the light most favorable to the appellant. Under that lens, the following was elicited at appellant's trial.

Tony Herndon testified that on the morning of August 4, he was cleaning his fenced-in backyard when appellant approached and said, "We both are men and . . . I see that your gate is open, and we can settle this as men."[2] Tony was not asked why appellant said what he did, but he testified that he took it to mean that appellant wanted to fight. Fearful of a physical altercation because he had recently had hand surgery, Tony went into his house and called the police. He then tried to obtain "a stay away order" against appellant but was unsuccessful.

Later that evening, Tony, his wife, his son, his daughter, and his grandchild had dinner in their backyard. Around 8:30 p.m., Tony walked out the front door of his house with his son to take him home, when appellant came off his front porch and approached them. A verbal argument ensued between Tony's son and appellant. At one point, appellant pulled out his cell phone. Because Tony believed that appellant was calling people to help him fight, Tony called his brother, Bennett, and asked him to come to the house.

The men were still arguing when Tony's brother Bennett arrived, and soon afterward, Bennett and appellant's brother, Steven, started arguing. According to both Tony and Bennett, at some point Steven "jumped" out at Tony like he was going to hit him,

[2] Because several members of each family testified at appellant's trial, we shall refer to them by their first names for clarity.

and Bennett hit Steven in response. Steven fell to the ground, and Bennett fell on top of him and held him down. Appellant's mother then came out of her home and started hitting Bennett on the back with a golf club. Tony pushed her away. Appellant then came out of the house, and when he asked who had pushed his mother, she pointed to Tony and said, "Shoot him." Appellant then raised a shotgun up in the air and cocked it. According to both Tony and Bennett, appellant then pointed the gun in Bennett's direction. Bennett rolled himself and Steven away, and appellant fired the gun where they had lain. Both Tony and Bennett testified that they were close enough that dirt "popped up" on both of them. Dirt from the shotgun blast was also thrown up onto Tony's cars that were parked in front of the common area, photographs of which were entered into evidence. After appellant fired the shotgun, everyone dispersed, and appellant went inside his house.

Tony testified that the argument and shooting occurred in the front common area between the two townhomes. He testified that he was familiar with the common area because he had been president of the community's homeowner's association. Tony's wife, Stephanie, testified that she witnessed the argument and shooting from her front porch and her testimony was similar to Tony's and Bennett's testimony. She also testified that the men argued in the common area between their homes but conceded that Bennett could have rolled onto the Jennings' property when he rolled to avoid being shot by appellant. The investigating officer testified that she responded to the scene of the shooting and determined that the shooting occurred in the common area between the two houses.

Appellant's mother testified for the defense. She testified that earlier that afternoon, around 2:30 p.m., she and her two sons were in their backyard barbecuing and playing

music when the police knocked on their door and said their neighbor had complained about them playing their music too loud. She testified that later that evening, around 8:00 p.m., as Steven was on the front porch and she was walking toward the porch after walking her dog, Tony ran over. He pushed her, and then "all these other men [started] coming over." In response, Steven ran off the front porch to protect her, but Bennett attacked him from behind, after which the other men started attacking Bennett. Tony pushed her a second time, so she grabbed her "putter" from the porch and went into the house to call the police. She denied striking anyone with the putter. She and Steven testified that during the altercation they were on their property.

Appellant testified that he was inside the house when he saw his mother return home from walking the dog. He saw Tony shove his mother and saw Bennett "sn[ea]k up" on his brother and start "choking him." When others joined in the beating of his brother, appellant went upstairs and got his rifle. He put a single shell in it and ran out the front door. When he saw his mother pushed a second time, he shot the gun by his own foot on his mother's property. He took the gun inside, and then returned to the porch to wait for the police. Appellant testified that he did not point his gun at anyone, and he fired only one shot because he wanted people to leave his family alone and to leave their property.

That night, appellant was interviewed at the police station and made a statement that largely mirrored his trial testimony. He told the police that he shot his gun "to make these people leave us alone." He said that earlier in the day when the police responded to the house, the police told him that he could defend himself "if they come on your property" or "[i]f they come on your property trying to hurt you or your family[.]"

DISCUSSION

Appellant argues on appeal that we must reverse his conviction for reckless endangerment because the trial court erred in refusing to instruct the jury on absence of flight and defense of property. The State argues that the trial court did not err in refusing to give an absence of flight instruction, and appellant failed to preserve for our review his defense of property argument.

A. Jury instruction law

Md. Rule 4-325(c), governing a trial court's instructions to a jury, provides:

> The 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 may give its instructions orally or, with the consent of the parties, in writing instead of orally. The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.

In sum, a trial court is required to give a requested instruction when: "'(1) the requested instruction is a correct statement of the law; (2) the requested instruction is applicable under the facts of the case; and (3) the content of the requested instruction was not fairly covered elsewhere in the jury instruction actually given.'" *Thompson v. State*, 393 Md. 291, 302-03 (2006) (quoting *Ware v. State*, 348 Md. 19, 58 (1997)).[3]

[3] Arguably, the "shall" requirement under Maryland Rule 4-325(c) does not apply here because the proposed instruction did not purport to instruct the jury on the law, but rather on what inferences the jurors were permitted to draw from the facts. *See Patterson v. State*, 356 Md. 677, 684-85 (1999) (jury instructions as to facts and inferences of facts are normally not required). Regardless, for the reasons we set forth in this opinion, the trial judge did not err in failing to instruct the jury on the absence of flight.

We review a trial court's denial of a requested jury instruction under an abuse of discretion standard. *Hall v. State*, 437 Md. 534, 539 (2014) (citation omitted). However, whether "the evidence is sufficient to generate the desired instruction in the first instance is a question of law for the judge." *Roach v. State*, 358 Md. 418, 428 (2000) (citation omitted). In such a case, "[o]ur review is limited to determining 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." *Marquardt v. State*, 164 Md. App. 95, 131 (quotation marks and citation omitted), *cert. denied*, 390 Md. 91 (2005). In determining whether competent evidence exists to generate the requested instruction, we examine the record in the light most favorable to the accused. *Fleming v. State*, 373 Md. 426, 433 (2003) (citation omitted).

B. Absence of flight instruction

Maryland does not have a pattern jury instruction on the "absence of flight" but defense counsel asked the court to give the following instruction:

> DEFENSE REQUEST FOR JURY INSTRUCTIONS
> (Absence of Flight)
>
> A person's decision not to flee immediately after the alleged commission of a crime, or after being accused of committing a crime, is not enough by itself to establish innocence, but it is a fact that may be considered by you as evidence. . . . You must first decide whether there is evidence of a decision not to flee. If you decide there is evidence of a decision not to flee, you then must decide whether this is inconsistent with a consciousness of guilt.

In support of its proposed instruction, defense counsel argued to the court, "[I]f an inference of guilt can arise from flight, then the opposite inference could arise from remaining and waiting for the police." The court declined to give the requested instruction, noting that the defense's proposed instruction was taken, in part, from the pattern instruction on flight but that "[i]t's a misstatement of the law" and would not assist the jury.[4]

Appellant argues that the trial court erred in refusing to give his proposed instruction. He argues that his instruction was factually applicable because evidence was elicited that he remained at his home until the police arrived. Citing *Pierce v. State*, 62 Md. App. 453 (1985), he argues that his proposed instruction was also: 1) a correct statement of the law, because absence of flight is no less probative of a consciousness of innocence than flight from the scene is probative of a consciousness of guilt had he fled; and 2) not fairly covered by the instructions given. The State disagrees, arguing that the instruction is not, as a matter of law, a theory of defense from which an inference of

[4] Maryland Pattern Jury Instruction (MPJI) - Cr 3:24 on flight or concealment of a defendant provides:

> A person's flight [concealment] immediately after the commission of a crime, or after being accused of committing a crime, is not enough by itself to establish guilt, but it is a fact that may be considered by you as evidence of guilt. Flight [concealment] under these circumstances may be motivated by a variety of factors, some of which are fully consistent with innocence. You must first decide whether there is evidence of flight [concealment]. If you decide there is evidence of flight [concealment], you then must decide whether this flight [concealment] shows a consciousness of guilt.

innocence may be drawn, and the trial court's presumption of innocence instruction fairly covered any inference of innocence from an absence of flight. We agree with the State.

In addressing the argument raised, we first turn to our decision in *Pierce*, which is instructive but not for the reasons appellant so believes. In *Pierce*, the defendant, who initially fled the scene of a shooting, and after going home and making arrangements for her children, went to the police station the next morning to explain that she had shot the victim in self-defense. 62 Md. App. at 456. The trial court gave the State's requested flight instruction, *i.e.*, that the jury could infer a consciousness of guilt from her flight, but the court refused defense counsel's request for a "voluntary surrender instruction," *i.e.*, that the jury may infer that she was innocent from her voluntary surrender. *Id*. We reversed her convictions on grounds not relevant here but addressed in dicta the trial court's refusal to give the voluntary surrender instruction, stating:

> In the normal course of behavior, flight may reflect an awareness of guilt. Thus, evidence of flight becomes relevant and admissible. Proof of voluntary surrender ordinarily is not admissible, because it is not viewed as unexpected behavior in what appears to be a criminal incident. This evidence becomes admissible, however, to rebut testimony concerning flight.

Id. (citations omitted). Concluding that the refusal to give the instruction was not error under the circumstances because the subject was fairly covered by the instruction on flight, we stated:

> [the flight instruction] clearly stated that flight may constitute evidence of consciousness of guilt and that the jury may consider it "unless adequately explained." In fact, it specifically noted that the motive for the flight may be taken into account. On the limited issue presented here, the jury could consider the voluntary surrender as a part of "all the other

> evidence in the case." These instructions provided ample room within which to argue the significance of the surrender in rebutting any consciousness of guilt, and defense counsel did so.

Id. at 458, 459.

The facts here are singularly different from those in *Pierce* because appellant never fled, and therefore, no flight instruction was given. Contrary to appellant's argument, we stated in dicta that evidence of voluntary surrender is *not* normally relevant, unless offered to rebut an inference of guilt from flight, and therefore, a trial court does not err in not instructing the jury on absence of flight. Other jurisdictions that have faced this issue have likewise held that a defendant is not entitled to an absence of flight instruction.[5]

The Superior Court of Pennsylvania in *Com. v. Hanford*, 937 A.2d 1094, 1097-98 (Pa. Super. Ct. 2007), *appeal denied*, 956 A.2d 432 (2008) also addressed the issue before us, and we find their reasoning, like our reasoning in *Pierce*, persuasive. In that case, the defendant raped his co-worker at a hotel after the two had spent the day drinking. *Hanford*,

[5] *See United States v. McQuarry*, 726 F.2d 401, 402 (8th Cir. 1984); *United States v. Telfaire*, 469 F.2d 552, 558 (D.C. Cir. 1972); *United States v. Scott*, 446 F.2d 509, 510 (9th Cir. 1971); *Albarran v. State*, 96 So.3d 131, 192-93 (Ala. Crim. App. 2011), *cert. denied*, 568 U.S. 1032 (2012); *State v. Walton*, 769 P.2d 1017, 1029-30 (Ariz. 1989), *aff'd*, 497 U.S. 639 (1990); *People v. Cowan*, 236 P.3d 1074, 1129-30 (Cal. 2010), *cert. denied*, 563 U.S. 905 (2011); *State v. Otero*, 715 A.2d 782, 788 (Conn. App. Ct. 1998), *cert. denied*, 719 A.2d 905 (Conn. 1998); *Smith v. U.S.*, 837 A.2d 87, 100 (D.C. 2003), *cert. denied*, 541 U.S. 1081 (2004); *Adams v. State*, 203 S.E.2d 318, 319 (Ga. Ct. App. 1973); *State v. Peck*, 95 P. 515, 518 (Idaho 1908); *State v. Mayberry*, 411 N.W.2d 677, 684 (Iowa 1987), *overruled on other grounds by State v. Heemstra*, 721 N.W.2d. 549 (Iowa 2006); *Com v. Martin*, 472 N.E.2d 276, 280 (Mass. App. Ct. 1984); *Starr v. State*, 433 P.3d 301, 305-06 (Nev. Ct. App. 2018); *State v. Burr*, 461 S.E.2d 602, 620 (N.C. 1995), *cert. denied*, 517 U.S. 1123 (1996); *State v. Sims*, 469 N.E.2d 554, 557 (Ohio Ct. App. 1984); *Com. v. Hanford*, 937 A.2d 1094, 1097-98 (Pa. Super. Ct. 2007), *appeal denied*, 956 A.2d 432 (Pa. 2008); *State v. Brewster*, 449 P.2d 685, 687 (Wash. 1969).

937 A.2d at 1096. The defense requested an instruction that the jury be allowed to infer his innocence from the fact that he did not attempt to flee the hotel after his co-worker called the police. *Id.* at 1097.

In upholding the trial court's refusal to give the instruction, the Superior Court noted that, although "a flight instruction . . . is well established in this Commonwealth, . . . there is no authority for a corresponding but inverse 'absence of flight' instruction" (quotation marks omitted). The Superior Court stated that the probative value of such an instruction was exceedingly limited because evidence of absence of flight can be interpreted in multiple ways, "many of which have little to do with consciousness of guilt," including that "the individual may be unaware that he is a suspect in a pending investigation; he may believe that he is more likely to be perceived as innocent of the crimes charged if he refrains from hiding; or perhaps he may not want to make a bad situation worse." *Id.* The Court reasoned that although "an affirmative action such as flight is usually performed for a reason that can be determined upon investigation, inaction does not lend itself to so tidy an inquiry" and that an instruction on the absence of flight would require a "logical leap of deductive reasoning that this Court cannot endorse." *Id.* The Court additionally reasoned that an absence of flight instruction was unnecessary "[b]ecause the defendant is already clothed with a presumption of innocence, . . . the jury need not be additionally charged on an inference of innocence where a suspect [did] not flee." *Id.* at 1097-98 (quotation marks and citation omitted).

We agree with the persuasive reasoning in *Hanford*, which mirrors our dicta in *Pierce*, that normally a court need not give an absence of flight instruction because such

an instruction has little probative value given the myriad reasons why someone does not flee. We are likewise persuaded that the trial court's instruction here on the presumption of innocence fairly covered any inference of innocence from an absence of flight instruction. We believe that in these circumstances the proper course was the one pursued by the trial court, to leave the evidence of specific conduct "to the give and take of argument." *See United States v. Telfaire*, 469 F.2d 552, 558 (D.C.Cir. 1972) (per curiam) (declining to "enshrine[] in an instruction" any inferences to be drawn from the absence of flight instruction). Here, defense counsel invited the jury in closing argument to infer that he was innocent because he did not flee, arguing:

> As soon as the crowd dissipated, he did the reasonable thing. He marched it right back in, put it away, came right back out and waited for the police to come. He didn't flee. He didn't deny. He said, yeah, I fired the weapon. I fired it.
>
> He didn't do any of the things that you would expect somebody to do if they were guilty. What does the Bible say? The guilty fleeth. What did he do? Did he flee? No. He made sure that the gun was safely stowed. He came out and sat on his porch and waited for the police to come.

In sum, we are persuaded that the trial court did not abuse its discretion in refusing to give appellant's proposed jury instruction on the absence of flight.

C. Defense of property instruction

Prior to trial, defense counsel did not ask for a defense of property jury instruction but asked the court to give the following proposed instruction on defense of habitation:

> DEFENDANT'S REQUEST FOR JURY INSTRUCTION
> (Defense of Habitation)
>
> MPJI-CR 5:02

> You have heard evidence that the defendant acted in defense of his home. Defense of one's home is a defense and you are required to find the defendant not guilty if all of the following three factors are present:
>
> (1) the defendant actually believed that (victim) was just about to commit the crime at the defendant's home;
>
> (2) the defendant's belief was reasonable; and
>
> (3) the defendant used no more force than was reasonably necessary to defend against the conduct of (victim).
>
> In order to convict the defendant, the State must show that the defense of one's home does not apply in this case by proving, beyond a reasonable doubt, that at least one of the three factors previously stated was absent.

Appellant's proposed "defense of habitation" instruction was a cobbling together of Maryland's pattern jury instructions on defense of habitation and defense of property.[6]

[6] MPJI-Cr 5:02 on defense of habitation provides:

> You have heard evidence that the defendant acted in defense of [his] [her] home. Defense of one's home is a defense, and you are required to find the defendant not guilty if all of the following five factors are present:
>
> (1) [name of person] entered [or attempted to enter] the defendant's home;
>
> (2) the defendant believed that [name of person] intended to commit a crime that would involve an imminent threat of death or serious bodily harm;
>
> (3) the defendant reasonably believed that [name of person] intended to commit such a crime;

After appellant's mother and brother testified but before appellant testified, the parties and the court discussed possible jury instructions. Defense counsel asked the trial court to give his proposed instruction on "defense of habitation." He never asked for a

> (4) the defendant believed that the force that [he] [she] used against [name of person] was necessary to prevent imminent death or serious bodily harm; and
>
> (5) the defendant reasonably believed that such force was necessary.
>
> In order to convict the defendant, the State must show that the defense of one's home does not apply in this case by proving, beyond a reasonable doubt, that at least one of the five factors previously stated was absent.

MPJI-Cr 5:02.1 on defense of property provides:

> You have heard evidence that the defendant acted in defense of [his] [her] property. Defense of property is a defense and you are required to find the defendant not guilty if all of the following three factors are present:
>
> (1) the defendant actually believed that (name of person) was unlawfully interfering [was just about to unlawfully interfere] with [his] [her] property;
>
> (2) the defendant's belief was reasonable; and
>
> (3) the defendant used no more force than was reasonably necessary to defend against the victim's interference with the property. [A person may not use deadly force to defend [his] [her] property. Deadly force is that amount of force reasonably calculated to cause death or serious bodily harm.]
>
> In order to convict the defendant, the State must show that the defense of property does not apply in this case by proving, beyond a reasonable doubt, that at least one of the three factors previously stated was absent.

defense of property instruction. The court declined to give defense counsel's proposed instruction on defense of habitation. After the trial court instructed the jury, defense counsel told the court that it objected to the court's refusal to give his requested instructions on "defense of habitation."

Md. Rule 4-325(e) provides: "No 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." Appellant argues that the trial court erred in not giving a defense of property instruction. Appellant, however, has failed to preserve this argument for review because he failed to ask the trial court for a defense of property instruction, and failed to object to the trial court's failure to give such an instruction, after it instructed the jury. *See* Md. Rule 4-325(e).

Appellant argues that we should overlook his preservation problem because it is clear that he was really "seeking [] a defense of property instruction" when he asked the trial court to give his defense of habitation instruction. We reject appellant's argument. As stated above, the Rule specifically provides that defense counsel is to state "distinctly" the matter to which he objects "and the grounds of the objection." Not only did appellant specifically tell the trial court that he wanted his requested "defense of habitation" instruction, but the title of his proposed instruction was "DEFENSE OF HABITATION" and his requested instruction used the words "defense of habitation" and "home" and did not mention the words "defense of property" or "property." Under the record presented and contrary to appellant's argument, appellant never asked the court for a defense of

property instruction. Accordingly, appellant has failed to preserve his argument that the trial court erred in refusing to give a defense of property instruction.

Appellant argues in a footnote that to the extent it was "unclear" whether his requested instruction was a request for a defense of habitation or a defense of property instruction, the trial court was "required to modify the language" of his defense of habitation instruction to make it a defense of property instruction. Appellant is incorrect. Appellant's proposed instruction was an incorrect statement of law on the defense of property. First, as stated above, the title of the proposed instruction was "DEFENSE OF HABITATION" and the instruction used the words "defense of habitation" and "home" and never mentioned the words "defense of property" or "property." Second, the proposed instruction failed to include that a person is prohibited from using deadly force to defend one's property, a requirement of a defense of property instruction. *See* MPJI-Cr 5:02.1(3). Where a requested instruction is legally wrong versus technically wrong, a trial court is under no obligation to fashion defense's proposed instruction to make it legally correct. *See Riggins v. State*, 155 Md. App. 181, 223 (A "trial court is under no obligation to give an instruction containing an incorrect statement of the law to the jury.") (citation omitted), *cert. denied*, 381 Md. 676 (2004). *Cf. Gunning v. State*, 347 Md. 332, 350 (1997) (holding that a trial court need not use the exact language proposed where the jury instruction correctly states the law); *Bentley v. Carroll*, 355 Md. 312, 329 n.10 (1999) (citing *Gunning* and noting that where a party requests an instruction that accurately states the law but in an inappropriate form, a trial court should re-craft so the form of the instruction is proper); and *Glover v. State*, 88 Md. App. 393, 398-400 (1991) (distinguishing between proposed

jury instructions that are premised in sanctioned law and those that are not, and holding that when faced with the former type of proposed instruction, a trial court has an obligation to re-craft to instruct correctly).

We, therefore, hold that the trial court did not err in failing to instruct the jury on the absence of flight and defense of property. Accordingly, we affirm the judgment of the Circuit Court.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.