Circuit Court for Baltimore City
Case No. 117150014

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 735

September Term, 2018

AVON BYRD

v.

STATE OF MARYLAND

Meredith,*
Friedman,
Beachley,

JJ.

Opinion by Meredith, J.
Dissent by Friedman, J.

Filed: October 6, 2020

*Meredith, J., now retired, participated in the argument and conference of this case while an active member of the Court; and after being recalled pursuant to Maryland Constitution, Article IV, Section 3A, he also participated in the decision and adoption of this Opinion.

At the conclusion of a jury trial in the Circuit Court for Baltimore City, Avon Byrd, appellant, was found guilty of (1) voluntary manslaughter, (2) use of a firearm in the commission of a crime of violence, and (3) possession of a firearm after being convicted of a disqualifying crime. In this direct appeal, Mr. Byrd presents a single question for our review:

> Whether the lower court erred in denying Mr. Byrd's request for jury instructions on the defense of necessity as a defense to the unlawful possession of a firearm by a prohibited person charge.

For the reasons set forth herein, we conclude that the requested instruction was not generated by the evidence, and we shall affirm the judgments of the Circuit Court for Baltimore City.

FACTS AND PROCEDURAL HISTORY

In the early morning hours of April 28, 2017, Avon Byrd shot and fatally wounded Andrew Terrell, a person he had known for over a year who was also the fiancé of Mr. Byrd's cousin, Tanish Evans.

Mr. Byrd lived just around the corner from Ms. Evans, and, as cousins, they would "hang out," "like, every day." On April 27, 2017, Mr. Byrd was at the home of his cousin, and the two of them spent the early part of the evening in the company of an acquaintance of his cousin, Laacosta "Keke" Beverly. On this occasion, they were drinking, listening to music, and socializing. Around midnight, they were joined by Andrew Terrell, who also lived in that house with Ms. Evans (who was the lessee of the home); Mr. Terrell was arriving home from working that evening. The group went to a

nearby bar for some drinks, and, after passing some time at the bar, they all returned to Ms. Evans's house.

After the group returned home from the bar, Mr. Terrell and Ms. Evans began quarreling. During the argument, Mr. Terrell went upstairs to the bedroom and could be heard throwing pictures and drawers. Mr. Byrd and Ms. Beverly remained on the first floor of the house. Mr. Terrell came back downstairs, continued arguing with Ms. Evans, and then left the house.

At trial, Mr. Byrd testified about what occurred after Mr. Terrell's first departure from the house:

> [MR. BYRD:] . . . He came back to the house. He went into the kitchen. He began to throw things out of the cabinets and out of the refrigerator, you know.
>
> Then me and him had words because I was telling him, like, Terrell, calm down, you know. She want you to go. Just come back tomorrow. So he was yelling at me. Then he left again.
>
> [DEFENSE COUNSEL:] And could you explain what happens next?
>
> [MR. BYRD:] I goes [sic] into the kitchen. I'm cleaning up, putting the things back into the cabinets. I see a gun. I gets the gun, put it in my pocket, finish cleaning up. I go and sit into the living room.
>
> He comes back banging on the window with a knife. [Ms. Evans] comes downstairs and see he has the knife, but she never goes outside. She sitting down on the -- on the couch with us, me, and the girl Keke. But you could hear him still outside. But he's at a distance.
>
> She gets up and goes to the door. And when she goes to the door, you can hear him louder now because the door is open. She goes outside still yelling up the street to him. He yelling back to her.

I go to the door. I get her. He is coming up the street, so I'm putting her up in the house, up onto the steps.

He gets closer to me. I'm backing up from him. And that is when everything else happened.

[DEFENSE COUNSEL:] And at what point -- was there a point when you saw the knife in his hand?

[MR. BYRD:] Yes.

[DEFENSE COUNSEL:] And could you describe that instance?

[MR. BYRD:] Well, he was um -- he was about three houses down from hers. I could see the knife in his hand then.

[DEFENSE COUNSEL:] And is he doing anything with it?

[MR. BYRD:] Oh, he was holding it as he was walking up the street.

[DEFENSE COUNSEL:] And when you say "walking up the street," is that away or towards you?

[MR. BYRD:] Towards us.

[DEFENSE COUNSEL:] All right. And does he have it raised? How does he have it positioned?

[MR. BYRD:] He had it down below his waist when he was walking up the street.

[DEFENSE COUNSEL:] And then what happens between the two of you?

[MR. BYRD:] After I get her onto the steps and I back up, he is walking towards me now. I'm telling him, like, chill, you know. Go ahead about your business and everything like that. But he is getting closer to me.

He raised the knife to go to swing at me. I – I know for sure he was going to hit me as close as he was to me. I turned, and I started to run.

* * *

[DEFENSE COUNSEL:] Going back to when you found the hand gun, is there a reason that you removed it from wherever it was?

[MR. BYRD:] Because he was coming back to the house. I -- I don't know for sure, but he may have been looking for the gun when he was throwing things out of the cabinet. So I wanted to get it out of the house so he don't be able to do anything reckless with it.

The State cross-examined Mr. Byrd as follows:

[THE STATE:] Mr. Byrd, when you took the gun out of the cabinet, did you tell anybody you had taken that gun?

[MR. BYRD:] No.

[THE STATE:] Did you know whose gun it was when you took it?

[MR. BYRD:] Yes.

[THE STATE:] It was Ms. Evans' gun?

[MR. BYRD:] No.

[THE STATE:] Whose gun was it?

[MR. BYRD:] Mr. Terrell's.

[THE STATE:] And so did you know that it was in there before you found it?

[MR. BYRD:] No.

[THE STATE:] When you took the gun out of the – out of the cabinet, why didn't you tell Ms. Evans that you had found a gun?

[MR. BYRD:] Because I know how she feel about guns.

[THE STATE:] So you didn't tell Ms. Evans that you found a gun because you knew how she felt about guns?

[MR. BYRD:] Yes.

[THE STATE:] And you took that gun, and you put it in your pocket, right?

[MR. BYRD:] Yes.

[THE STATE:] And then you sat down on the couch and kept drinking?

* * *

[MR. BYRD:] Yes, I went back into the living room. I wasn't drinking still.

[THE STATE:] What were you doing?

[MR. BYRD:] I was just sitting there.

[THE STATE:] Sitting on the couch?

[MR. BYRD:] Yes.

[THE STATE:] Was Ms. Beverly in there with you?

[MR. BYRD:] Yes.

[THE STATE:] And is she related to you at all?

[MR. BYRD:] No.

[THE STATE:] Just a friend?

[MR. BYRD:] I don't know her.

[THE STATE:] But you were just sitting on the couch with the gun in your pocket?

[MR. BYRD:] Yes.

[THE STATE:] Was Ms. Evans in the living room?

[MR. BYRD:] Yes.

[THE STATE:] And Mr. Terrell had left at that point, right?

[MR. BYRD:] He had came [sic] back, yeah. He had left. He was -- he was out of the house.

[THE STATE:] So I'll make sure my question is clear.

At the point that you were in the living room with the gun in your pocket, was Mr. Terrell in the house?

[MR. BYRD:] No.

[THE STATE:] But Ms. Evans was in the house, right?

[MR. BYRD:] Yes.

[THE STATE:] And the door was locked; wasn't it?

[MR. BYRD:] Was the door locked? No.

[THE STATE:] You didn't watch Ms. Evans lock the door?

[MR. BYRD:] The second time when she came back down the steps, yes. She had locked the door. But at first, it wasn't locked. That is how he came back in.

* * *

[THE STATE:] So you found the gun after [Mr. Terrell] left that second time; isn't that right?

[MR. BYRD:] Yes.

[THE STATE:] And it was after Mr. Terrell left that second time that Ms. Evans locked the door, right?

[MR. BYRD:] Yes.

[THE STATE:] Now, it is your testimony that at some point you went outside with the gun, right?

[MR. BYRD:] Yes.

* * *

[THE STATE:] . . . You testified that when you saw Mr. Terrell coming down the street, three houses away you saw the knife in his hand, right?

[MR. BYRD:] Yes.

[THE STATE:] And, in fact, you saw the knife in his hand when he was tapping on the window, right?

[MR. BYRD:] No.

[THE STATE:] You didn't?

[MR. BYRD:] No.

[THE STATE:] But three doors away, you saw him and he had a knife in his hand, right?

[MR. BYRD:] Yes.

[THE STATE:] And had you begun trying to move or entice Ms. Evans to go into her house?

[MR. BYRD:] No. She said that he had a knife.

[THE STATE:] When did she say that?

[MR. BYRD:] When he tapped on the window.

[THE STATE:] So where were you when Ms. Evans said that?

[MR. BYRD:] I was in the living room.

[THE STATE:] And did you have the gun at that time?

[MR. BYRD:] At that time, yeah. It was in -- no, it was in my -- yeah. It was in my pocket at that time already. Mm-hmm.

[THE STATE:] So Mr. Terrell came back to the window. He tapped on the window. And Ms. Evans said he has a knife?

[MR. BYRD:] Yeah. She was upstairs. She could see from upstairs, her window. She could look straight down to her front.

[THE STATE:] Now, but -- but you hadn't seen it yet --

[MR. BYRD:] No.

[THE STATE:] -- at that point?

[MR. BYRD:] No.

[THE STATE:] So once you saw Mr. Terrell with the knife in his hand three doors away, did that give you more urgency to get into the house?

[MR. BYRD:] To get her into the house.

[THE STATE:] How about yourself?

[MR. BYRD:] Me? I was going to get away anyway. I was going to -- I was going to go home.

[THE STATE:] And so did you -- withdrawn.

Is there a reason you didn't just push Ms. Evans into the house and lock the door?

[MR. BYRD:] No.

[THE STATE:] Were you concerned for your safety at that time?

[MR. BYRD:] Yes.

[THE STATE:] Were you concerned for her safety at that time?

[MR. BYRD:] Yes.

[THE STATE:] But instead of going into the locked house, you stayed out on the street?

[MR. BYRD:] Yes. Because I was going to go home.

* * *

[THE STATE:] And so why didn't you just turn and run home?

[MR. BYRD:] I did turn and run home.

[THE STATE:] Well, not until you shot Mr. Terrell, right?

[MR. BYRD:] Not until he went to attack me with the knife.

[THE STATE:] So before you turned to run home, you shot Mr. Terrell, right?

[MR. BYRD:] No. As I turned to run home, that is when the shot happened.

* * *

[THE STATE:] When you found the gun in the cabinet and you put it in your pocket, what was your intention?

[MR. BYRD:] To get it out of the house.

[THE STATE:] And where were you going to go with it?

[MR. BYRD:] I was going to take it to my grandmother's house.

* * *

[THE STATE:] Does your – does your grandmother permit guns in her house?

[MR. BYRD:] No.

[THE STATE:] So why were you going to take that gun to your grandmother's house?

[MR. BYRD:] To get it away from her house that night. But I didn't want for him the way he was to have possession of it.

After the close of evidence at trial, Mr. Byrd argued that the defense of necessity applied to the charge of unlawful possession of a firearm and requested that the jury be instructed on that defense. The court refused to give the jury an instruction on necessity, and defense counsel lodged an objection after the court finished instructing the jury. After deliberations, the jury found Mr. Byrd not guilty of second degree murder, but guilty of voluntary manslaughter, use of a handgun in the commission of a violent crime, and unlawful possession of a firearm.

Mr. Byrd moved for a new trial, which the court denied. The court sentenced Mr. Byrd to imprisonment for 10 years for the voluntary manslaughter conviction, 15 years consecutive for the use of a firearm in the commission of a crime of violence, and 5 years

consecutive for the possession of a firearm by a prohibited person. Mr. Byrd filed this timely appeal.

DISCUSSION

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). 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)).

"'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). When the question on appeal is whether there was sufficient evidence to generate a requested jury instruction, that is a question of law, and that issue is reviewed *de novo*. *Howell v. State*, 465 Md. 548, 561 (2019) (whether the defendant "presented evidence sufficient to generate a jury instruction on such defense" is a "question[] of law" that we review *de novo*).

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 for establishing that an instruction on a point of law applies to the facts of the case is low: the requesting party must be able to point to "some evidence" in the record to support the requested instruction. *Page*, 222 Md. App. at 668. 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.**

(Bold emphasis added.)

On appeal, when we review whether there was "some evidence" of each of the five elements of a necessity defense, we view the evidence in the light most favorable to

the requesting party, here, Mr. Byrd. *See Page*, 222 Md. App. at 668-69 (citation omitted).

At the close of evidence, Byrd asked the court to instruct the jury on the defense of necessity, citing the comment to MPJI-Cr 5:03 in the MARYLAND CRIMINAL PATTERN JURY INSTRUCTIONS (2d ed. 2012). Although MPJI-Cr 5:03 addresses the defense of duress, the accompanying comment explains that there is an "interrelationship between duress and necessity," *id.* at 898, and the comment then quotes the elements of a necessity defense with respect to the crime of unlawful handgun possession, as set forth in *State v. Crawford*, 308 Md. 683, 698-99 (1987). The trial court denied the request to give a necessity instruction, explaining only: "No. I won't give that." After the court instructed the jury, when defense counsel stated an objection to the court's failure to give an instruction on necessity, the request was again summarily denied.

In *Crawford*, the Court of Appeals affirmed this Court's holding that the trial court had erred by failing to instruct the jury that necessity could be a defense to a charge of illegal possession of a handgun. Crawford had testified at trial about being attacked in his apartment, being shot at, falling from his second-story apartment to the ground, finding a handgun on the ground while he was still under attack, and trying to use the gun to defend himself from his assailants. 308 Md. at 685-690. With that evidence in the record, the Court of Appeals agreed with this Court's conclusion that necessity could provide a defense to illegal possession of a handgun under some circumstances, stating:

> As we see it, the 1972 handgun control legislation does not address the unexpected and sudden circumstance when an individual is threatened

> with present, impending danger to his life or limb and as a consequence has no time to seek other protection. Furthermore, we cannot accept the contention that, in such circumstances, the General Assembly intended that the individual should succumb to his attacker and possibly forfeit his life rather than take possession of a handgun and act in self-defense. We find it entirely reasonable and consistent with § 36B's legislative purpose 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. We therefore hold that necessity may be a defense to the charge of unlawful possession of a handgun.

308 Md. at 696. The Court reiterated in the final paragraph of the opinion:

> [W]e think it is common sense that the legislature could not have intended that a man, who has been attacked and shot and lies injured after falling from a window, cannot pick up a handgun that, as luck would have it, falls next to him when he hears what he believes are his aggressors in hot pursuit. It is utter folly to talk of requiring a man to get a permit to carry a handgun when threatened with death or serious bodily harm under such circumstances. Thus, we find that the trial court erred in failing to instruct the jury on the availability of the necessity defense, because if Crawford's version of the story is believed, his possession of the handgun was not unlawful.

Id. at 701.

Having concluded that necessity could be a defense to illegal possession of a handgun, the Court in *Crawford* announced a five-element test for establishing the necessity defense:

> We . . . hold that necessity is a valid defense to the crime of unlawful possession of a handgun when five elements are present: (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. **We emphasize 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.

308 Md. at 698-99 (emphasis added) (footnote omitted).

The *Crawford* Court observed in Footnote 8 that this Court had correctly concluded in an earlier case that the necessity defense would not authorize possession of a handgun *in anticipation of* a future attack, stating:

> The Court of Special Appeals, in *Medley v. State*, 52 Md. App. 225, 448 A.2d 363, *cert. denied*, 294 Md. 544 (1982), held that a defendant charged with unlawful possession of a handgun under § 36B(b) is not entitled to a jury instruction "that a person who is not seeking a fight, but is reasonably apprehensive he might be attacked has a right to arm himself in anticipation of attack." As we have stated above, the gun control legislation passed by the General Assembly in 1972 eliminated any right to carry a handgun in anticipation of future harm. As such, the requested instruction was properly refused.

308 Md. at 699 n.8. *Cf. Holt v. State*, 236 Md. App. 604, 624-26 (2018) (trial court did not err in refusing to instruct on imperfect self-defense where there was "no evidence on the record from any source that appellant subjectively believed he was in imminent danger of death or serious bodily harm when shots were fired").

Although the evidence in this case indicated that Byrd was—like the defendant in *Medley*—not under immediate attack at the time he found the gun and took possession of it, we need not rest our opinion on the lack of some evidence of an immediate threat of

peril. *Cf. Howell*, 465 Md. at 566 (duress defense was not available because "the alleged threat against Mr. Howell was not immediate").

But we conclude that there was not "some evidence" in this case of the third *Crawford* element, *i.e.*, the element requiring that Byrd not have any reasonable, legal alternative to possessing the handgun. 308 Md. at 698-99. Consequently, because the record did not include some evidence of one of the five required elements enumerated in *Crawford*, Byrd was not entitled to a jury instruction on necessity.

Here, Byrd clearly had the legal alternatives of either removing the ammunition from the gun and hiding it again, or asking one of the other two occupants to take possession of it. And, Ms. Evans testified that, when she had had a physical altercation with Mr. Terrell a couple of weeks earlier, she had "called 911 from my cell phone." Ms. Evans also testified that, when Mr. Terrell was shot, she immediately was "telling everybody call 911. Call 911," which suggests that phones were available to do so. But, even if there was no testimony expressly confirming that Mr. Byrd could have called 911 when he found the gun, that lack of evidence does not satisfy the requirement that there be "some evidence" that Byrd had no alternative to taking personal possession of the gun.

We conclude that the trial court did not err in refusing to instruct the jury that necessity could provide a defense to the charge of possession of a firearm by a prohibited person.

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

Circuit Court for Baltimore City
Case No. 117150014

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 735

September Term, 2018

AVON BYRD

v.

STATE OF MARYLAND

Meredith,*
Friedman,
Beachley,

JJ.

Dissent by Friedman, J.

Filed: October 6, 2020

*Meredith, J., now retired, participated in the argument and conference of this case while an active member of the Court; after being recalled pursuant to Maryland Constitution, Article IV, Section 3A, he also participated in the decision and adoption of this Opinion.

I respectfully dissent. I think Byrd generated at least "some evidence" of each of the five elements of the necessity defense in handgun possession cases. Once that minimal threshold was surmounted, questions like "how imminent must the threat be?" and "how reasonable must the available legal alternatives be?" are better answered by juries than by appellate judges. Here, particularly, I am uncomfortable suggesting from the quiet and comfort of my office chair that, in the moment of confrontation, Byrd and his friends were not yet in enough danger or that there were better alternatives, like hiding the bullets or giving the gun to someone else. Those are questions better resolved by a jury.