Circuit Court for Montgomery County
Criminal Case No. 126872

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1118

September Term, 2017

RAYNARD HOLMES

v.

STATE OF MARYLAND

Friedman,
Beachley,
Fader,
JJ.

Opinion by Friedman, J.

Filed: May 31, 2018

Raynard Holmes, appellant, was indicted in the Circuit Court for Montgomery County with attempted kidnapping, two counts of assault in the second degree, robbery, and three counts of indecent exposure. A jury convicted Holmes of two counts of assault and one count of indecent exposure; he was found not guilty as to the robbery and attempted robbery charges.[1] The circuit court sentenced Holmes to concurrent sentences of ten years' imprisonment for the second-degree assault convictions, with credit for time served and the remainder of the sentence suspended. For the indecent exposure conviction, the court sentenced Holmes to time served, to be followed by five years' probation.

On appeal, Holmes presents two questions for our consideration, which we have rephrased slightly:

1. Was the evidence sufficient to sustain Holmes's convictions for second-degree assault?

2. Did the trial court abuse its discretion in refusing to instruct the jury on the defense of mistake of fact?

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

BACKGROUND

On the morning of November 5, 2014, Isabel Cabana, who was employed as a nanny for eight-month-old Eloise Joselow, brought Eloise to Sligo Park in Silver Spring to play. While on the slide with Eloise, Ms. Cabana noticed Holmes enter the park near

[1] The court granted Holmes's motion for acquittal as to the attempted kidnapping charge and one of the indecent exposure counts. The State *nolle prossed* a second indecent exposure count.

the swings, approximately 20 to 30 feet away from her. Holmes, who had been walking through the trails of the park, and smoking PCP,[2] approached Ms. Cabana yelling, in a "loud" and "mean" voice, "Do you know what kind of animal you are?" As Ms. Cabana carried Eloise to her stroller, Holmes approached her, and, in a "demanding voice," said: "Give me the baby" as he outstretched his arms in front of her.

As Ms. Cabana backed away with the stroller, Holmes pulled the stroller out of her hands and put it behind him. Ms. Cabana testified that she was "scared" because Holmes was "mean," and she was afraid that "he was going to get the baby." Holmes then asked Ms. Cabana, "Do you know what happens in the movies?" Ms. Cabana tried to keep Eloise's face turned away so that she could not see what was happening.

Ms. Cabana looked around the park for help, and noticed two women approaching from a path nearby. Once Holmes noticed the two women on the path, he "backed up and pushed the stroller away." Ms. Cabana approached the two women and told them what was happening. The women comforted Ms. Cabana, who was "hysterical." One of the women, Patricia Bunn, asked Holmes why he was bothering Ms. Cabana, but Holmes turned and walked away. After a short distance, Holmes turned around to face Ms. Bunn, dropped his pants, and exposed himself.

Police interviewed Holmes later that same day. The audiovisual recording of Holmes's interview was played for the jury and introduced into evidence. In the

[2] According to www.merriam-webster.com, PCP (phencyclidine) is used "illicitly as a psychedelic drug to induce vivid mental imagery." (last visited May 9, 2018)

interview, Holmes acknowledged that he had smoked PCP. Holmes told police that he had been panhandling and walking the trails at the park when he observed "one big person" who was carrying "a little, little baby." Holmes was concerned because the baby was "too little" to be hers, and the woman was "Chinese," "White," "Hispanic," or "Japanese." Holmes explained that he thought that something did not seem "right" and that he suspected that "it was probably… a crime going on." According to Holmes, "I asked, is it your baby? She said, she's like, I'm working, working what [?]" Holmes explained that he then "took the stroller away" to ask the woman for money, but that he then gave the stroller back to her when she did not give him any money.

At trial, Holmes testified that he had been smoking PCP while walking through the trails of the park, and that he had also smoked marijuana and synthetic marijuana that day. He claimed that when he saw Ms. Cabana and Eloise, he was concerned that Eloise was in danger because Ms. Cabana and Eloise were of different races, and Eloise did not look like she was Ms. Cabana's baby. Holmes thought that he was helping Eloise by getting her away from Ms. Cabana. Holmes did not recall telling Ms. Cabana to give him the baby, but he recalled asking her if Eloise was her baby. He also recalled touching the stroller and seeing that Ms. Cabana "was getting real scared."

After the jury convicted Holmes of two counts of second-degree assault and one count of indecent exposure, he noted a timely appeal.

DISCUSSION

I. SUFFICIENCY OF THE EVIDENCE

Holmes contends that the evidence was insufficient to sustain his convictions for second-degree assault.[3] Specifically, he argues that there was no evidence that he attempted to frighten Ms. Cabana or Eloise or that he attempted to cause "offensive" physical contact with them. The State responds that Holmes failed to preserve his sufficiency challenge as to the assault charges because he did not challenge the State's evidence as to the assault on Ms. Cabana, and he failed to challenge the State's evidence as to the attempted battery modality of assault on Eloise. Alternatively, the State contends that the evidence presented at trial was sufficient to convict him of assault.

There are three modalities of second-degree assault: "(1) intent to frighten, (2) attempted battery, and (3) battery." *Jones v. State*, 440 Md. 450, 455 (2014) (citation omitted); Md. Code, CR § 3-203(a). To prove the intent-to-frighten modality of assault, the State must establish that: "(1) the defendant committ[ed] an act with the intent to place a victim in fear of immediate physical harm; (2) the defendant ha[d] the apparent ability at the time to bring about the physical harm; and (3) the victim [was] aware of the impending physical harm." *Jones*, 440 Md. at 455 (internal quotations and citation omitted).

The battery modality of assault is "characterized as the unjustified, offensive[,] and non-consensual application of force." *Hickman v. State*, 193 Md. App. 238, 251

[3] Holmes does not challenge his conviction for indecent exposure.

(2010). The attempted battery modality of assault requires that the State establish that the defendant has taken "a substantial step toward the completion of a battery, with the apparent present ability to do so." *Id*. "Unlike the intent to frighten variety of assault, there is no need for the victim to be aware of the impending battery[.]" *Id*.

With respect to Ms. Cabana, the State proceeded on the theory that Holmes was guilty of either the attempted battery or intent-to-frighten modality of second-degree assault. As to Eloise, the State sought to prove that Holmes was guilty only of the attempted battery modality of second-degree assault.

The Maryland Rules provide, in pertinent part: "A defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. Md. Rule 4-324(a). The defendant shall state with particularity all reasons why the motion should be granted." We have consistently recognized that "alleged deficiencies in the evidence must be pointed out 'with particularity' at the time of trial … to preserve for appellate review a challenge to the sufficiency of the evidence." *Mulley v. State*, 228 Md. App. 364, 387 (2016). Thus, "Maryland Rule 4-324(a) is not satisfied by merely reciting a conclusory statement and proclaiming that the State failed to prove its case." *Arthur v. State*, 420 Md. 512, 524 (2011).

At the close of the State's case, Holmes moved for judgment of acquittal as to the assault against Eloise as follows:

THE COURT: There are two second degree assaults. *One's on the baby,* I think.

[DEFENSE COUNSEL]: Well, I make a motion for judgment of acquittal on that, Judge.

THE COURT: You want to be heard on that [prosecutor]?

PROSECUTOR: Yes, Your Honor. The baby is in her arms. He's reaching towards the baby. [The prosecutor] asked her, basically, did you think he was going to try to touch you? That's all that's required for assault. It doesn't matter that it's a baby or that the baby was unaware that that was going on. She was clearly frightened. Your Honor, Ms. Cabana, in terms of the intentional frightening, but –

THE COURT: Well, I don't dispute anything with respect to Ms. Cabana and her being frightened and her being in fear of immediate apprehension of intentional unwanted bodily contact. But I have problems with the baby. I mean, doesn't the baby have to be the one that's put in fear?

THE PROSECUTOR: No.

*** * ***

THE COURT: So I think you're out of luck with that one.

[DEFENSE COUNSEL]: Well, I still maintain that it shouldn't go to the jury.

(Emphasis added)

*** * ***

THE COURT: Well, what did I do with respect to the – I didn't do anything yet with respect to the –

[DEFENSE COUNSEL]: The assault on the baby.

THE COURT: The assault you didn't say anything on, did you?

[DEFENSE COUNSEL]: Well, I'm suggesting there's no assault on –

> THE COURT: On the baby?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: Well, my understanding of assault is consistent with what [the prosecutor's] already argued, so I'm going to deny that motion – going to deny the motion on the baby's assault.

During jury instructions, Holmes renewed his motion for judgment of acquittal as to the assault charge regarding Eloise, but, again, failed to state any grounds for the motion, stating only that "it's the same thing I said before[.]" Because Holmes failed to articulate the basis for his motion for judgment of acquittal as to the charge of assault against Eloise, his claim that the evidence as to that charge was insufficient is unpreserved. *See Byrd v. State*, 140 Md. App. 488, 494 (2001) (a defendant's mere assertion that evidence was insufficient, without some particularity as to the why the motion should be granted, will not preserve the claim). Moreover, Holmes made no argument requesting judgment of acquittal with respect to the charge of assault against Ms. Cabana. As such, his argument that the evidence was insufficient to sustain his conviction for assault against her has not been preserved for our review.

Even if Holmes had preserved these claims, however, they would be without merit. There was sufficient evidence to support his convictions for second-degree assault as to both Eloise and Ms. Cabana. The standard for our review of the sufficiency of the evidence is "'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.'" *Benton v. State*, 224 Md. App. 612, 629 (2015) (quoting

Jackson v. Virginia, 443 U.S. 307, 319 (1979)) (emphasis in original). In applying that test, "[w]e defer to the fact finder's opportunity to assess the credibility of witnesses, weigh the evidence, and resolve conflicts in the evidence[.]" *Neal v. State*, 191 Md. App. 297, 314 (2010) (internal quotations and citation omitted).

Viewing the evidence in the light most favorable to the State, the jury could reasonably find that Holmes committed an attempted battery on Eloise by attempting to make an unjustified and offensive contact with her, and that he took action to do so by reaching for her with outstretched arms and saying to Ms. Cabana, "Give me the baby." The jury could also find that he had the present ability to make the offensive contact based on his proximity to her and his hostile demeanor.

There was also sufficient evidence to sustain Holmes's conviction of second-degree assault for his intent-to-frighten Ms. Cabana. She testified that Holmes approached her yelling, "Do you know what kind of animal you are?" Holmes then proceeded to reach toward her as she was holding Eloise in her arms, instructing her in a "loud" and "demanding voice" to "Give me the baby." As Ms. Cabana backed away and pulled the stroller with her, Holmes "pulled the stroller" out of her hands. Ms. Cabana testified that she was "scared" because Holmes was "mean," and she was afraid that "he was going to get the baby." A jury could reasonably find, based on this evidence, that Holmes's aggressive actions were intended to place Ms. Cabana in fear that he would take Eloise from her. Accordingly, there was sufficient evidence from which a rational trier of fact could have found the essential elements of the attempted battery modality of

assault against Eloise and the intent-to-frighten modality of second-degree assault as to Ms. Cabana.

II. MISTAKE OF FACT JURY INSTRUCTION

Holmes contends that the circuit court erred in refusing to instruct the jury as to the defense of mistake of fact. The State suggests that Holmes failed to preserve this issue because he did not request a mistake of fact instruction with regard to the charges of assault or indecent exposure, the only crimes of which he was convicted. Alternatively, the State contends that the circuit court did not abuse its discretion in refusing to instruct the jury on mistake of fact because Holmes failed to establish two of the elements required for that instruction.

The relevant rule provides: "The court may, and at the request of any party shall, instruct the jury as to the applicable law[.]" Md. Rule 4-325(c). We review a court's decision whether or not to give a particular instruction under an abuse of discretion standard. *Appraicio v. State*, 431 Md. 42, 51 (2013). In determining whether a trial court abused its discretion in granting or denying a requested instruction we consider: "(1) whether the requested instruction was a correct statement of the law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions actually given." S*tabb v. State*, 423 Md. 454, 465 (2011).

Defense counsel argued in support of the requested mistake of fact instruction as follows:

THE COURT: I may have a problem with mistake of fact.

(Discussion off the record.)

THE COURT: The problem I have is with his statement to the police. He doesn't say anything about he thought that the baby was in danger, and he only pulled the stroller away to do X, Y, or Z.

* * *

[DEFENSE COUNSEL]: Well, he does say in there that he thought there was a crime being committed by the lady. He says that.

THE COURT: He didn't say anything about that with respect to the stroller. He says it about the kidnapping. I guess. Who knows?

[PROSECUTOR]: Yes, well, what would –

THE COURT: Mistake of fact. Here's the instruction.

[PROSECUTOR]: Right.

THE COURT: You heard evidence that the defendant's actions were based on a mistake of fact. So when did he testify to a mistake of fact, either in his statement to the police or on the stand, with respect to taking the stroller? Mistake of fact is a defense. You are required to find the defendant not guilty if the defendant actually believed what?

[DEFENSE COUNSEL]: That the, if they –

THE COURT: The baby was in danger?

[DEFENSE COUNSEL]: That he did this because he thought the baby – that, the mistake of fact is, it's sort of like from the defense of others. It is, the mistake in fact is that there was something wrong, a crime was being committed when this lady of a different race than the baby was moving the baby away from him.

[PROSECUTOR]: *So I took the stroller*.

[DEFENSE COUNSEL]: *That's the mistake of fact.*

> [PROSECUTOR]: So I took the stroller because the baby was in danger.
>
> [DEFENSE COUNSEL]: Well, I got that stuff, but I think that generates Judge, if you don't –
>
> THE COURT: Yes. I'm not giving it.
>
> [DEFENSE COUNSEL]: Okay. Well –
>
> THE COURT: I don't think it's generated by the robbery. I just don't.

(Emphasis added).

The record indicates that Holmes's request for a mistake of fact instruction was limited to the charge of robbery, and possibly to the charge of kidnapping. Holmes failed, however, to request a mistake of fact instruction as to the assault and indecent exposure charges. As a result, his claim that the court erred in refusing to give the instruction as to those charges is not preserved. In addition, as the State notes, because Holmes was found not guilty of robbery, and because he was acquitted of kidnapping, any error in the court's refusal to give a mistake of fact instruction with respect to those charges would be harmless error.

Nonetheless, even if we were to consider Holmes's claim, we would conclude that the trial court did not abuse its discretion in refusing to give the mistake of fact instruction because Holmes failed to establish the second and third elements required for the instruction. The mistake of fact instruction provides:

> You have heard evidence that the defendant's actions were based on a mistake of fact. Mistake of fact is a defense. You are required to find the defendant not guilty if:

> (1) the defendant actually believed (*alleged mistake*);
>
> (2) the defendant's belief and actions were reasonable under the circumstances; and
>
> (3) the defendant did not intend to commit the crime of (*crime*) and the defendant's conduct would not have amounted to the crime of (*crime*) if the mistaken belief had been correct, meaning that, if the true facts were what the defendant thought them to be, the [defendant's conduct would not have been criminal][defendant would have the defense of (*defense*)].
>
> [T]o convict the defendant, the State must prove beyond a reasonable doubt that at least one of the three factors was absent.

Md. Pattern Jury Instruction – Criminal 5:06.

Holmes fails to explain how the evidence satisfied elements two and three of the instruction. At trial, defense counsel argued that "the mistake in fact is that there was something wrong, a crime was being committed when this lady of a different race than the baby was moving the baby away from him." Holmes argues that even if his mistaken belief that Eloise was in danger of being kidnapped because Ms. Cabana was of a different race than Eloise, and because, in his opinion, she looked too old to be Eloise's mother, "may not have been reasonable," he was entitled to an instruction on mistake of fact, which he equates to the imperfect defense of defense of others. We disagree.

Imperfect self-defense may be invoked "if the appellant held an actual belief that he had to use force to defend another, but his belief was not objectively reasonable and/or the level of force he used was not objectively reasonable[.]" *Lee v. State*, 193 Md. App. 45, 59 (2010) (citing Judge Charles E. Moylan, Jr., *Criminal Homicide Law* 193 (2002)).

Imperfect self-defense, however, is a mitigation defense available only in cases of homicide, and, in some cases, first-degree assault. *Christian v. State*, 405 Md. 306, 332-33 (2008). Accordingly, imperfect self-defense is inapplicable in the present case, and Holmes's argument that he was entitled to a mistake of fact instruction, even if his mistaken belief "may not have been reasonable," is without merit. Here, Holmes was obligated to establish that his belief was reasonable, which he failed to do.

Holmes also failed to establish that "his conduct would not have amounted to a crime had the circumstances been as he believed them to be." *See Marquardt v. State*, 164 Md. App. 95, 139 (2005). Under the circumstances, Holmes would still be guilty of second-degree assault even if his suspicions about the situation had been correct because he intended the consequences of his actions, namely, attempting offensive contact with Eloise and frightening Ms. Cabana. *See e.g. Gregory v. State*, 189 Md. App. 20, 44-45 (2009) (trial court did not abuse its discretion in refusing to give a mistake of fact instruction where defendant's mistaken belief that he was God was not a defense to motor vehicle theft charges where he had acknowledged that he acted willfully and knowingly in entering a vehicle that he knew he did not own and attempting to "get it" from the victim).

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.